

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

STATE OF WISCONSIN

Plaintiff,

v.

CASE NO. 05 C 408 C

ABBOTT LABORATORIES, INC., et al.,

Defendants.

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO
STAY CONSIDERATION OF PLAINTIFF'S MOTION TO REMAND**

Defendants respectfully move this Court to stay consideration of the State's remand motion pending the decision of the Judicial Panel on Multidistrict Litigation ("JPML") on whether this "tag-along" action should be transferred to the United States District Court for the District of Massachusetts for consolidated or coordinated pretrial proceedings. This lawsuit raises many of the same legal and factual issues that are present in dozens of other average wholesale price ("AWP") actions that have already been transferred to the Honorable Patti B. Saris in Boston for consolidated and coordinated pretrial proceedings. *See generally In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL 1456 ("AWP MDL"). In addition, on the same day defendants removed this action, they also removed ten similar cases brought by six other states.¹ Remand motions raising the same issues raised here have been (or will be) filed in those cases.²

¹ See Notice of Removal, *Illinois v. Abbott Labs., Inc.*, Case No. 05C 4056 (N.D. Ill. July 13, 2005); Notice of Removal, *Kentucky v. Alpharma, Inc.*, Case No. 05 CV 47 (E.D. Ky. July 13, 2005); Notice of Removal, *Kentucky v. Abbott Labs., Inc.*, Case No. 05 CV 48 (E.D. Ky. July 13, 2005); Notice of Removal, *Kentucky v. Warrick Pharm. Corp.*, Case No. 05 CV 49 (E.D. Ky. July 13, 2005); Notice of Removal, *New York v. Aventis*, Case No. 05-CV-0874 (continued...)

The interests of judicial efficiency and consistency of decision weigh strongly in favor of staying 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.

As discussed below, the overwhelming weight of authority provides that the transferee court in multi-district litigation should be permitted to decide remand issues. Moreover, there are special and compelling circumstances why Judge Saris should be permitted to address the remand motion that has been filed in this case. A recent United States Supreme Court decision has overturned a remand ruling by Judge Saris in a virtually identical case. *See State of Montana v. Abbott Labs.*, 266 F. Supp. 2d 250, 256 (D. Mass. 2003). There, Judge Saris ruled that, although state law claims seeking recovery for certain Medicare payments present a substantial federal question, those claims were not removable under *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986), because the Medicare statute creates no private cause of action. *Id.*

The Supreme Court's recent decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. _____, 125 S. Ct. 2363 (June 13, 2005), establishes that a state law claim requiring the interpretation of a federal statute creates federal

(N.D.N.Y. July 13, 2005); Notice of Removal, *New York v. GlaxoSmithKline plc*, Case No. 05-CV-0874 (N.D.N.Y. July 13, 2005); Notice of Removal, *New York v. Pharmacia Corp.*, Case No. 05-CV-0874 (N.D.N.Y. July 13, 2005); Notice of Removal, *Pennsylvania v. TAP Pharm. Prod., Inc.*, Case No. 05CV 3605 (E.D. Pa. July 13, 2005); Notice of Removal, *Alabama v. Abbott Labs., Inc.*, Case No. 2:05CV647-M (M.D. Ala. July 13, 2005); Notice of Removal, *Minnesota v. Pharmacia Corp.*, Case No. 05-CV-1394 (D. Minn. July 13, 2005).

² As of this date, remand motions have also been filed in the Illinois, Kentucky, Pennsylvania and Alabama cases. In the New York cases, plaintiff has written a letter to the court announcing its intention to file a remand motion.

question jurisdiction, even though the federal statute at issue does not itself create a private cause of action. *See id.* at 2368. Thus, having already decided that state law claims to recover Medicare payments present a substantial federal question, Judge Saris is uniquely qualified to decide whether *Grable* requires her to change her prior ruling on the jurisdictional issue in a way that would give her jurisdiction over this case as well.

Ten district courts considering related AWP lawsuits issued stays and declined to rule on remand motions pending potential transfer to Judge Saris in Boston. In granting stays, these courts have reasoned that the “benefit of judicial economy and consistency among pretrial rulings outweighs any prejudice plaintiff may suffer as a result of a stay.” *See, e.g.*, Ex. 1 at 3 (*Montana Stay Order*); *see also* 28 U.S.C. § 1407. Defendants respectfully maintain that the same logic applies here.

I. PROCEDURAL BACKGROUND

A. The Wisconsin Action

On June 3, 2004, the State of Wisconsin filed the civil action captioned *State of Wisconsin v. Abbott Laboratories, Inc., et al.*, 04 CV 1709, in the Circuit Court for Dane County, Wisconsin. On July 14, 2004, defendants removed the action to this Court based on its diversity jurisdiction (Case no. 04 C 477 C), the only basis for jurisdiction available in good faith to defendants at the time. *See infra* at 4. On October 5, 2004, this Court remanded the action to the Circuit Court for Dane County, Wisconsin, and on November 1, 2004, the State of Wisconsin filed an amended complaint in the above-captioned action in the Circuit Court for Dane County, Wisconsin (the “Complaint”).

The Complaint alleges that each defendant drug manufacturer caused the State of Wisconsin’s Medicaid program to overpay for that company’s pharmaceutical products by reporting inflated average wholesale price (“AWP”) and other pricing information, which serves

as the basis for Wisconsin's Medicaid reimbursement rates for prescription drugs. Compl. ¶¶ 57-61. In particular, the Complaint alleges that for Wisconsin Medicaid beneficiaries who are also qualified to receive federal Medicare benefits, Wisconsin Medicaid pays the Medicare beneficiaries' 20% co-payment under Medicare Part B, which until recently was based on AWP. Compl. ¶¶ 62-66; see also 42 U.S.C. §§ 1395l(a), 1395u(o). The State alleges that by reporting allegedly inflated AWP pricing information nationwide, each defendant has caused the Wisconsin Medicaid program to make inflated Medicare Part B co-payments. Compl. ¶ 1. The State seeks to recover the amounts allegedly overpaid for these Medicare Part B co-payments.

Id.

Although the State of Wisconsin is the named plaintiff in this action, although the State also purports to prosecute this action *parens patriae* on behalf of its citizens and Wisconsin entities that pay prescription drugs costs of their members ("private payers") and who allegedly have paid inflated prices for defendants' prescription drugs as a result of defendants' unlawful conduct concerning AWP information. In addition to seeking recovery for its own alleged overpayment for Medicare Part B co-payments, the State's *parens patriae* claims seek recovery of such overpayments made by individual Medicare beneficiaries. Compl., ¶¶ 1, 66, 74, 79, 83, 88. The five-count Complaint seeks recovery under Wis. Stat. § 100.18(1) (Count I), Wis. Stat. § 100.18(10)(b) (Count II), the Wisconsin Trust and Monopolies Act (Count III), Wis. Stat. § 49.49(4m)(a)(2), Medical Assistance Fraud (Count IV), and unjust enrichment (Count V) and seeks restitution, forfeitures, disgorgement, damages (including treble damages), injunctive relief, attorney's fees, and costs. Defendants have filed a comprehensive motion to dismiss the Complaint, which is fully briefed.

When originally filed, this action was not removable on the basis of federal question jurisdiction as Judge Saris had ruled that AWP actions in which federal question

jurisdiction was based on state law claims to recover Medicare payments were not removable because there is no private cause of action under the federal Medicare statute. *See State of Montana*, 266 F. Supp. 2d at 255-57 (discussing Minnesota's remand motion).³ Defendants thus could not remove this case in good faith because it would have been transferred to Judge Saris, who had already made clear her opinion on the federal question issue.⁴

The Supreme Court's recent decision in *Grable*, however, establishes that Judge Saris's previous removal decision in *State of Montana* was incorrect. Because the Supreme Court's decision in *Grable* rendered this case removable where it had previously not been removable, defendants removed this case to this federal court on July 13, 2005.⁵

Pursuant to MDL Rule 7.5(e), defendants filed a Notice of Related Action ("Tag-Along Notice") with the JPML on July 15, 2005, designating this case as a related tag-along action to those actions already transferred to the AWP MDL. This action involves "common

³ In *State of Montana*, Judge Saris considered separate but related AWP actions brought by the states of Montana, Minnesota and Nevada. 266 F. Supp. at 252.

⁴ Even if the case had not been transferred to the MDL, Seventh Circuit authority also overturned by *Grable* would have required remand. *See Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994) (state law action based upon violation of federal statute does not raise substantial federal question, for purposes of conferring jurisdiction on federal court, unless there is a federal right of action to enforce the federal claim); *Grable*, 125 S. Ct. at 2366 n.2 (citing *Seinfeld* as example of those circuits which had held that a private right of action is required to give rise to federal question jurisdiction).

⁵ Removal is timely under 28 U.S.C. § 1446(b) because it was filed within thirty days of defendants' receipt of the United States Supreme Court's decision in *Grable*, which constitutes an "other paper from which it may first be ascertained that this case is removable." *See Smith v. Burroughs Corp.*, 670 F. Supp. 740, 741 (E.D. Mich. 1987) (removal petition timely where defendants filed notice of removal within thirty days of Supreme Court decision rendering claim removable); *see also Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 267-68 (5th Cir. 2001) (holding that "other paper" for purposes of § 1446(b) removal need not be from same case); *Doe v. Am. Red Cross*, 14 F.3d 196, 201-02 (3d Cir. 1993) (holding "order" for purposes of § 1446(b) removal need not be from same case); *Davis v. Time Ins.*, 698 F. Supp. 1317, 1321-22 (S.D. Miss. 1988); *but see Kocaj v. Chrysler Corp.*, 794 F. Supp. 234, 236 (E.D. Mich. 1992). Although plaintiff sharply disputes the timeliness of removal, this is yet another issue in common with the ten other recently-removed cases that would most efficiently be decided by Judge Saris.

questions of fact” and shares similar complicated jurisdictional questions with the actions already transferred to the AWP MDL. An amended “tag along” notice was filed July 18, 2005.

Defendants expect that the JPML will issue a conditional transfer order as a matter of course in response to the filing of this notice of related action. *See* MDL Rule 7.4(a) (providing that “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 the plaintiff files an objection). On July 20, 2005, Magistrate Judge Crocker issued an Order postponing further scheduling in this matter for approximately 60 days “[t]o avoid potentially unnecessary work” while the parties “obtain ‘tag along’ status in the AWP MDL.”

