

multidistrict litigation statute (28 U.S.C. § 1407): preserving resources of both the court and the parties and avoiding inconsistent rulings on the same pretrial issues by different federal courts.

II. PROCEDURAL BACKGROUND

A. *Federal Actions Challenging AWP Pricing and Marketing Practices Have All Been Transferred To The AWP MDL Proceeding*

This action is one of numerous actions filed throughout the country alleging that the defendant pharmaceutical companies improperly inflated the “Average Wholesale Prices” (“AWPs”) for their respective medicines. As in the current action, these other lawsuits alleged that defendants’ AWP practices violate state (and in some cases federal) statutes and common law and seek damages, restitution, disgorgement, and injunctive relief. In April 2002, the MDL Panel issued its first decision to transfer actions like the instant action to the U.S. District Court for the District of Massachusetts for coordinated or consolidated pretrial proceedings. *See In re Pharmaceutical Industry Average Wholesale Price Litigation* (MDL No. 1456), 201 F.Supp.2d 1378 (J.P.M.L. 2002).

In establishing the AWP MDL, the Panel stated that the transferred actions involved common questions of fact “concerning whether (either singly or as part of a conspiracy) the pharmaceutical defendants engaged in fraudulent marketing, sales and/or billing schemes by unlawfully inflating the average wholesale price of their Medicare covered prescription drugs in order to increase the sales of these drugs to health care professionals and thereby boost the pharmaceutical companies’ profits.” *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 201 F.Supp.2d 1378, 1380 (J.P.M.L. 2002). Accordingly, the Panel concluded 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.” *Id.* Among the actions transferred by the MDL Panel were AWP actions brought by the states of Montana, Nevada, New York, Connecticut, and Minnesota, and by the New York Counties of Suffolk, Rockland, and Westchester. *See infra* n. 1.

B. The MDL Panel Has Consistently Transferred “Tag Along” AWP Cases To The Boston MDL Proceeding

Since its original order in April 2002, the MDL Panel, as required by its rules, has consistently transferred later-filed AWP cases (referred to as “tag-along actions” under the MDL Rules, *see* MDL Rules 1.1 & 7.4) to the Boston MDL for coordinated pretrial proceedings. Thus, since the AWP MDL was initiated, the MDL Panel has ordered the transfer of every single federal AWP action that has been filed since the AWP MDL began – over 25 in all¹ – including a number of cases where plaintiffs objected and remand motions were pending.² In cases where objections were posed by plaintiffs, the MDL Panel reaffirmed its original conclusion that the actions:

¹ On May 31, 2002, the Panel issued Conditional Transfer Order No. 1, which transferred six actions to the AWP MDL, including one brought by the State of Montana. On June 26, 2002, the Panel issued Conditional Transfer Order No. 2, which transferred four actions to the District of Massachusetts, including actions brought by the State of Nevada. On August 8, 2002, the Panel issued Conditional Transfer Order No. 3, which transferred three additional actions to the District of Massachusetts, including one brought by the State of Minnesota. On March 3, 2003, the Panel issued Conditional Transfer Order No. 8, which transferred an action brought by the County of Suffolk to the District of Massachusetts. On April 7, 2003, the Panel issued Conditional Transfer Order No. 10, which transferred the State of New York AWP case to the District of Massachusetts. On May 19, 2003, the Panel issued Conditional Transfer Order No. 11, which transferred four actions brought by the State of Connecticut to the District of Massachusetts. On October 10, 2003, the Panel issued Conditional Transfer Order No. 15, which transferred the actions brought by the County of Westchester and County of Rockland to the District of Massachusetts. In addition to these government actions, the Panel has transferred over twenty other AWP actions to the District of Massachusetts in numerous separate transfer orders. After transfer, Judge Saris later ordered the remand of one of the Nevada AWP cases (on procedural grounds) and the Minnesota AWP case (for lack of federal question jurisdiction).

² *E.g.* Exh. L (MDL Panel Transfer Order dated Dec. 11, 2002 Regarding State of Minnesota). Under MDL Rule 7.4, “conditional transfer orders” are entered automatically once the Clerk of the Panel becomes aware of a “tag-along action,” and these orders become final within fifteen days unless plaintiff files an objection.

involve common questions of fact with the actions in this litigation previously transferred to the District of Massachusetts [and] . . . transfer of these actions to that district for inclusion in the coordinated or consolidated pretrial proceedings occurring there will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation.

