

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE PHARMACEUTICAL INDUSTRY )  
AVERAGE WHOLESALE PRICE )  
LITIGATION )  
*State of Wisconsin v. Abbott Laboratories, et al.* )  
04-C-0477-C (W.D. Wis.) )

MDL Docket No. 1456

**OPPOSITION TO MOTION TO VACATE CONDITIONAL TRANSFER ORDER**

Defendant Bayer Corporation (“Bayer Corp.”), on behalf of all defendants in *State of Wisconsin v. Abbott Laboratories, et al.*, 04-C-0477-C (the “Wisconsin AWP Action”), respectfully submits this memorandum in opposition to Plaintiff State of Wisconsin’s Motion to Vacate the Conditional Transfer Order entered on August 3, 2004 (“CTO 17”), which conditionally ordered that the Wisconsin AWP Action be transferred to the District of Massachusetts for consolidated or coordinated pretrial proceedings before Judge Saris in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456 (“AWP MDL”).

There is no dispute that, as found in CTO 17, the Wisconsin AWP Action “involves questions of fact which are common to the actions previously transferred to the District of Massachusetts and assigned to Judge Saris.” The State’s Motion to Vacate does not challenge the finding that the Wisconsin AWP Action involves common questions of fact with the AWP MDL. Instead, the State’s sole argument is that no decision regarding transfer to the AWP MDL should be made before the District Court in the Western District of Wisconsin rules on the State’s pending motion to remand. It is well settled, however, that the pendency of a remand

motion is no basis to avoid transfer of a “tag-along action” under Rule 7.4. Indeed, the Panel already has ordered the transfer of other AWP cases under these same circumstances.

The State’s arguments in favor of remand not only are wrong – since removal was appropriate under Judge Newman’s reasoning in *State of Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 370-71 (D. Conn. 1979) – but misplaced, because it is not this Panel’s role to rule on pending remand motions. If the State’s remand motion remains pending at the time the Panel decides whether to order the transfer of this case (the Wisconsin district court has ordered that briefing on this motion be completed by September 22, 2004) then it is appropriately left for the transferee court, which has developed expertise in handling these AWP cases. At bottom, the question of transfer under 28 U.S.C. § 1407(a) focuses on whether this case as a whole and the AWP MDL share common issues, not on whether the remand motion has any merit or is duplicative of jurisdictional issues already before Judge Saris. It should be noted, however, that although Judge Saris does not currently face other AWP cases that present the precise jurisdictional issues raised by the State’s remand motion, there is a reasonable likelihood that such issues will be repeated as additional states pursue similar AWP claims. Moreover, Plaintiff’s procedural challenge to removal (claiming lack of unanimity) is an issue Judge Saris already has dealt with in these AWP cases and again is an issue likely to repeat itself in future AWP cases.

Plaintiff’s motion thus should be denied, and the Wisconsin AWP Action should be transferred to the AWP MDL for proceedings before Judge Saris.

## PROCEDURAL HISTORY

### A. The AWP MDL Proceeding.

On April 30, 2002, the Panel transferred sixteen actions to the U.S. District Court for the District of Massachusetts for coordinated or consolidated pretrial proceedings as part of the AWP MDL. The Panel found that the transferred actions involved common questions of fact regarding the marketing, sales and/or billing practices of the defendants and, further, that “[c]entralization of all actions . . . in the District of Massachusetts will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation [and] avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.” *In re Immunex Corp. Average Wholesale Price Litig.*, 201 F. Supp.2d 1378, 1380 (J.P.M.L. 2002).

Since its original order, the Panel has transferred thirty-two additional actions to the AWP MDL. *See* CTO 17. A number of those actions had been removed from state court, and motions to remand were pending at the time of transfer. *See, e.g., IUOE Local 68 Welfare Fund v. AstraZeneca PLC, et al.*, 3:03-3230; *Nevada v. Abbott Labs., Inc., et al.*, 02-CV-12085-PBS; *Nevada v. American Home Prods., Inc., et al.*, 02-CV-12086-PBS; *Minnesota v. Pharmacia Corp.*, 03-CV-10069-PBS; *Montana v. Abbott Labs., Inc., et al.*, 02-CV-12084-PBS; *Rice v. Abbott Labs., Inc., et al.*, 03-CV-11285-PBS; *Turner v. Abbott Labs., et al.*, 3:02-5006. In all of these actions, the plaintiffs moved to vacate the conditional transfer orders and relied, all or in part, on the fact that motions to remand were pending. The Panel, without exception, denied each of those motions to vacate. *See In re Pharmaceutical Indus. Average Wholesale Price Litig.*, MDL No. 1456 at 1-2 (J.P.M.L. Oct. 16, 2002) (reaffirming original finding that transfer and consolidation of AWP cases would promote the just and efficient conduct of the

litigation). In orders transferring these other AWP cases, the Panel specifically noted that the pending remand motions could be presented to and decided by the transferee judge. *See id.* at 1 (citing *In re Ivy*, 901 F.2d 7 (2d Cir. 1990) and *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp.2d 1346, 1347-48 (J.P.M.L. 2001)).