B. Numerous Actions Challenging AWP Pricing and Marketing Practices Have Been Transferred to the AWP MDL Proceeding.

The State’s allegations that the defendant pharmaceutical companies improperly inflated the AWP for their respective products share numerous “common issues of fact” with many similar actions filed earlier by other public and private parties. Like the Wisconsin action, these other cases allege that the defendants’ AWP practices violate state statutes and common law and seek damages and other equitable relief. In April 2002, the JPML transferred sixteen then-pending cases to Judge Saris for coordinated or consolidated pretrial proceedings because “[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.” *See In re Immunex Corp. Average Wholesale Price Litig.* (MDL No. 1453), 201 F. Supp. 2d 1378, 1380 (J.P.M.L. 2002) (“April 2002 Order”).

Since the April 2002 Order, the JPML has transferred thirty-four related cases in order to “serve the convenience of the parties and witnesses and promote the just and efficient

conduct of this litigation.” See Ex. 2 at 1 (*Montana and Nevada Transfer Orders*).⁶ The JPML has 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.” *Id.* at 2 (*Montana and Nevada Transfer Orders*). Even when plaintiffs have opposed transfer pending a decision on remand, the JPML has granted the transfer order, recognizing that any pending motions to remand could be resolved by the transferee judge. *Id.* (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)).

⁶ See *Montana, v. Abbott Labs.*, 2002-12084 (Oct. 16, 2002); *Nevada v. Am. Home Prod. Corp.*, 2002-12086 (Oct. 16, 2002); *Swanston v. TAP Pharma. Prod., Inc.*, 2003-11157 (June 13, 2003); *Cal. ex rel. Ven-A-Care of the Florida Keys, Inc., v. Abbott Labs.*, 2003-12226 (June 23, 2003); *County of Rockland v. Abbott Labs., Inc.*, (Oct. 28, 2003); *Int’l Union of Oper. Eng’rs, Local No. 68 Welfare Fund v. AstraZeneca, PLC*, 2004-11503 (Dec. 3, 2003); *County of Westchester v. Abbott Labs., Inc.*, 2004-10322 (Feb. 13, 2004); *City of New York v. Abbott Labs., Inc.*, 2004-12264 (Oct. 13, 2004); *County of Nassau v. Abbott Labs., Inc.*, 2005-10179 (Jan. 21, 2005); *County of Onondaga v. Abbott Labs., Inc.*, 2005-10599 (Mar. 24, 2005); *County of Washington v. Abbott Labs., Inc.*, 2005-11180 (May 31, 2005); *County of Rensselaer v. Abbott Labs., Inc.*, 2005-11181 (May 31, 2005); *County of Albany v. Abbott Labs., Inc.*, 2005-11182 (May 31, 2005); *County of Warren v. Abbott Labs., Inc.*, 2005-11183 (May 31, 2005); *County of Greene v. Abbott Labs., Inc.*, 2005-11184 (May 31, 2005); *County of Saratoga v. Abbott Labs., Inc.*, 2005-11185 (May 31, 2005); *County of Chenango v. Abbott Labs., Inc.*, 2005-11186 (May 31, 2005); *County of Broome v. Abbott Labs., Inc.*, 2005-11187 (May 31, 2005); *County of Tompkins v. Abbott Labs. Inc.*, 2005-11188 (May 31, 2005); *County of Cayuga v. Abbott Labs, Inc.*, 2005-11189 (May 31, 2005); *County of Herkimer v. Abbott Labs., Inc.*, 2005-11190 (May 31, 2005); *County of Washington v. Abbott Labs., Inc.*, 2005-11180 (May 31, 2005); *County of Oneida v. Abbott Labs., Inc.*, 2005-11191 (May 31, 2005); *County of St. Lawrence v. Abbott Labs., Inc.*, 2005-11192 (May 31, 2005); *County of Chautauqua v. Abbott Labs., Inc.*, 2005-11193 (May 31, 2005); *County of Alleghany v. Abbott Labs., Inc.*, 2005-11194 (May 31, 2005); *County of Cattaraugus v. Abbott Labs., Inc.*, 2005-11195 (May 31, 2005); *County of Wayne v. Abbott Labs., Inc.*, 2005-11196 (May 31, 2005); *County of Monroe v. Abbott Labs., Inc.*, 2005-11197 (May 31, 2005); *County of Yates v. Abbott Labs., Inc.*, 2005-11198 (May 31, 2005); *County of Fulton v. Abbott Labs., Inc.*, 2005-11368 (June 23, 2005); *County of Putnam v. Abbott Labs. Inc.*, 2005-11369 (June 23, 2005); *County of Genesee v. Abbott Labs., Inc.*, 2005-11370 (June 23, 2005); *County of Steuben v. Abbott Labs., Inc.*, 2005-11371 (June 23, 2005); and *County of Niagara v. Abbott Labs, Inc.*, (July 18, 2005).

C. District Courts In Other AWP Suits Have Repeatedly Issued Orders Staying Consideration of Remand Motions Pending Ruling by JPML on Transfer.

In ten earlier-removed AWP lawsuits, district courts across the country have declined to rule on remand motions pending a ruling by the JPML on transfer.⁷ For example, in an action filed by the State of Montana, the district court granted defendants' motions to stay all proceedings — including plaintiffs' motions to remand — pending a decision by the JPML on transfer to the AWP MDL because “the benefit of judicial economy and consistency among pretrial rulings outweighs any prejudice plaintiff may suffer as a result of a stay.” Ex. 1 at 3 (*Montana* stay order). Likewise, in similar actions filed by the State of Nevada, the district court granted defendants' motion to stay proceedings “[b]ecause the jurisdictional issues are both complicated and likely to arise in other cases before the MDL Panel,” making a stay “the most appropriate course of action.” See Ex. 3, at 13-14 (*Nevada* stay order).

The only AWP case where the district court ruled on a remand motion before the case was transferred to Judge Saris was this one. See *Wisconsin v. Abbott Labs.*, Case No. 04-C-477-C, 2004 WL 2055717 (W.D. Wis. Sept. 9, 2004). The situation now is readily

⁷ Specifically, district courts issued stays in the following AWP actions: (i) *Geller v. Abbott Labs., Inc.*, Case No. CV 02-00553 DDP (C.D. Cal. Mar. 22, 2002) (Pregerson J.) (“The Court finds that all factors, including the jurisdictional issues presented and the potentially expansive nature of this litigation, favor granting the stay”); (ii) *Montana v. Abbott Labs., Inc.*, Case No. CV 02-09-H-DWM (D. Mont. June 21, 2002) (Molloy J.) (“In this case, the benefit of judicial economy and consistency among pretrial rulings outweighs any prejudice plaintiff may suffer as a result of a stay.”); (iii) *Nevada v. Abbott Labs., Inc.*, Case No. CV-N-02-80-ECR (D. Nev. Jul. 26, 2002) (Reed J.) (“Nevada I”); (iv) *Nevada v. American Home Prods., Inc.*, No. CV-N-02-202-ECR (D. Nev. Jul. 26, 2002) (Reed J.) (“Nevada II”) (action identical to Nevada I but involving different defendants); (v) *Rice v. Abbott Labs., Inc.*, Case No. C 02-3925 (N.D. Cal. Nov. 26, 2002) (Jenkins, J.); (vi) *Virag v. Allergan, Inc.*, Case No. 02-8417 RSWL (C.D. Cal. Jan. 7, 2003) (Lew, J.); (vii) *Digel v. Abbott Labs.*, Case No. 03-2109 Ma BRE (W.D. Tenn. Mar. 12, 2003) (Donald, J.); (viii) *Swanston v. TAP Pharm. Prod. Inc.*, Case No. 03-CV-62 (D. Ariz. May 16, 2003) (McNamee, J.); (ix) *Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. AstraZeneca PLC*, 03 CV 03230 (D.N.J. July 23, 2003) (Chesler, J.); and (x) *County of Erie v. Abbott Labs., Inc.*, 05-CV-0259E (SC) (W.D.N.Y. June 1, 2005) (Telesca, J.).

distinguishable, however, from that which existed when this matter was last before this Court because removal then was based on a ground not yet asserted in any other AWP case. Thus, the court found that ruling on the motion to remand “involve[d] no specialized knowledge about the merits of the case” 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.” *Id.* at * 1. Here, by contrast, the importance of the federal statute to the merits of the State’s claims is the very basis for the removal, and the identical jurisdictional issue is presented in this case, the ten other cases removed on the same day as this one, and in the cases on which Judge Saris has previously ruled.

II. ARGUMENT

Like the district courts in ten prior AWP lawsuits, this Court should stay action on plaintiff’s remand motion pending transfer of this case for consolidated and coordinated pretrial proceedings before Judge Saris, who is familiar with the common factual and legal issues relating to the alleged AWP scheme and has previously considered the federal question and removal issues in this case. A stay of proceedings would promote judicial economy, avoid inconsistent rulings by different district courts, and avoid prejudice to both the State and defendant pharmaceutical companies.

A. The Court Has The Inherent Power To Stay Proceedings In The Interests of Judicial Economy and Uniformity

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. N. 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.”). Granting a stay pending a decision by the JPML to transfer the action “is within the court’s discretion and it is appropriate

when it serves the interests of judicial economy and efficiency.” *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997) (citation omitted).⁸

Federal courts and the JPML have consistently recognized that such stays are proper even when the federal court’s jurisdiction is challenged on remand, leaving such jurisdictional challenges to be resolved by the MDL court. *See, e.g., Weinke v. Microsoft Corp.*, 84 F.Supp.2d 989 (E.D.Wis. 2000) (staying action, including consideration of remand motion, pending decision by JPML to transfer action to MDL court); *In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (recognizing authority to stay action despite pending remand motion); *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”); *Medical Soc’y v. Conn. Gen. Corp.*, 187 F. Supp. 2d 89, 91 (S.D.N.Y. 2001) (declining to decide motion to remand pending transfer decision by the MDL Panel); *Aikins v. Microsoft Corp.*, 2000 WL 310391 at *1 (E.D. La. Mar. 24, 2000) (declining to decide motion to remand pending transfer decision by the MDL Panel); *Johnson v. AMR Corp.*, 1996 WL 164415 at *3-*4 (N.D. Ill. Apr. 3, 1996) (staying ruling on jurisdictional motion pending transfer decision by the JPML). As demonstrated above, courts have also granted such stays in AWP cases.