See Exh. K at 1 (Panel Transfer Order of October 16, 2002 Regarding Montana and Nevada Actions). The MDL Panel has stressed further that the pending motions to remand in those actions could be presented to and decided by the transferee judge. *Id.* at 2 (citing *In re Ivy*, 901 F.2d 7 (2d Cir. 1990) and *In re Prudential Ins. Co. of Am. Sale Practices Litig.*, 170 F.Supp.2d 1346, 1347-48 (J.P.M.L. 2001)). Responding to claims that these cases do not share sufficiently similar claims to warrant inclusion in the MDL proceeding, the Panel found that transfer “allows discovery with respect to any non-common issues to proceed concurrently with discovery on common issues,” and “ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties.” Exh. K, at 2.

C. District Courts Have Repeatedly Issued Orders Staying All Proceedings Pending Ruling by the MDL Panel on Transfer

In nine separate AWP lawsuits, district courts across the country have issued orders staying AWP cases pending a ruling by the Panel on transfer under the same circumstances presented here. (Copies of these Orders are attached as Exhibits A-I).³ For

³ District courts issued stays pending action by the MDL Panel in the following AWP actions: (1) *Montana v. Abbott Labs, Inc., et al.*, Case No. CV 02-09-H-DWM (D. Mont. June 21, 2002) (Molloy, J.) (Exh. A); (2) *Nevada v. American Home Prods., Inc.*, No. CV-N-02-202-ECR (D. Nev. July 26, 2002) (Reed, J.) (Exh. B); (3) *International Union of Operating Engineers, Local No. 68 Welfare Fund v. AstraZeneca PLC*, 03 CV 03230 (D. N.J. July 23, 2003) (Chesler, J.) (Exh. C); (4) *Swanston v. TAP Pharmaceutical Products Inc., et al.*, Case No. 03-CV-62 (D. Ariz. May 16, 2003) (McNamee, J.) (Exh. D) (“[T]he benefit of judicial economy and consistency among pretrial rulings outweighs any potential prejudice Plaintiff may suffer as a result of a stay.”); (5) *Turner v. Abbott Labs, et al.*, Case No. 02-CV-050006 (N.D. Ca. March 3, 2003) (Jenkins, J.) (Exh. E) (order granting stipulation by parties regarding stay of all proceedings); (6) *Virag v. Allergan, Inc., et al.*, Case No. 02-8417 RSWL (C.D. Cal. Jan. 7, 2003) (Lew, J.) (Exh. F); (7) *Rice v. Abbott Labs, Inc., et al.*, Case No. 02-3925 (N.D. Cal. Nov. 26, 2002) (Jenkins, J.) (Exh. G); (8) *Thompson v. Abbott Labs, Inc., et al.*, Case No. CGC-02-411813 (N.D. Cal. Sept. 30, 2002)

On July 14, 2004, defendants removed this action to this Court on the basis of diversity jurisdiction. On July 16, 2004, as required by Rule 7.5(e) of the MDL Rules, defendant Bayer Corp. filed a notice of related action with the Panel designating this action as a related tag-along action to those actions already transferred to the AWP MDL for consolidated and coordinated pretrial proceedings. *See* Exh. J (without attachments). As explained in that notice, this action involves “common questions of fact” with the actions already transferred to the AWP MDL. The Defendants thus anticipate that, pursuant to MDL Rule 7.4(a), the Clerk of the Panel will soon issue a conditional transfer order directing that the case be transferred to the Boston MDL (subject to the State’s objection, *see* MDL Rule 7.4(c)).

III. A STAY PENDING TRANSFER BY THE MDL PANEL IS JUSTIFIED TO PROMOTE JUDICIAL ECONOMY AND CONSISTENCY

Like the nine district courts that previously faced this issue, this Court should stay all proceedings in this action pending its transfer for consolidated and coordinated pretrial proceedings before Judge Saris. This Court’s power to stay its proceedings is “incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”). For this reason, courts and the MDL Panel have consistency recognized that such stays may properly be entered despite challenges to the federal court’s jurisdiction, leaving such jurisdictional challenges to be resolved by the MDL court. *See, e.g., In re Amino Acid Lysine Antitrust Litig.*, 910 F.Supp. 696, 700 (J.P.M.L. 1995) (ordering consolidation and transfer and recognizing that “the pending motion to remand ... can be presented to and decided by the transferee judge”); *In*

example, the district courts in the Montana and Nevada actions granted defendants' motions to stay all proceedings, including plaintiffs' motions to remand, pending a decision by the Panel on transfer of those actions to the AWP MDL. Exhs. A-B (Montana and Nevada Stay Orders).