**B. The Wisconsin AWP Action.**

On June 3, 2004, the State of Wisconsin filed a Complaint in the Circuit Court of Dane County, Wisconsin that named twenty pharmaceutical manufacturers as defendants. Like the other AWP cases, including those filed by state attorneys general and transferred to the AWP MDL, the Complaint alleged that the State and its citizens have paid “inflated prices” for medicines based on the defendants’ alleged misuse of AWP, Compl. ¶¶ 38-51, 56.C, and that the Defendants have “fraudulently inflated the average wholesale prices of their drugs, and drugs sold by their subsidiaries.” Compl. ¶ 27; Motion to Vacate at 1.

On July 14, 2004, Defendants timely removed this action on the basis of diversity jurisdiction. On July 16, 2004, defendant Bayer Corp. filed a Notice of Related Action, designating the Wisconsin case as a tag-along to those actions already transferred to the AWP MDL for consolidated and coordinated pretrial proceedings. The Notice explained – and the State does not contest – that this action involves “common questions of fact” with the actions already transferred to the AWP MDL.

On August 3, 2004, the Panel issued CTO 17, noting that “[i]t appears that [the Wisconsin AWP Action] involves common questions of fact which are common to the actions previously transferred to the District of Massachusetts and assigned to Judge Saris.” The State filed a notice of opposition to the conditional transfer order on August 17, 2004 and filed the instant Motion to Vacate on September 2, 2004.

Shortly before CTO 17 was issued, on July 27, 2004, the State moved to remand this case to Wisconsin state court. By order dated September 9, 2004, the District Court directed defendants to file their response to the remand motion on or before September 22, 2004.<sup>1</sup>

## ARGUMENT

### **I. THE WISCONSIN AWP ACTION SATISFIES THE CONDITIONS FOR TRANSFER UNDER 28 U.S.C. § 1407(a).**

The Panel may transfer proceedings for coordinated or consolidated pre-trial proceedings if: (1) the actions involve one or more common questions of fact; (2) transfer would serve the convenience of the parties and witnesses; and (3) transfer would promote the just and efficient conduct of the actions. 28 U.S.C. § 1407(a). The State does not and cannot dispute the Panel's conclusion in CTO 17 that this case involves common questions of fact with numerous actions already transferred to the AWP MDL. Moreover, transfer will undoubtedly promote efficiency and convenience because, as the State acknowledges, Judge Saris has gained "familiarity with this MDL litigation as a whole" (Motion to Vacate at 3) by devoting substantial time and resources analyzing the numerous jurisdictional, factual, and legal issues that have been consistently raised in the AWP cases before her. For these reasons alone, transfer of this case to the AWP MDL is appropriate under § 1407, and the State's motion should be denied.

The State's opposition to transfer is based solely on the pendency of its remand motion. However, the Panel has already determined in connection with the AWP MDL that it is appropriate to transfer related actions, notwithstanding the pendency of a motion to remand, for such motions "can be presented to and decided by the transferee judge." *In re Pharmaceutical*

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<sup>1</sup> In that September 9, 2004 Order, the District Court stated that it had made a preliminary assessment that remand was appropriate, but invited Defendants to submit arguments justifying removal by September 22, 2004. A copy of the District Court's September 9 Order is attached hereto for the information of the Panel as Exhibit A.

*Indus. Average Wholesale Price Litig.*, MDL No. 1456 (J.P.M.L. Oct. 16, 2002); *see also In re Ivy*, 901 F.2d at 9 (“Section 1407 does not empower the MDL Panel to decide questions going to the jurisdiction or the merits of a case, including issues relating to a motion to remand.”); *In re Asbestos Prods. Liab. Litig.*, 170 F. Supp.2d 1348, 1349 n.1 (J.P.M.L. 2001) (rejecting plaintiffs’ argument that “transfer should be denied or deferred in order to permit the resolution of pending motions to remand”); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 151 F. Supp.2d 1381, 1382 (J.P.M.L. 2001) (noting that the pending remand motions can be presented to and decided by the transferee court). In fact, the State’s narrow focus on its remand motion ignores the central question before this Panel: whether the Wisconsin AWP Action as a whole, not simply the remand motion, meets the requirements for transfer under § 1407. The State does not even contend that the Wisconsin AWP Action as a whole fails this test.