B. A Stay Would Promote Judicial Economy and Efficiency.

Most courts have granted motions to stay when, without a stay, there is the potential for an inefficient use of judicial resources, as is the case where transfer by the JPML is

⁸ *See also Walker v. Merck & Co., Inc.*, 2005 WL 1565839, at *2 (S.D. Ill. June 22, 2005) (“In considering a motion for stay, courts consider both the interest of judicial economy and the potential prejudice or hardship to the parties.”); *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.”).

pending. *See, e.g., Rivers*, 980 F. Supp. at 1362 (“[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.”). As discussed above, the judges in the Montana and Nevada AWP actions found that these interests weighed in favor of a stay. Ex. 1 at 3 (*Montana Stay Order*) (“[T]he benefit of judicial economy and consistency among pretrial rulings outweighs any prejudice plaintiff may suffer as a result of a stay.”); Ex. 3 at 14 (*Nevada Stay Order*) (“On the question of judicial economy, this factor appears to weigh in favor of a stay.”). Absent a stay, this Court “would have to familiarize itself with the legal and factual intricacies of the case” that has already been mastered by the MDL court. *See* Ex. 4 at 5 (*Rice stay order*). As Magistrate Judge Crocker has recognized, permitting the JPML to determine whether this case should be transferred to Judge Saris will “avoid potentially unnecessary work.” Order (July 20, 2005) (Docket No. 33).

In particular, judicial economy would be served by having Judge Saris decide the remand motions filed in this and the other state cases that were removed on the same day on identical grounds. As discussed above, in very similar cases brought by the states of Minnesota, Montana and Nevada, Judge Saris previously held that state law claims relating to Medicare Part B co-payments present a “substantial federal question.” *State of Montana*, 266 F. Supp. 2d at 255 (“[A]n essential element” of the state law claim “is proof of a discrepancy between the AWPs reported by [defendant] and the meaning of AWP under the Medicare statute.”). She nevertheless remanded Minnesota’s suit, because the Medicare statute did not create a private right of action for claims related to the reporting of AWPs. *Id.* at 257 (“even though violation of the Medicare statute is a necessary element of Minnesota’s Medicare-beneficiary claims, *Merrell Dow* requires a finding that the federal issue is not substantial enough to create federal jurisdiction.”). The Supreme Court’s decision in *Grable*, however, establishes that a private

right of action is not required to confer federal jurisdiction. *Grable*, 125 S. Ct. at 2368. Thus, having already decided whether state law claims relating to Medicare Part B co-payments present a “substantial federal question,” Judge Saris will only have to reconsider her decision about *Merrell Dow*’s requirements. In contrast, absent a stay, this Court will have to devote substantial time and effort to the consideration of the jurisdictional issues raised by the State’s motion for remand, unnecessarily duplicating Judge Saris’ efforts.

Assuming that there is federal jurisdiction in this case, permitting it to be transferred to the District of Massachusetts would also promote judicial economy by allowing all other substantive pretrial issues in the AWP cases to be handled by Judge Saris, who has been dealing with AWP issues for over three years. Judge Saris has devoted substantial time and resources to analyzing the numerous jurisdictional, factual, and legal issues that have been raised in these AWP cases and is familiar with the legal and factual intricacies presented by the other AWP cases, including those brought by other States alleging violations of state law.⁹

C. A Stay Will Prevent Inconsistent Decisions On Common Factual And Legal Issues, Including Remand.

A stay also will avoid the possibility of inconsistent decisions in this case and in the ten other AWP actions that were removed on the same day presenting the identical jurisdictional issues raised by the State’s remand motion. As the JPML recognized long ago, the “remedial aim” of the multidistrict litigation statute is “to eliminate the potential for conflicting

⁹ See, e.g., *In re Pharm. Indus. Average Wholesale Price Litig.*, No. 1456, Civ.A. 01-12257-PBS (D. Mass. Apr. 8, 2005) (Ex. 5); *In re Pharm. Indus. Average Wholesale Price Litig.*, No. 1456, Civ.A. 01-12257-PBS, 2004 WL 2387125 (D. Mass. Oct. 26, 2004); *In re Pharm. Indus. Average Wholesale Price Litig.*, 339 F. Supp. 2d 165 (D. Mass. 2004); *In re Pharm. Indus. Average Wholesale Price Litig.*, 321 F. Supp. 2d 187 (D. Mass. 2004); *In re Pharm. Indus. Average Wholesale Price Litig.*, 309 F. Supp. 2d 165 (D. Mass. 2004); *In re Pharm. Indus. Average Wholesale Price Litig.*, 307 F. Supp. 2d 196 (D. Mass. 2004); *In re Pharm. Indus. Average Wholesale Price Litig.*, 307 F. Supp. 2d 190 (D. Mass. 2004).

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). Toward this end, district courts regularly stay pretrial proceedings to avoid potentially inconsistent rulings on pretrial matters.¹⁰ Furthermore, assuming that there is federal jurisdiction, consolidation of the several state cases before Judge Saris will avoid inconsistent rulings on the meaning of “AWP” in the federal Medicare statute and regulations — an issue that is raised by all of the recently removed state cases as well as the cases already before Judge Saris.

D. A Stay Will Avoid Prejudice To All Parties.

The State will suffer little if any prejudice if this case is stayed. Issuance of the transfer order is imminent, and tag-along proceedings generally move quickly. *See, e.g., Good*, 5 F. Supp. 2d at 809 (granting a stay where “a stay pending a final decision by the MDL Panel would likely be brief”); *Tench v. Jackson Nat’l. Life Ins. Co.*, 1999 WL 1044923, at *2 (N.D. Ill. Nov. 12, 1999) (granting a stay as plaintiff would suffer no prejudice from the short delay). Other courts have similarly concluded that the long-run benefits of a stay greatly outweigh the minimal short-run costs of a delay. *See Rosenfeld v. Hartford Fire Ins. Co.*, 1988 WL 49065, at *2 (S.D.N.Y. May 12, 1988) (“While [plaintiffs] may suffer some initial delay, once the cases

¹⁰ *See, e.g., In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (recognizing that “[c]onsistency as well as economy is thus served” when proceedings are stayed pending transfer); *Rivers*, 980 F. Supp. at 1360-61 (concluding that, *inter alia*, the potential for conflicting decisions weighed in favor of a stay); *Good*, 5 F. Supp. 2d at 807 (granting a stay pending a transfer decision by the JPML because “[t]he purpose of such transfers is . . . to eliminate the potential for conflicting pretrial rulings”); *American Seafood, Inc. v. Magnolia Processing, Inc.*, 1992 WL 102762, at *2 (E.D. Pa. May 7, 1992) (“judicial economy and prejudice to defendant[] weigh heavily in favor of [a] stay” when defendant may be forced to litigate similar motions that may result in conflicting rulings); *Medical Society*, 187 F. Supp. 2d at 92 (granting stay of all proceedings, including remand motion, because “there are significant economies in having a single court decide a jurisdictional question which has arisen and presumably will continue to arise in cases around the nation.”).

are coordinated and the defendants are able to respond to all the complaints in a coordinated manner, more time may well be saved than was lost.”); *Egon v. Del-Val Fin. Corp.*, 1991 WL 13726, at *1 (D.N.J. Feb. 1, 1991) (“[E]ven if a temporary stay can be characterized as a delay prejudicial to plaintiffs, there are considerations of judicial economy and hardship to defendants that are compelling enough to warrant such a delay.”).

In contrast, denying the stay would result in hardship and inequity to defendants because they will be “forced to litigate the same jurisdictional issues, as well as other substantive and procedural issues, multiple times in multiple courts” while they wait for transfer to the AWP MDL to become final. Ex. 4 at 6 (*Rice* stay order). All but a few 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 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.¹¹

¹¹ Prior to removal, defendants had been conferring with plaintiff’s counsel over discovery and, since removing this action, a number of defendants have served written discovery responses on the State. Defendants do not intend the requested stay to preclude progress on discovery matters already begun in state court.

CONCLUSION

For the reasons stated above, the Court should grant the motion to stay.

Dated: July 29, 2005.

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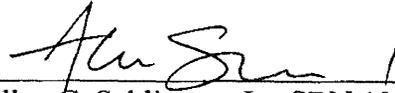
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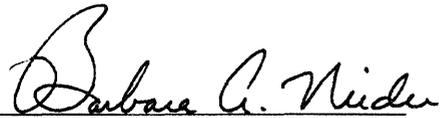
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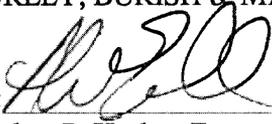
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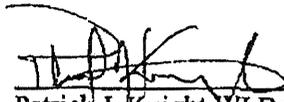
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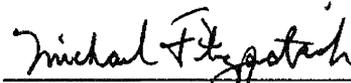
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Dated: July 28, 2005

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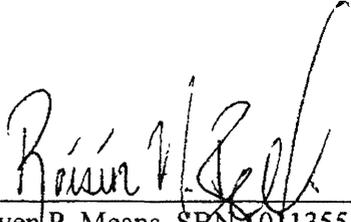


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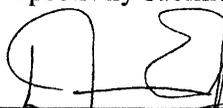


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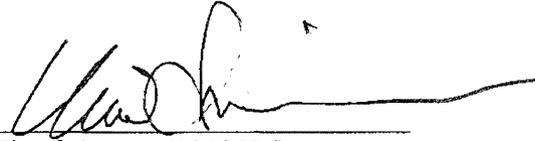
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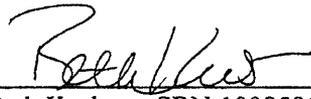
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EXHIBIT 1