Those district courts recognized that "the benefit of judicial economy and consistency among pretrial rulings outweighs any prejudice plaintiff may suffer as a result of a stay." Exh. A, at 3 (Montana Stay Order); *see also* Exh. B, at 17 (Nevada Stay Order) ("[A] stay will promote consistency, efficiency and judicial economy pending whatever is decided by the MDL Panel.").

The other district courts have followed the same reasoning in granting stays pending a decision by the MDL Panel. *See, e.g.*, Exh. D, at 3 (*Swanston* Stay Order) (finding that "the benefit of judicial economy and consistency among pretrial rulings outweighs any potential prejudice Plaintiff may suffer as a result of a stay"); Exh. G, at 10 (*Rice* Stay Order) (concluding that a stay of all proceedings "would promote judicial economy and uniformity" and avoid "the possibility of conflicting pretrial rulings").

D. State of Wisconsin Action

On June 3, 2004, the State of Wisconsin filed a Complaint in state court naming twenty defendants. Like the other AWP cases, including numerous state cases already transferred to the Boston MDL proceeding, the Complaint alleges that the State and its citizens pay "inflated prices" for medicines based on the defendants' alleged misuse of AWP. Compl. ¶¶ 38-51, 56.C. Like the other AWP complaints, the Wisconsin Complaint alleges that all defendants "fraudulently inflated the average wholesale prices of their drugs, and drugs sold by

(Wilken, J.) (Exh. H); (9) *Geller v. Abbott Labs, Inc., et al.*, Case No. CV 02-00553 DDP (C.D. Ca. Mar. 22, 2002) (Pregerson, J.) (Exh. I).

re Ivy, 901 F.2d 7, 9 (2d Cir. 1990) (recognizing authority to stay action despite pending remand motion); *Medical Soc’y v. Connecticut Gen. Corp.*, 187 F.Supp.2d 89, 91 (S.D.N.Y. 2001) (declining to decide motion to remand pending transfer decision by MDL Panel); *Meyers v. Bayer AG*, 143 F.Supp.2d 1044, 1046-47 (E.D. Wis. 2001) (staying consideration of existence of federal question pending transfer decision by MDL Panel); *Aikins v. Microsoft Corp.*, 2000 WL 310391, at *1 (E.D. La. 2000) (declining to decide motion to remand pending transfer decision by Panel); *Johnson v. AMR Corporation*, 1996 WL 164415, at *3-4 (N.D. Ill. 1996) (staying ruling on jurisdictional motion pending transfer decision by MDL Panel).

Granting a stay pending a decision by the MDL Panel to transfer the action thus is well within this Court’s discretion and is appropriate when it would “further judicial economy and consistency.” *Meyers v. Bayer AG*, 143 F.Supp.2d 1044, 1049 (E.D. Wis. 2001); *see also Wienke v. Microsoft Corp.*, 84 F.Supp.2d 989, 990 (E.D. Wis. 2000) (“The court concludes that in light of the pending MDL Panel ruling on transfer, this action should be stayed in the interest of judicial economy and to avoid inconsistent results.”). Here, a stay would further judicial economy by allowing all pretrial issues in the AWP cases to be handled by a single district court – Judge Saris’ MDL proceedings. Judge Saris has devoted substantial time and resources in analyzing the numerous jurisdictional, factual, and legal issues that have been consistently raised in these AWP cases. *See, e.g., In re Pharmaceutical Industry Wholesale Price Litigation*, 263 F.Supp. 2d 172 (D. Mass. 2003); *In re Pharmaceutical Industry Wholesale Price Litigation*, 309 F.Supp. 2d 165 (D. Mass. 2004); *In re Pharmaceutical Industry Wholesale Price Litigation*, 307 F.Supp. 2d 196 (D. Mass 2004). Thus, Judge Saris already is familiar with the legal and factual intricacies presented by these AWP cases – including those brought by state and local

governments. By granting the requested stay, this Court can avoid unnecessarily duplicating Judge Saris' efforts, and use its resources to attend to other cases on its docket.