Nor is there any merit to the State’s narrow claims that the remand motion is better decided by the District Court in Wisconsin than by Judge Saris. The State’s claim that transfer would be inefficient because Judge Saris is not currently facing similar remand motions (Motion to Vacate at 2-3) ignores the fact that the State challenges removal, in part, based on a lack of unanimity among defendants at the time of removal, which is a legal issue Judge Saris has twice faced in the AWP cases (under different fact settings). In addition, although this is the first State AWP case removed on diversity grounds, it is reasonably likely that similar state actions will be filed in the future and will be subject to removal on the same grounds. Thus, there are clear efficiencies to be gained by having Judge Saris resolve the pending remand motion, just as there are obvious efficiencies gained by having Judge Saris oversee pretrial proceedings for the entire case. And, given the likelihood of future State AWP cases, there is a significant threat of inconsistent federal decisions on similar issues. Even when only focusing

on the remand motion, therefore, the transfer of this Wisconsin AWP Action to the AWP MDL would serve the central aims of the multidistrict litigation statute.

In claiming that the transferor court is better suited than Judge Saris to apply Seventh Circuit law for its remand motion (Motion to Vacate at 3), the State does not contend, much less show, that the law of the Seventh Circuit is meaningfully different from the law of the First Circuit or is somehow more difficult or complex. The State's parochial claim that "a district court judge in the Seventh Circuit [should] decide jurisdictional issues of Seventh Circuit law" (Motion to Vacate at 3-4) is directly at odds with the purpose of the multidistrict litigation statute, which anticipates the transfer of cases from around the nation for resolution before the same court.

**II. THE STATE'S REMAND MOTION IS NOT BEFORE THE PANEL AND, IN ANY EVENT, IS WITHOUT MERIT.**

Although the issue is not properly before the Panel, the State also argues that this case should be remanded. This argument must fail because, as discussed above, the Panel has repeatedly ruled that motions to remand are appropriately presented to and decided by the transferee judge. *See supra* at 3, 5-6.

The State's position fails on the merits as well. Contrary to the State's analysis (Motion to Vacate at 4), this case is removable under the jurisdictional principles discussed by then-District Judge Newman in *State of Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 370-71 (D. Conn. 1979). Because the State brings claims that on their face are on behalf of a defined group of Wisconsin residents and organizations, and requests payments directly to those individuals and organizations, *see, e.g.*, Compl. ¶¶ 2, 38-52, 56.C, 60.C, 74.C, it is *their* citizenship, not the State's, that controls for the purpose of determining diversity jurisdiction. *Levi Strauss*, 471 F. Supp. at 370-71; *see also Butler v. Cadbury Beverages, Inc.*, 1998 WL

422863 at \*2 (D. Conn. 1998). While the Wisconsin district court has informed the parties of its preliminary assessment that remand may be appropriate, it has invited a response from the Defendants, which is due to be filed on September 22, 2004. *See* Exh. A (September 9, 2004 Order).

The State's related claim that transferring this case would somehow impinge on its sovereign status and conflict with the Eleventh Amendment (Motion to Vacate at 4-5), is also wrong because the Eleventh Amendment has no application where the State voluntarily brings suit as a plaintiff. *See, e.g., California v. Dynegy, Inc.*, 375 F.3d 831, 848 (9th Cir. 2004) (“[A] state that voluntarily brings suit as a plaintiff in state court cannot invoke the Eleventh Amendment when the defendant seeks removal to a federal court of competent jurisdiction.”); *Oklahoma v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239 (10th Cir. 2004) (same).

Finally, the State also provides no support for its assertion that a transfer will unfairly delay resolution of its remand motion (Motion to Vacate at 2, 4). There is no reason to believe – and the State provides none – that Judge Saris will not expeditiously address the pending remand motion should it remain an open issue at the time the Panel directs the transfer of this case. Moreover, any delay in presenting this issue to Judge Saris rests squarely with the State. Absent the instant motion, this matter would already be before Judge Saris. Finally, the State cites no actual prejudice that it will suffer as a result of any modest delay in the resolution of its remand, other than its baseless Eleventh Amendment challenge.

**CONCLUSION**

For the foregoing reasons, the Panel should deny the State of Wisconsin's motion to vacate the conditional transfer order and should transfer this action to the AWP MDL proceeding without further delay.

Respectfully Submitted,  
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# **EXHIBIT A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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STATE OF WISCONSIN,

Plaintiff,

ORDER

04-C-447-C

v.