JUN 24 2002

FILED
MISSOULA, MT

2002 JUN 21 PM 5:02

PATRICK E. DUFFY CLERK

BY CAYLE A. REUTERDAHL
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

THE STATE OF MONTANA, ex rel.)	CV 02-09-H-DWM
MIKE McGRATH, Attorney)	
General,)	
)	
Plaintiff,)	
)	
-vs-)	ORDER
)	
ABBOTT LABORATORIES, INC;)	
AMERICAN HOME PRODUCTS)	
CORPORATION; AMGEN INC.;)	
ASTRAZENECA; AVENTIS PHARMA;)	
CHIRON; BAXTER PHARMACEUTICAL)	
PRODUCTS, INC.; BRISTO-MYERS)	
SQUIBB COMPANY; DEY, INC.;)	
SMITHKLINE BEECHAM CORPORATION))	
d/b/a GLAXOSMITHKLINE)	
CORPORATION; PHARMACIA)	
CORPORATION; HOECHST MARION)	
RCUSSEL, INC.; IMMUNEX)	
CORPORATION; ELI LILLY AND)	
COMPANY; SCHERING-PLOUGH)	
CORP.; PHARMACIA & UPJOHN)	
COMPANY; SMITHKLINE BEECHAM)	
CORPORATION; WARRICK)	
PHARMACEUTICALS CORPORATION;)	
AND DOES 1-100; DOES 101-125;)	
DOES 126-150; DOES 151-200,)	
)	
Defendants.)	
)	

This action was originally filed in the Montana First
Judicial District in Lewis and Clark County, Montana. Defendants

removed it to federal court, from which it was conditionally transferred by the Judicial Panel on Multidistrict Litigation ("Panel") to the District of Massachusetts pursuant to the Panel's order governing transfer of all cases involving claims that pharmaceutical corporations inflated the average wholesale price of Medicare covered prescription drugs. In re Immunex Corporation Average Wholesale Price Litigation, ___ F. Supp. ___, 2002 W.L. 857692 (Jud. Pan. Mult. Lit. 2002).

Plaintiff has filed a motion to remand the action to state court. Defendants Smithkline Beecham Corporation d/b/a Glaxosmithkline, Pharmacia Corporation and Pharmacia & Upjohn Company ask the Court to stay consideration of the motion to remand pending a decision in the MDL proceedings. The other Defendants join in the motion.

A pending transfer order does not limit the Court's authority to rule on the motion to remand. McCrary v. Bayer Corporation, 2002 WL 1308588 (E.D.La. 2002). Whether to grant a stay is within the Court's discretion. Id. In deciding whether to rule, district courts should take into account whether the motion to remand involves issues unique to the action or whether it raises issues likely to arise in other actions in the transferee district should transfer be ordered.

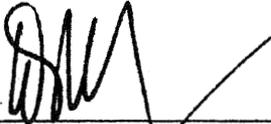
In addition to judicial efficiency, a key purpose of consolidating cases before the Panel is to promote consistent

rulings on pretrial matters. In this case, the benefit of judicial economy and consistency among pretrial rulings outweighs any prejudice plaintiff may suffer as a result of a stay. Therefore, a stay pending the Panel's final decision on transfer is the best course of action.

Accordingly, IT IS HEREBY ORDERED Defendants' Motions to Stay (dkt. #57, dkt #64) are GRANTED.

IT IS FURTHER ORDERED that consideration of Plaintiffs' Motion to Remand (dkt # 45) is STAYED pending the Panel's final ruling on transfer.

DATED this 21st day of June, 2002.



Donald W. Molloy, Chief Judge
United States District Court

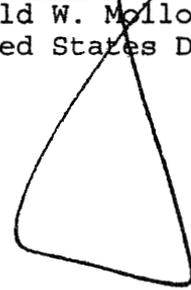


EXHIBIT 2

UNITED STATES OF AMERICA
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

FILE COPY



CHAIRMAN:
Judge Wm. Terrell Hodges
United States District Court
Middle District of Florida

MEMBERS:
Judge John F. Keenan
United States District Court
Southern District of New York

Judge Morey L. Sear
United States District Court
Eastern District of Louisiana

Judge Bruce M. Selya
United States Court of Appeals
First Circuit

Judge Julia Smith Gibbons
United States Court of Appeals
Sixth Circuit

Judge D. Lowell Jensen
United States District Court
Northern District of California

Judge J. Frederick Motz
United States District Court
District of Maryland

DIRECT REPLY TO:

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<http://www.jpml.uscourts.gov>

October 16, 2002

TO INVOLVED COUNSEL

Re: MDL-1456 -- In re Pharmaceutical Industry Average Wholesale Price Litigation

State of Montana, etc. v. Abbott Laboratories, et al., D. Montana, C.A. No. 6:02-9

State of Nevada v. Abbott Laboratories, Inc., et al., D. Nevada, C.A. No. 3:02-80

State of Nevada v. American Home Products Corp., et al., D. Nevada, C.A. No. 3:02-202

Dear Counsel:

For your information, I am enclosing a copy of an order filed today by the Judicial Panel on Multidistrict Litigation involving this matter.

Very truly,

Michael J. Beck
Clerk of the Panel

By 
Deputy Clerk

Enclosure

JPML Form 34B



JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

OCT 16 2002

FILED
CLERK'S OFFICE

DOCKET NO. 1456

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

**IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESAL PRICE
LITIGATION**

State of Montana, etc. v. Abbott Laboratories, et al., D. Montana, C.A. No. 6:02-9

State of Nevada v. Abbott Laboratories, et al., D. Nevada, C.A. No. 3:02-80

State of Nevada v. American Home Products, et al., D. Nevada, C.A. No. 3:02-202

**BEFORE WM. TERRELL HODGES, CHAIRMAN, JOHN F. KEENAN,
MOREY L. SEAR,* BRUCE M. SELYA,* JULIA SMITH GIBBONS, D.
LOWELL JENSEN AND J. FREDERICK MOTZ, JUDGES OF THE PANEL**

TRANSFER ORDER

Presently before the Panel are motions, pursuant to Rule 7.4, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001), by the State plaintiffs in these actions to vacate the Panel's orders conditionally transferring these actions to the District of Massachusetts for inclusion in the Section 1407 proceedings occurring there in this docket. Responding defendants favor inclusion of these actions in Section 1407 proceedings.

On the basis of the papers filed and hearing session held, the Panel finds that these three actions involve common questions of fact with the actions in this litigation previously transferred to the District of Massachusetts, and that 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. We note that the pending motions to remand the actions to state court can be presented to and decided by the transferee judge. *See, e.g., In re Ivy*, 901 F.2d 7 (2d Cir. 1990); *In re Prudential Insurance Company of America Sales Practices Litigation*, 170 F.Supp.2d 1346, 1347-48 (J.P.M.L. 2001). The Panel further finds that transfer is appropriate for reasons expressed by the Panel in its original order directing centralization in this docket. The Panel held that the District of Massachusetts was a proper Section 1407 forum for actions concerning whether (either singly or as part of a conspiracy) the pharmaceutical defendants engaged

* Judges Sear and Selya did not participate in the decision of this matter. In light of the fact that three other Panel members could be members of the putative classes in this litigation, i) these Panel members have renounced any claim as putative class members, and in any event ii) the Panel is invoking the Rule of Necessity to decide the matter now before it. *In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation*, 170 F.Supp.2d 1356, 1357-58 (J.P.M.L. 2001).



- 2 -

in fraudulent marketing, sales and/or billing schemes by unlawfully inflating the average wholesale price of certain prescription drugs in order to increase the sales of these drugs to health care professionals and thereby boost the pharmaceutical companies' profits. See *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 201 F.Supp.2d 1378 (J.P.M.L. 2002).

Plaintiffs' objection to Section 1407 transfer is based primarily on the ground that these actions do not share sufficient questions of fact with previously centralized actions to warrant inclusion in Section 1407 proceedings. We disagree. We point out that transfer under Section 1407 has the salutary effect of placing all actions in this docket before a single judge who can formulate a pretrial program that: 1) allows discovery with respect to any non-common issues to proceed concurrently with discovery on common issues, *In re Joseph F. Smith Patent Litigation*, 407 F.Supp. 1403, 1404 (J.P.M.L. 1976); and 2) 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. See *In re StarLink Corn Products Liability Litigation*, 157 F.Supp.2d 1378 (J.P.M.L. 2001).

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, these actions are transferred to the District of Massachusetts and, with the consent of that court, assigned to the Honorable Patti B. Saris for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

FOR THE PANEL:

Wm. Terrell Hodges
Chairman

EXHIBIT 3

ORIGINAL

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BEFORE THE HONORABLE EDWARD C. REED, JR., DISTRICT JUDGE

---000---

STATE OF NEVADA,

PLAINTIFF,

-VS-

AMERICAN HOME PRODUCTS, INC.,
ET AL.,

DEFENDANTS.

NO. CV-N-02-202-ECR(RAM)

JULY 26, 2002

RENO, NEVADA

STATE OF NEVADA,

PLAINTIFF,

-VS-

ABBOTT LABORATORIES, INC.,
ET AL.,

DEFENDANTS.

NO. CV-N-02-80-ECR(RAM)

DECISION OF THE COURT

APPEARANCES:

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		ERIC GAILL, ESQUIRE
7	BAXTER	MATTHEW ROSSI, ESQUIRE
8	CHIRON CORPORATION	RONALD L. CASTLE, ESQUIRE
9	SCHERING-PLOUGH	DAVID POTTER, ESQUIRE
10	BRISTOL-MYERS SQUIB	LYNDON TRETTER, ESQUIRE
11		LEE GODDARD, ESQUIRE
12	ELI LILLY COMPANY	WILLIAM DAVIS, ESQUIRE
13	BAYER CORPORATION	KIMBERLY DUNN, ESQUIRE
14	ABBOTT LABORATORIES	CHRISTOHER COOK, ESQUIRE
		BOB JENKINS, ESQUIRE
15	TAP PHARMACEUTICALS	LEE ANN RUSSO, ESQUIRE
16	DEY, INC.	LISA LEWIS, ESQUIRE
17	AMERICAN HOME PRODUCTS	CRAIG HOLDEN, ESQUIRE
18		DAVID FRANCIS, ESQUIRE
19	AMGEN	JOSEPH YOUNG, ESQUIRE
20		
21		
22	REPORTED BY:	CATHY M. WORKEN, CCR, RPR
23		OFFICIAL COURT REPORTER
		400 SOUTH VIRGINIA STREET
24		RENO, NEVADA 89501
		(775) 324-6777
25		COMPUTER-ASSISTED TRANSCRIPTION

1 RENO, NEVADA, FRIDAY, JULY 26, 2002, 1:30 P.M.

2 ---000---

3 THE COURT: MS. CLERK, DO YOU HAVE SOME OF
4 THE ATTORNEYS ON THE TELEPHONE?

5 THE CLERK: YES, YOUR HONOR.

6 THERE ARE SEVERAL ATTORNEYS ON THE TELEPHONE, I
7 WOULD ASK COUNSEL ON THE TELEPHONE PLEASE STATE YOUR
8 APPEARANCES.

9 MR. MATT: SEAN MATT, LAW FIRM OF HAGENS
10 BERMAN, SEATTLE, SPECIAL COUNSEL TO THE STATE OF NEVADA.
11 GOOD AFTERNOON, YOUR HONOR.