The requested stay also will preserve the resources of the litigants. All of the defendants in this action are currently participating in the MDL proceedings before Judge Saris. A stay of this action pending its transfer to the MDL thus will allow these defendants to address common discovery and other pretrial matters in a coordinated and consolidated fashion, rather than piecemeal. For example, this Court's Standing Order requires that the defendants, consistent with the local rules, compile and submit information to this Court that overlaps information already before Judge Saris in the MDL proceeding. It is precisely this duplication of effort – required of both this Court and the parties – that the MDL proceeding was designed to avoid. *See* Exh. D (*Rice Stay Order*) (noting that, absent stay, court “would have to familiarize itself with the legal and factual intricacies of a case” that had already been mastered by MDL court); Exh. I (*Geller Stay Order*) (same).

The requested stay also will avoid inconsistent decisions on the same or similar issues presented by these AWP cases. For example, the discovery obligations imposed by this Court could conflict with the obligations the defendants already face in AWP actions brought by other states that are currently before Judge Saris. Similarly, to the extent plaintiff seeks to challenge federal jurisdiction, the issues raised will likely duplicate legal and fact issues that will need to be addressed in the future as still additional state AWP cases are filed.⁴ Again, the AWP MDL is designed to avoid just such inconsistent district court rulings. As the MDL Panel long ago recognized, the “remedial aim” of the multidistrict litigation statute is “to eliminate the

⁴ Significantly, although this is the first state AWP case that has been removed on grounds of federal diversity jurisdiction, we anticipate that similar state actions will be filed in the future that will be subject to removal on the same grounds.

potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions.” *In re Plumbing Fixture Cases*, 298 F.Supp. 484, 491-92 (J.P.M.L. 1968).

Finally, the State can point to no unfair prejudice that would arise from a stay. Under the MDL Panel’s Rules, the transfer of this action to the Judge Saris in Boston should proceed expeditiously. The Clerk of the MDL Panel automatically issues a conditional transfer order upon learning of a “tag-along action,”⁵ and this order becomes effective just fifteen days later absent objection by a party. MDL Rule 7.4(a). Once the transfer has been completed, Judge Saris and the assigned magistrate can proceed promptly to set appropriate guidelines for discovery and resolve any disputes among the parties, including any claim concerning federal jurisdiction. Moreover, to the extent the State intends to challenge federal jurisdiction, Judge Saris has not hesitated to remand cases where she has determined that the particular circumstances presented do not support jurisdiction, including in certain of the transferred state cases.⁶

It is for these reasons that district courts have repeatedly ordered general stays of the AWP actions pending their transfer to the AWP MDL proceeding. *See* Exhs. A-I. Other district courts in similar cases have consistently reached the same conclusion. *See, e.g., Wienke v. Microsoft Corp.*, 84 F.Supp.2d 989, 990 (E.D. Wis. 2000) (“The court concludes that in light of the pending MDL Panel ruling on transfer, this action should be stayed in the interest of judicial economy and to avoid inconsistent results.”); *Aikins v. Microsoft Corp.*, 2000 WL

⁵ As noted above, Bayer notified the Clerk of the MDL Panel of the instant “tag-along action,” as required by the MDL Rules, on July 16, 2004. *See* Exh. J; MDL Rule 7.5(e).

⁶ For example, Judge Saris has remanded one of the two Nevada AWP cases (on procedural grounds) and the Minnesota AWP case (on grounds that federal question jurisdiction was not present), in an Order dated June 11, 2003.

310391, at *1 (E.D. La. 2000) (staying further pretrial proceedings because “[c]onsistency and economy are both served by resolution of these issues by a single court after transfer by the [MDL Panel]”); *Tench v. Jackson Nat’l Life Ins. Co.*, 1999 WL 1044923, at *1 (N.D. Ill. Nov. 12, 1999) (“Under these circumstances, *i.e.* pending a decision by the MDL Panel whether to add a case, stays are frequently granted to avoid duplicative efforts and preserve valuable judicial resources.”); *Rivers v. Walt Disney Co.*, 980 F.Supp. 1358, 1362 (C.D. Cal. 1997) (“[A] majority of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending with the MDL Panel because of the judicial resources that are conserved.”); *Good v. Prudential Ins. Co.*, 5 F.Supp.2d 804, 809 (N.D. Cal. 1998) (“Courts frequently grant stays pending a decision by the MDL Panel regarding whether to transfer a case.”). The reasoning of these courts applies equally here.

IV. CONCLUSION

The temporary stay sought herein will promote the goals of judicial economy, efficiency, and uniformity. The Defendants thus respectfully request that this Court stay all proceedings until such time as a final decision is issued concerning the transfer of the case to the AWP MDL, so that the pretrial issues, including federal jurisdiction, can be decided by the single federal judge designated by the Panel to preside over the consolidated federal proceeding.

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Respectfully submitted,

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