ABBOTT LABORATORIES, AMGEN, INC.,  
ASTRAZENECA PHARMACEUTICALS, LP,  
ASTRAZENECA, LP, AVENTIS PHARMACEUTICALS,  
INC., AVENTIS BEHRING, LLC., BAXTER  
INTERNATIONAL, INC., BAYER CORPORATION,  
BOEHRINGER INGELHEIM CORPORATION,  
BRISTOL-MYERS SQUIBB CO., DEY, INC.,  
FUJISAWA HEALTHCARE, INC.,  
GENSIA SICOR PHARMACEUTICALS, INC.,  
GLAXOSMITHKLINE, INC., JOHNSON &  
JOHNSON, INC., PFIZER, INC., PHARMACIA  
SCHERING-PLOUGH CORPORATION,  
TAP PHARMACEUTICAL PRODUCTS, INC.,  
and WATSON PHARMACEUTICALS, INC.,

Defendants.  
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This is a suit for monetary and injunctive relief filed by the State of Wisconsin on behalf of its citizens, state programs, and private payers against twenty pharmaceutical manufacturers. Plaintiff alleges that defendants inflated the average wholesale prices of their

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has been mailed to the following:

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record

this 9<sup>th</sup> day of September, 2004 by  
S. Vogel, Secretary to Judge Crabb

drugs, thereby violating several provisions of Wisconsin law. This case was filed in the Circuit Court for Dane County on June 3, 2004. Defendant Bayer Corporation removed the case to this court by filing a notice of removal with this court on July 14, 2004. In that notice, defendant Bayer alleged federal jurisdiction under the diversity statute, 28 U.S.C. § 1332. On July 22, 2004, defendants jointly filed a motion to stay all proceedings in this court pending a possible transfer of this case by the Judicial Panel on Multidistrict Litigation. On July 26, plaintiff filed a motion to remand this case back to the Dane County court. In separate orders dated August 2 and 3, 2004, I stayed briefing on plaintiff's motion to remand until defendants' motion to stay is resolved. On August 3, 2004, the Judicial Panel on Multidistrict Litigation issued a Conditional Transfer Order transferring this case to the District of Massachusetts pursuant to 28 U.S.C. § 1407. The panel found that this case presented questions of fact similar to cases that have been assigned to Judge Patti B. Saris in the District of Massachusetts. See In Re Immunex Corp. Average Wholesale Price Litigation, 201 F. Supp. 2d 1378 (J.P.M.L. 2002).

In Meyers v. Bayer AG, 143 F. Supp. 2d 1044, 1048-49 (E.D. Wis. 2001), the district court proposed an analytical framework for situations in which a court must decide both a motion to remand and a motion to stay proceedings pending a possible MDL transfer. According to Meyers, the district court's "first step should be to make a preliminary assessment of the jurisdictional issue." Id. at 1048. If this initial examination

suggests that removal was improper, the court should promptly complete its consideration and remand the case to state court. If, on the other hand, the jurisdictional issue appears factually or legally difficult, the court's second step should be to determine whether identical or similar jurisdictional issues have been raised in other cases that have been or may be transferred to the MDL proceeding.

Id. at 1049. Finally, “[o]nly if the jurisdictional issue is both difficult and similar or identical to those in cases transferred or likely to be transferred should the court proceed to the third step and consider the motion to stay.” Id. I find the Meyers court's analytical framework persuasive and adopt it for the purpose of this order.

After examining the briefs supporting and opposing the motion to stay, as well as the orders entered by other district courts that addressed motions to remand coupled with motions to stay pending a possible MDL transfer, it appears that removal was improper in this case. It is appropriate to take up the jurisdictional issue in this court because the question involves no specialized knowledge about the merits of the case or the handling of the other pharmaceutical cases and there is no apparent overlap between the jurisdictional issue presented in this case and the jurisdictional issues raised in other cases that have been transferred to Judge Saris. However, I am willing to entertain any additional arguments defendants may have in support of this court's jurisdiction. Therefore, I will lift the stay on the briefing on plaintiff's motion to remand. Defendants will have until September 22, 2004 to submit additional arguments regarding why this case should not be remanded to the

Circuit Court for Dane County. Should defendants submit argument opposing the motion to remand, plaintiff need not submit a reply brief.

IT IS ORDERED that defendants may have until September 22, 2004, in which to submit any additional arguments they have concerning plaintiff's motion to remand. A reply brief from plaintiff is not necessary.

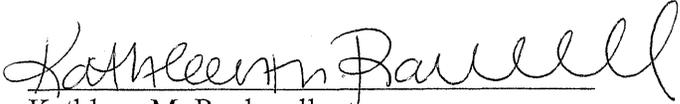
Entered this 9<sup>th</sup> day of September, 2004.

BY THE COURT:

  
BARBARA B. CRABB  
District Judge

**CERTIFICATE OF SERVICE**

I, Kathleen Rockwell, a legal assistant, hereby certify that on September 21, 2004, I caused a true and correct copy of the accompanying Opposition to Motion to Vacate Conditional Transfer Order to be served by Federal Express on Counsel for the State of Wisconsin, and by first class U.S. mail on the other individuals listed on the attached service list.

  
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