12 MR. HUBBELL: THIS IS ROBERT HUBBELL, HELLER,
13 EHRMAN, WHITE & MCAULIFFE, FOR GLAXCOSMITHKLINE.

14 MS. HARRIS: THIS IS KIM HARRIS FROM DAVIS,
15 POLK & WARDELL FOR ASTRAZENECA PHARMACEUTICALS.

16 MR. ROSSI: THIS IT MATT ROSSI FROM AKIN,
17 GUMP, STRAUSS, HAUER & FELD, FOR DEFENDANT BAXTER.

18 MR. CASTLE: RONALD L. CASTLE, ARENT, FOX,
19 KINTNER, PLOTKIN & KAHN, FOR CHIRON CORPORATION.

20 MR. POTTER: THIS IS DAVID POTTER, ROPES AND
21 GRAVES FOR SCHERING-PLOUGH.

22 MR. TRETTER: LYNDON TRETTER OF HOGAN &
23 HARTSON FOR BRISTOL-MYERS SQUIBB.

24 MR. DAVIS: WILLIAM DAVIS FOR ELI LILLY &
25 COMPANY.

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MS. DUNN: KIMBERLY DUNN OF REALTA (PHON),
BROWN & WOOD FOR BAYER CORPORATION.

MS. GODDARD: LEE GODDARD FROM McDONALD
CARANO ALSO FOR BRISTOL-MYERS SQUIBB.

MR. COOK: CHRISTOPHER COOK FROM JONES DAY
FOR ABBOTT LABORATORIES.

MS. RUSSO: LEE ANN RUSSO FROM JONES DAY FOR
TAP PHARMACEUTICALS PRODUCTS, INC.

MS. LEWIS: LISA LEWIS FROM COUDERT BROTHERS
FOR DEY, INC.

MR. HOLDEN: CRAIG HOLDEN FROM OBERT TAYLOR,
FOR AMERICAN HOME PRODUCTS.

MR. FRANCIS: DAVID FRANCIS, LAS VEGAS
COUNSEL FOR AMERICAN HOME PRODUCTS.

MR. GAILL: ERIC GAILL FROM DAVIS POLK ALSO
FOR ASTRAZENECA.

MR. YOUNG: JOSEPH YOUNG, HOGAN & HARTSON FOR
AMGEN.

MR. LARRABEE: GOOD AFTERNOON, YOUR HONOR,
MATTHEW LARRABEE FROM HELLER EHRMAN FOR GLAXOSMITHKLINE.

MR. JENKINS: BOB JENKINS FROM BURTON,
BARTLETT & GLOGOVAC FOR ABBOTT LABORATORIES AND TAFT
HOLDINGS, INC.

THE COURT: IS THAT THE FULL ROLL CALL,
MS. CLERK?

1 THE CLERK: THAT SOUNDS LIKE THAT'S IT, YOUR
2 HONOR.

3 THE COURT: I'M ASSUMING THAT ALL OF YOU CAN
4 HEAR ME.

5 THE COURT AT THIS TIME IS PREPARED TO ANNOUNCE ITS
6 DECISION.

7 I DIDN'T TAKE THE ROLL OF THE MANY ATTORNEYS WHO
8 ARE IN THE COURTROOM, I INDICATED PREVIOUSLY IT DIDN'T MAKE
9 ANY DIFFERENCE WHETHER YOU WERE HERE OR NOT OR WERE HERE BY
10 TELEPHONE, THAT'S NOT GOING TO AFFECT THE DECISION IN ANY
11 WAY, AND THERE ARE ATTORNEYS ON BOTH SIDES HERE PRESENT IN
12 THE COURTROOM.

13 WE ARE AT THIS TIME PREPARED TO ANNOUNCE OUR
14 DECISION ON THE PENDING MOTIONS NOW BEFORE THE COURT.

15 THESE CASES INVOLVE THE STATE OF NEVADA VERSUS
16 ABBOTT LABORATORIES AND NUMEROUS OTHER DEFENDANTS, THAT'S
17 CASE NUMBER CV-N-02-0080.

18 I WILL BE REFERRING TO THAT CASE AS THE ABBOTT
19 CASE.

20 THE SECOND CASE INVOLVES STATE OF NEVADA VERSUS
21 AMERICAN HOME PRODUCTS AND NUMEROUS OTHER DEFENDANTS, AND
22 THAT CASE IS NUMBER 02 -- THAT'S CV-N-02--202.

23 I'LL BE REFERRING TO THAT CASE AS THE AMERICAN HOME
24 CASE.

25 ARGUMENTS WERE PRESENTED TO THE COURT ON JULY 23 IN

1 RESPECT TO THESE MOTIONS.

2 THE MOTIONS ARE IN THE ABBOTT CASE DOCKET NUMBER 88
3 TO RECONSIDER OUR PREVIOUSLY ENTERED STAY ORDER, DOCKET
4 NUMBER 79.

5 WE ALSO HEARD ARGUMENTS IN THE ABBOTT CASE ON THE
6 MOTION TO REMAND, WHICH IS DOCKET NUMBER 19.

7 IN THE AMERICAN HOME CASE WE HEARD ARGUMENTS ON
8 MOTION TO STAY, DOCKET NUMBER 25, AND A MOTION TO REMAND,
9 DOCKET NUMBER 30. ALL.

10 MOTIONS IN BOTH CASES WERE FULLY BRIEFED AND THE
11 COURT CONSIDERED ALL THE PAPERS ON FILE, AS WELL AS THE ORAL
12 ARGUMENTS.

13 THE ORAL ARGUMENTS, AS I COMMENTED AT THE END OF
14 THE ARGUMENTS WERE OUTSTANDING. IT ISN'T EVERYDAY IN THIS
15 COURT THAT WE HEAR WELL PREPARED, WELL PRESENTED ARGUMENT
16 SUCH AS WE HEARD ON JULY 23RD. IT'S A TREAT FOR THE COURT TO
17 HAVE THE FINE LAWYERS WHO ARE IN THIS CASE ON BOTH SIDES.

18 THE ARGUMENTS WERE VERY USEFUL, THEY HELPED US TO
19 UNDERSTAND SOME THINGS THAT WE'RE NOT QUITE SO FAMILIAR WITH,
20 PARTICULARLY WHERE AN MDL STAY MAY BE APPROPRIATE, AND THE
21 MEDICARE AND MEDICAID PROGRAMS.

22 WE FREQUENTLY BUMP INTO MDL, BUT I THINK THIS CASE
23 HAS TAUGHT US QUITE A BIT ABOUT MDL THAT WE DID NOT
24 UNDERSTAND BEFORE.

25 THESE CASES PRESENT A DIFFICULT DILEMMA WHICH

1 REQUIRES US TO BALANCE TWO COMPETING ASPECTS OF THE FEDERAL
2 COURT SYSTEM.

3 ON THE ONE HAND WE ARE CALLED TO EXAMINE OUR
4 JURISDICTION OVER THIS CASE. THIS IS AN INQUIRY THAT HAS
5 BEEN REFERRED TO AS A FIRST AND FUNDAMENTAL QUESTION FOR A
6 COURT, CITING STEEL COMPANY VERSUS CITIZENS FOR A BETTER
7 ENVIRONMENT, 523 U.S. 83, AT 94, AND AT 101-2,, 1998.

8 THE STATE HAS MADE A STRONG AND PERSUASIVE
9 ARGUMENT, PUTTING FORTH THIS AS A FIRST CONSIDERATION FOR US.

10 ON THE OTHER HAND, WE ARE FACED WITH THE FACT THAT
11 THIS CASE EXISTS WITHIN THE REALM OF MULTIDISTRICT
12 LITIGATION, WHICH I WILL REFER TO GENERALLY AS MDL.

13 MDL PLACES GREAT EMPHASIS ON CONSISTENCY OF
14 DECISIONS, CONSERVATION OF JUDICIAL RESOURCES, AND EFFICIENCY
15 OF THE COURT PROCESS.

16 THE COURT VIEWS THIS SITUATION SOMEWHAT LIKE THE
17 PROVERBIAL CHICKEN AND EGG QUESTION.

18 IF PENDING BEFORE US WERE ONLY A SIMPLE NON-COMPLEX
19 MOTION INVOLVING JURISDICTION, WE WOULD HAVE LITTLE TROUBLE
20 DETERMINING HOW TO PROCEED.

21 IF THERE WERE NO COMPLEX OR DIFFICULT
22 JURISDICTIONAL PROBLEM OUR DECISION ON A STAY WOULD BE MUCH
23 EASIER.

24 IT IS THE INTERSECTION OF THESE TWO IMPORTANT
25 CONSIDERATIONS THAT CAUSES THE DIFFICULTY IN ANALYSIS OF THIS

1 CASE.

2 THE PRINCIPAL PURPOSE OF MDL IS TO ENSURE THAT
3 MULTIPLE CASES AROUND THE COUNTRY OF NATIONAL IMPORTANCE
4 WHICH RAISE SIMILAR ISSUES MAY BE DECIDED IN A CONSISTENT AND
5 EFFICIENT MANNER.

6 IN DETERMINING WHETHER TO STAY THESE CASES PENDING
7 THE MDL DECISION ON TRANSFER, WE CONSIDER THE FOLLOWING
8 FACTORS WHICH APPEAR TO BE SPECIFIC TO MDL CONSIDERATION:

9 ONE, CONSISTENCY OF JUDICIAL OUTCOME.

10 TWO, EFFICIENT RESOLUTION OF THE ISSUES.

11 THREE, JUDICIAL ECONOMY.

12 FOUR, CONVENIENCE OF THE PARTIES AND WITNESSES.

13 FIVE, THE COMPLEXITY OF THE JURISDICTIONAL ISSUES.

14 AND SIX, THE SUFFICIENT LIKELIHOOD THAT THE ISSUES
15 WILL ARISE IN MDL.

16 SEE FOR EXAMPLE, KOHL, K-O-H-L, VERSUS AMERICAN
17 HOME PRODUCTS CORP. 78 FED. SUPP. 2d 885, WESTERN DISTRICT OF
18 ARKANSAS, 1999.

19 STATING THAT THE COURT CONSIDERS "WHETHER THE
20 ISSUES ARE EASILY CAPABLE OF ARISING IN MULTIPLE CASES,
21 WHETHER THE ISSUES INVOLVE QUESTIONS OF LAW IN FACT WHICH
22 RELATE TO THE CASES ALREADY TRANSFERRED TO MDL, AND WHETHER
23 IT WOULD SERVE JUDICIAL ECONOMY TO HAVE THE QUESTIONS
24 RESOLVED BY A SINGLE COURT:

25 THESE FACTORS WE HAVE LISTED ARE DRAWN FROM

1 NUMEROUS CASES HOWEVER, THOSE ARE CASES WHICH HAVE CONSIDERED
2 STAYS PENDING POSSIBLE TRANSFER TO A MULTIDISTRICT COURT.

3 IN OUR ANALYSIS WE ALSO CONSIDER THE FOLLOWING
4 FACTORS APPLICABLE IN GENERAL TO CONSIDERATION OF STAY
5 MOTIONS:

6 ONE, THE POTENTIAL PREJUDICE TO THE NON-MOVING
7 PARTY.

8 TWO, THE HARDSHIP AND INEQUITY TO THE MOVING PARTY
9 IF THE ACTION IS NOT STAYED.

10 AND THREE, THE JUDICIAL RESOURCES THAT WOULD BE
11 SAVED BY AVOIDING DUPLICATIVE LITIGATION.

12 A DISTRICT COURT HAS THE INHERENT POWER TO STAY ITS
13 PROCEEDINGS, RIVERS VERSUS WALT DISNEY COMPANY, 980 FED.
14 SUPP. 1358, AT 1360. CENTRAL DISTRICT, 1997.

15 THIS POWER IS INCIDENTAL TO THE POWER INHERENT IN
16 EVERY COURT TO CONTROL THE DISPOSITION OF THE CAUSES ON ITS
17 DOCKET, CITING LANDIS VERSUS NORTH AMERICAN COMPANY, 299 U.S.
18 248 AT 254, 1936.

19 THE POWER TO STAY IS NOT ELIMINATED BY A PENDING
20 MOTION TO TRANSFER BEFORE A MULTIDISTRICT LITIGATION PANEL.

21 THE RULES OF PROCEDURE OF THE JUDICIAL PANEL ON
22 MULTIDISTRICT LITIGATION, RULE 1.5, CITING SMITH VERSUS MAIL
23 BOXES ETC. U.S.A., INCORPORATED, 191 FED. SUPP. 2d 1155, AT
24 1157, EASTERN DISTRICT OF CALIFORNIA, 2002, RIVERS, 980 FED.
25 SUPP. AT 1360.

1 WE HAVE EXAMINED MANY CASES WHICH SEEM TO INDICATE
2 THAT JURISDICTIONAL ISSUES SHOULD BE RESOLVED FIRST.

3 SEE FOR EXAMPLE, SHERWOOD VERSUS MICROSOFT, 91 FED.
4 SUPP. 2d 1196, MIDDLE DISTRICT OF TENNESSEE, 2000.

5 TORTOLA RESTAURANTS, L.P. VERSUS KIMBERLY-CLARK
6 CORPORATION, 987 FED. SUPP. 1186, NORTHERN DISTRICT OF
7 CALIFORNIA, 1997.

8 AETNA VERSUS HOECHST, THAT'S H-O-E-C-H-S-T, I'M NOT
9 GOING TO TRY TO PRONOUNCE THE SECOND NAME, I'LL SPELL IT,
10 A-K-T-I-E-N-G-E-S-E-L-L-S-C-H-A-F-T, 54 FED. SUPP. 2d 1042,
11 DISTRICT OF KANSAS, 1999.

12 FARKAS VERSUS BRIDGESTONE/FIRESTONE, INCORPORATED,
13 113 FED. SUPP. 2d 1107, WESTERN DISTRICT OF KENTUCKY, 2000.

14 SMITH VERSUS MAIL BOXES, ETC., 1991, FED. SUPP. 2d
15 1155, 1157, EASTERN DISTRICT OF CALIFORNIA, 2002.

16 THAT LATTER CASE COLLECTS CASES WHERE
17 JURISDICTIONAL ISSUES WERE ADDRESSED BEFORE ANY MOTIONS TO
18 STAY.

19 WE HAVE ALSO EXAMINED MANY CASES THAT INDICATE THAT
20 JURISDICTION SHOULD BE DETERMINED IN THESE CIRCUMSTANCES IN
21 THE MULTIDISTRICT COURT. SEE FOR EXAMPLE, WEINKE VERSUS
22 MICROSOFT, 84 FED. SUPP. 2d 989, EASTERN DISTRICT OF
23 WISCONSIN, 2000, STATING THAT BECAUSE MULTIPLE ACTIONS WERE
24 COMMENCED AND PENDING TRANSFER TO MDL WITH THE SAME ISSUES AS
25 THE PRESENT CASE THE COURT WOULD STAY PENDING TRANSFER IN THE

1 INTEREST OF JUDICIAL ECONOMY AND TO AVOID INCONSISTENT
2 RESULTS.

3 IVY V. DIAMOND SHAMROCK CHEMICALS COMPANY, 901 F.2d
4 7, SECOND CIRCUIT, 1990.

5 MEDICAL SOCIETY OF STATE OF NEW YORK VERSUS
6 CONNECTICUT GENERAL CORPORATION, 187 FED. SUPP. 2d 89,
7 SOUTHERN DISTRICT OF NEW YORK, 2001.

8 RIVERS VERSUS WALT DISNEY COMPANY, 980 FED. SUPP.
9 1358, CENTRAL DISTRICT OF CALIFORNIA, 1997.

10 GOOD VERSUS PRUDENTIAL INSURANCE COMPANY OF
11 AMERICA, 5 FED. SUPP. 2d 804, NORTHERN DISTRICT OF
12 CALIFORNIA, 1998.

13 PORTNOY VERSUS ZENITH LAB, 1987, WL 10236, DISTRICT
14 OF COLUMBIA, WHICH STAYED CASES FOR PURPOSES OF COORDINATION
15 OF RELATED CASES AND BECAUSE OF MINIMAL DELAY.

16 HAVING SAID THAT, WE NEXT CONSIDER WHETHER THE
17 ISSUES PRESENTED HERE WOULD LIKELY ARISE IN MDL.

18 IF THE ISSUES HERE ARE UNIQUE ONLY TO THIS CASE,
19 THIS FACTOR WOULD WEIGH STRONGLY IN FAVOR OF DENYING A STAY
20 AND PROCEEDING TO DECIDE THE JURISDICTIONAL QUESTION.

21 THERE DOES NOT SEEM TO BE ANY REAL DEBATE THAT THE
22 UNDERLYING FACTUAL ALLEGATIONS CONCERNING THE ALLEGED
23 MANIPULATIONS OF THE AVERAGE WHOLESAL PRICE AND MEDICAID
24 BEST PRICES ARE LIKELY TO, AND IN FACT HAVE ARISEN IN THE
25 CASES CURRENTLY CONSOLIDATED BEFORE JUDGE SARIS WHO PRESIDES

1 OVER THE POTENTIAL MDL TRANSFEREE COURT.

2 THE DEBATE SEEMS TO BE OVER WHETHER THE SPECIFIC
3 JURISDICTIONAL QUESTIONS HERE WILL BE PRESENTED TO JUDGE
4 SARIS.

5 WITH RESPECT TO AMERICAN HOME WE CONCLUDE THAT THE
6 QUESTION OF WHETHER THE CLAIMS MADE HERE ARISE UNDER FEDERAL
7 LAW IS LIKELY TO BE BEFORE JUDGE SARIS IN CONNECTION WITH
8 CASES PENDING BEFORE THE MDL COURT.

9 JUDGE MALLOY IN MONTANA RECENTLY STAYED A VERY
10 SIMILAR CASE IN MONTANA PENDING POSSIBLE TRANSFER TO MDL.

11 THE ORAL ARGUMENTS BROUGHT OUT THE FACT THAT A
12 SIMILAR CASE TO THE MONTANA AND NEVADA CASES HAS BEEN FILED
13 IN MINNESOTA.

14 THE MORE DIFFICULT ISSUE IS WHETHER THE QUESTION OF
15 SEPARATE AND INDEPENDENT CLAIMS WILL ARISE BEFORE JUDGE
16 SARIS.

17 THERE MAY WELL BE A QUESTION AS TO THIS PARTICULAR
18 ISSUE.

19 AS POINTED OUT DURING THE HEARINGS, THE COMBINATION
20 OF ONE FEDERAL CLAIM PLUS MULTIPLE NONREMOVABLE CLAIMS, PLUS
21 FAILURE OF ALL PARTIES TO JOIN IN THE REMOVAL IS NOT A COMMON
22 SITUATION TO BE FOUND IN THIS COURT.

23 SECTION 1441(c) WAS INVOKED IN THE AMERICAN HOME
24 CASE AS A REASON FOR REMOVAL.

25 WE CANNOT TELL IF THIS SPECIFIC ISSUE HAS ARISEN OR.

1 WILL ARISE IN CONNECTION WITH OTHER MDL CASES, BUT THE
2 PRESENTATION OF THAT ISSUE BY ITSELF IS NOT IN OUR VIEW
3 DETERMINATIVE OF HOW WE SHOULD DECIDE THE STAY ISSUE.

4 IT APPEARS TO THIS COURT THAT THIS CASE MOST
5 CLOSELY RESEMBLES MEDICAL SOCIETY AND IVY IN THAT BOTH ABBOTT
6 AND AMERICA HOME PRESENT COMPLICATED ISSUES LIKELY TO ARISE
7 BEFORE JUDGE SARIS.

8 THIS CASE IS ALSO LIKE MYERS VERSUS BAYER, 143 FED.
9 SUPP. 2d 1044, AT 1049, WESTERN DISTRICT OF WISCONSIN, 2001,
10 WHERE THE DISTRICT COURT'S CONCLUSION WAS THAT BECAUSE THE
11 JURISDICTIONAL ISSUE APPEARS FACTUALLY OR LEGALLY DIFFICULT
12 AND BOTH DIFFICULT AND SIMILAR OR IDENTICAL TO THOSE CASES
13 TRANSFERRED OR LIKELY TO BE TRANSFERRED THAT IT WOULD GRANT A
14 STAY AND ALLOW THE MULTIDISTRICT COURT TO DETERMINE THE
15 JURISDICTIONAL QUESTION.

16 OUR CASE PRESENTS A VIRTUALLY IDENTICAL SITUATION
17 TO MYERS IN OUR VIEW.

18 IN ABBOTT WHETHER THE CLAIMS AGAINST GSK ARE
19 SEPARATE AND INDEPENDENT UNDER 1441(c) IS INDEED A DIFFICULT
20 ISSUE.

21 LIKewise IN AMERICAN HOME WHETHER THE MEDICAID
22 FRAUD CLAIM ARISES UNDER FEDERAL LAW IS ALSO A DIFFICULT
23 ISSUE.

24 BECAUSE THE JURISDICTIONAL ISSUES ARE BOTH
25 COMPLICATED AND LIKELY TO ARISE IN OTHER CASES BEFORE THE MDL

1 PANEL, WE BELIEVE A STAY IS THE MOST APPROPRIATE COURSE OF
2 ACTION FOR THESE CASES.

3 IT DOES APPEAR THAT THE CORE OF THE ISSUES BEFORE
4 THIS COURT HAVE ARISEN OR ARE LIKELY TO ARISE IN CASES
5 TRANSFERRED TO THE MDL COURT.

6 THE CLAIMED MANIPULATION OF THE AVERAGE WHOLESale
7 PRICE AND THE MEDICAID BEST PRICES ARE FACTUALLY AT THE HEART
8 OF THESE CASES. THE OVERLAP IS SUBSTANTIAL.

9 THIS IS NOT TO SAY THAT THERE MAY NOT BE DISCRETE
10 ISSUES UNIQUE TO THESE CASES WHICH MAY BE UNLIKE OTHER ISSUES
11 BEFORE THE MDL COURT.

12 THESE FACTORS OF CONSISTENCY AND EFFICIENCY WEIGH
13 IN FAVOR OF GRANTING A STAY.

14 IF ANY SUBSTANTIAL NUMBER OF THE ISSUES PRESENTED
15 HERE ARE LIKELY TO ARISE BEFORE JUDGE SARIS, THEN ALLOWING
16 HER TO DETERMINE THEM IN ALL OF THE CASES WILL CERTAINLY
17 PROMOTE CONSIDERATION OF CONSISTENCY. IT WILL ALSO BE MORE
18 EFFICIENT TO HAVE ONE JUDGE CONSIDER ALL OF THE ISSUES.

19 ON THE QUESTION OF JUDICIAL ECONOMY, THIS FACTOR
20 APPEARS TO WEIGH IN FAVOR OF A STAY.

21 IF MDL TRANSFERS THE CASES THEN JUDGE SARIS WILL BE
22 THE ONE TO EXPEND THE TIME AND RESOURCES TO DETERMINE THE
23 JURISDICTIONAL QUESTION.

24 JUDGE SARIS WILL BE CONSIDERING THESE
25 JURISDICTIONAL ISSUES IN OTHER CASES.

1 IT WOULD DEFEAT THE PURPOSE OF MULTIDISTRICT
2 CONSOLIDATION WERE WE TO TAKE THE TIME SEPARATELY TO CONSIDER
3 THESE QUESTIONS.

4 WE DO RECOGNIZE THE PERSUASIVE ARGUMENT OF THE
5 STATE, ADOPTED BY SOME COURTS, THAT A DETERMINATION OF THE
6 JURISDICTION FIRST ACTUALLY PROMOTE JUDICIAL ECONOMY BECAUSE
7 IT ALLOWS THE CASE TO PROCEED IN THE PROPER FORM.

8 HOWEVER, WE CONCLUDE IN THESE CASES, WHERE THE
9 JURISDICTIONAL ISSUES ARE DIFFICULT AND LIKELY TO ARISE IN
10 THE MDL CASES, A STAY IS PROPER.

11 THE COURT IN MEDICAL SOCIETY SAID, AND I PARAPHRASE
12 THIS A LITTLE BIT, IF THE UNDERLYING JURISDICTIONAL ISSUE
13 INVOLVES A QUESTION OF LAW OR FACT NOT BOUND UP WITH THOSE
14 INVOLVED IN THE MULTIDISTRICT LITIGATION, OR IF IT WERE
15 FAIRLY OBVIOUS, SUCH AS WHETHER THE PARTIES WERE COMPLETELY
16 DIVERSE, THE PREFERENCE WOULD BE TO RULE ON JURISDICTION IN
17 THE FIRST INSTANCE AND NOT TO WAIT FOR THE MDL PANEL'S
18 TRANSFER DECISION.

19 IN THE VIEW OF THE COURT IF THE JURISDICTIONAL
20 ISSUES WERE SLAM DUNK WE WOULD LIKELY NOT DECIDE THE MOTIONS
21 AS WE ARE DOING.

22 IT IS TO A CONSIDERABLE EXTENT THE COMPLEXITY AND
23 DIFFICULTY OF THESE ISSUES AND THE LIKELIHOOD THAT THE SAME
24 OR SIMILAR ISSUES WILL COME BEFORE THE MDL COURT WHICH MAKES
25 OUR DECISION COME OUT AS IT DOES.

1 I MIGHT NOTE THERE THAT OF COURSE THE TRANSFER IS
2 UP TO THE MDL PANEL, AND I'M NOT TRYING TO DECIDE THAT IN ANY
3 WAY, BUT I THINK WHETHER WE STAY OR NOT DEPENDS ON WHAT MAY
4 LIKELY HAPPEN BEFORE THE MDL PANEL, OR WHAT COULD HAPPEN
5 THERE.

6 THEY MAY DECIDE TO SEND THESE CASES BACK TO US AND
7 NOT TRANSFER THEM, AND WE'RE PREPARED TO PROCEED SHOULD THAT
8 OCCUR. THAT'S THEIR DECISION TO MAKE.

9 AND OUR STAY WILL SIMPLY WAIT TO SEE WHAT THEIR
10 DECISION IS.

11 THE ISSUE OF CONVENIENCE OF THE PARTIES AND
12 WITNESSES IS NEXT.

13 THIS FACTOR MIGHT WEIGH TO SOME EXTENT AGAINST A
14 STAY. IT LIKELY WILL BE AN ISSUE THAT THE MDL PANEL WILL
15 CONSIDER IN DETERMINING WHETHER TO TRANSFER THE CASES.

16 CLEARLY IT WOULD BE MORE CONVENIENT FOR THE STATE
17 AND ITS WITNESSES IN NEVADA TO HAVE THE CASES DECIDED IN THIS
18 COURT.

19 THIS CANNOT, HOWEVER, BE SAID NECESSARILY FOR THE
20 DEFENDANTS OR DEFENSE WITNESSES.

21 AT THIS POINT WE CAN'T REALLY TELL WHERE
22 CONVENIENCE LIES.

23 IF THE CASE IS TRANSFERRED TO THE MDL COURT THE
24 STATE WILL HAVE TO PROCEED IN MASSACHUSETTS, YET, AS I WILL
25 COMMENT A LITTLE BIT FURTHER LATER, WITH RAPID AND READY

1 TRAVEL AND COMMUNICATION IN THIS DAY AND AGE THIS DOES NOT
2 SEEM TO BE A TRULY UNREASONABLE BURDEN.

3 BASED ON CONSIDERATION OF THESE FACTORS, AND WE
4 HAVE CONCLUDED THAT A STAY IS THE CORRECT COURSE OF ACTION, A
5 STAY WILL PROMOTE CONSISTENCY, EFFICIENCY AND JUDICIAL
6 ECONOMY PENDING WHATEVER IS DECIDED BY THE MDL PANEL.

7 IT DOES NOT APPEAR TO THE COURT THAT THE STATE WILL
8 SUFFER ANY REAL PREJUDICE IF JUDGE SARIS RATHER THAN A
9 FEDERAL JUDGE IN NEVADA DECIDES THESE ISSUES OF JURISDICTION.

10 WE DON'T ANTICIPATE THE STATE WOULD BE AFFORDED ANY
11 HOMETOWN ADVANTAGE HERE, AND WE DON'T ANTICIPATE IT WILL BE A
12 DISADVANTAGE TO BE BEFORE JUDGE SARIS, EVEN THOUGH SHE'S NOT
13 A JUDGE SITTING WITHIN THE STATE OF NEVADA AND WILL BE
14 ADDRESSING NEVADA LAW.

15 AND AS I MENTIONED PREVIOUSLY, WE DON'T FIND IT
16 PARTICULARLY PERSUASIVE THAT THE STATE OF NEVADA WILL BE
17 PREJUDICED BY HAVING TO TRAVEL TO BOSTON TO LITIGATE THE CASE
18 SHOULD THAT TRANSFER OCCUR.

19 THE SPECIAL COUNSEL FOR THE STATE OF NEVADA
20 APPARENTLY MAINTAINS OFFICES IN BOSTON AND WILL BE IN BOSTON
21 ALREADY FOR THE OTHER CASES.

22 WE ALSO DO NOT BELIEVE THAT ANY DELAY IN THESE
23 CASES OCCASIONED BY OUR STAY OR BY TRANSFER BY THE MDL WILL
24 UNDULY PREJUDICE THE STATE.

25 THE MDL PANEL WILL HEAR THE CASES ACCORDING TO THE

1 INFORMATION PROVIDED AT THE HEARINGS LIKELY IN SEPTEMBER, AND
2 WILL DETERMINE WHETHER TO ENTER A TRANSFER ORDER.

3 THE ISSUES HAVE BEEN FULLY BRIEFED AND IF THE CASES
4 ARE TRANSFERRED TO THE MDL COURT IT SHOULDN'T TAKE THE
5 TRANSFEREE COURT TOO MUCH LONGER THAN IT WOULD TAKE THIS
6 COURT TO DECIDE THESE ISSUES.

7 THEREFORE, MS. CLERK, YOU WILL ENTER THE FOLLOWING
8 ORDERS:

9 THE MINUTES HERE SHOULD BE FILED IN BOTH CASES AND
10 SHOULD BEAR BOTH HEADINGS.

11 IN THE ABBOTT CASE, WHICH IS STATE OF NEVADA VERSUS
12 ABBOTT LABORATORIES, ET AL., CV-N-02-0080, IT IS ORDERED THAT
13 THE MOTION FOR RECONSIDERATION, NUMBER 88, IS DENIED.

14 THE CASE CONTINUES TO BE STAYED PENDING A DECISION
15 ON TRANSFER BY THE MDL PANEL.

16 IN THE AMERICAN HOME CASE, WHICH IS STATE OF NEVADA
17 VERSUS AMERICAN HOME PRODUCTS, ET AL., CV-N-02-0202, REFERRED
18 TO AS THE AMERICAN HOME CASE, IT IS HEREBY ORDERED THAT THE
19 MOTION FOR STAY, NUMBER 25, IS GRANTED.

20 THIS CASE IS STAYED PENDING A DECISION ON TRANSFER
21 BY THE MDL PANEL.

22 AGAIN, I THANK COUNSEL FOR YOUR HELP AND WE WILL
23 STAND ADJOURNED.

24 (COURT ADJOURNED, 2:00 P.M.)
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I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND
CORRECT COPY OF THE PROCEEDINGS HELD IN THE
ABOVE-ENTITLED ACTION.)

7-27-02
DATE

Cathy M. Worken
CATHY M. WORKEN, CCR, RPR
OFFICIAL COURT REPORTER
400 SOUTH VIRGINIA STREET
RENO, NEVADA 89501
(775) 324-6777

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NEVADA V. AMERY HOME PRODUCTS
HEARING, JULY 26, 2004

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CATHY M. WORKEN, OFFICIAL COURT REPORTER

709 Unique Words

(775) 324-6777

From READY to STRAUSS

NEVADA V. AMERI I HOME PRODUCTS
HEARING, JULY 26, 2002

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CATHY M. WORKEN, OFFICIAL COURT REPORTER

709 Unique Words

{775} 324-8777

From STREET to ZENITH

EXHIBIT 4

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN RICE, on behalf of himself, all others
similarly situated, and the general public,

Plaintiff,

v.

ABBOTT LABORATORIES, INC., et al.

Defendants.

No. C 02-3925 MJJ

ORDER GRANTING DEFENDANT
SMITHKLINE BEECHAM
CORPORATION'S MOTION TO STAY

INTRODUCTION

Before this Court is SmithKline Beecham Corporation's (doing business as GlaxoSmithKline) ("Defendant"),¹ Motion to Stay All Proceedings ("Motion"), including consideration of John Rice's ("Plaintiff") motion for remand, pending a ruling by the Judicial Panel on Multidistrict Litigation ("JMPL") on Defendant's motion to transfer and consolidate.

FACTUAL BACKGROUND

On July 12, 2002, Plaintiff filed a representative and class action complaint based on violations of California Business and Professions Code section 7200 in Superior Court of the State of

¹ Several other Defendants join this motion.

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1 California, Alameda County.² Plaintiff alleges that the pharmaceutical companies named in the complaint,
2 including Defendant, fraudulently manipulated the Average Wholesale Price ("AWP")—the standard which
3 governs how much physicians and hospitals are reimbursed for selling these companys' products (including
4 those covered by Medicare and Medicaid)—in order to unjustly enrich themselves at the expense of
5 consumers and the government. See Complaint ¶¶ 2, 73-76.

6 On August 14, 2002, Defendant removed the action to federal court in this district based on federal
7 question jurisdiction, pursuant to 28 U.S.C. § 1441 (a)-(b). The next day, Defendant filed a notice of
8 related action with the JPML requesting that the action be transferred to Judge Patti B. Saris in the United
9 States District Court for District of Massachusetts as part of Multidistrict Litigation ("MDL") 1456.³ See
10 Larrabee Decl., Exh. I. On August 19, 2002, Plaintiff filed a motion to remand the case to state court.
11 Defendant subsequently filed this Motion to Stay the action, including consideration of the remand motion,
12 until the JPML rules on Defendant's motion to transfer.

13 On September 18, 2002, the JMPL issued a conditional transfer order in this case. See Reply to
14 Opposition to Motion ("Reply") at 1 (citing Declaration of Carol Lynn Thompson in Support of Reply to
15 Opposition to Motion ("Thompson Decl."), Exh. D). Plaintiff timely filed a notice of opposition to the
16 conditional transfer order, which will be considered at the JPML hearing session in January.

17 LEGAL STANDARD

18 The pendency of a conditional transfer order before the JPML "does not affect or suspend orders
19 and pretrial proceeding in the district court in which the action is pending and does not in any way limit the
20 pretrial jurisdiction of the court." JMPL Rule 1.5. At the same time, a court maintains its inherent power to
21 stay its proceedings. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Generally, when
22

23 ² The class is defined as: "All persons or entities in the State of California who paid directly, made co-
24 payments for, or became obligated to pay the costs of pursuant to an insurance plan, Medicare B pharmaceuticals
25 manufactured and sold by defendants, their subsidiaries, agents, and/or co-conspirators during the period January 1, 1995
and continuing through the present (the "Class Period"). Excluded from this class are government entities, the defendants,
the defendants' parent companies, subsidiaries, and affiliates." Complaint ¶ 62.

26 ³ On April 30, 2002, the JMPL transferred and consolidated sixteen AWP actions before Judge Saris under
27 the caption *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL 1456. As of October 30, 2002, twenty-
28 eight AWP cases have been transferred and consolidated before Judge Saris. In at least four of these cases, the district court
stayed the action(s) pending the JPML's decision on transfer. See Larrabee Decl., Exh. A (*Geller v. Abbott Laboratories*
Order), Exh. B (*State of Montana v. Abbott Laboratories* Order), Exh. C (*State of Nevada v. American Home Products* and
State of Nevada v. Abbott Laboratories Order)

1 reviewing a motion to stay, the court considers the: (1) economy of judicial resources; (2) potential
2 prejudice to the non-moving party; and (3) hardship and inequity to moving party if the stay is not granted.
3 *Rivers v. Walt Disney Co.*, 980 F.Supp. 1358, 1360 (C.D. Cal. 1997).

4 However, there are additional concerns when a case is implicated in multidistrict litigation, and the
5 requested stay would delay determination of jurisdictional issues. Under these circumstances, a court
6 should first make a preliminary assessment of the merits of the jurisdictional issues. If the issues are
7 factually or legally difficult, the court should then determine whether identical or similar jurisdictional issues
8 have been raised in other cases that have been or may be transferred to the MDL proceeding. *Meyers v.*
9 *Bayer AG*, 143 F.Supp.2d 1044, 1049 (E.D. Wisc. 2001). "Only if the jurisdictional issue is both difficult
10 and similar or identical to those in cases transferred or likely to be transferred should the court...consider
11 the motion to stay." *Id.*; see also *Medical Society of the State of New York v. Connecticut General*
12 *Corp.* 187 F.Supp.2d 89, 92 (S.D.N.Y. 2001) ("If the underlying jurisdictional issue involved questions of
13 law or fact not bound up with those involved in the multidistrict...litigation, or if it were fairly obvious...my
14 preference would be to rule on jurisdiction in the first instance and not wait for the MDL Panel's transfer
15 decision."). The purpose of this inquiry is to determine which court is in the best position to decide the
16 jurisdiction issue—the original district court or the MDL court. See *Medical Society*, 187 F.Supp.2d at 92.

17
18 ANALYSIS

19 A. Preliminary Assessment of Jurisdictional Issue

20 A preliminary assessment of the jurisdictional issue presented in Plaintiff's motion to remand reveals
21 that it cannot easily be disposed of by this Court. First, as in *Medical Society* (187 F.Supp.2d at 92), the
22 remand motion here presents a complicated jurisdictional issue involving the application of ERISA
23 preemption to state law claims. Compare, e.g., *Villareal v. Chrysler Corp.*, 1996 WL 116832 (N.D.
24 Cal. 1996) (denying defendant's request to stay consideration of remand where the jurisdictional issue was
25 whether plaintiffs' satisfied the amount in controversy requirement for diversity jurisdiction); *Tortola*
26 *Restaurant, L.P. v. Kimberley-Clark Corp.*, 987 F.Supp. 1186 (N.D. Cal. 1997) (same). Moreover, in
27 order to rule on Plaintiff's motion, the Court would have to delve in the factual intricacies of the alleged
28 AWP scheme as well as healthcare reimbursement issues. Based on these legal and factual complexities,

1 the Court must move to the second prong of the *Meyers* test and determine whether the jurisdictional issue
2 presented in this case is similar to the jurisdictional issues presented in some of the MDL cases, or potential
3 MDL cases.

4 B. Commonality of Jurisdictional Issues

5 As of October 30, 2002, twenty-eight AWP actions have been transferred and consolidated before
6 Judge Saris in the District of Massachusetts under the caption *In re Pharmaceutical Industry Average*
7 *Wholesale Price Litigation*, MDL 1456. Moreover, at least three district courts in this circuit have stayed
8 consideration of motions to remand in AWP cases pending the JPML's transfer ruling. See Motion at 5
9 (citing Larrabee Decl., Exh. A (*Geller Order*), Exh. B (*Montana Order*), Exh. C (*Nevada I and II*
10 *Order*). Each of these cases was subsequently transferred to the MDL proceedings.⁴

11 More importantly, the exact same jurisdictional issue presented in the this case is currently before
12 the MDL court in *Geller*. See Larrabee Decl., Exh. A (*Geller Order*), Exh. D (JPML's initial transfer
13 order). In *Geller*, plaintiff filed a state court action in Los Angeles alleging that several pharmaceutical
14 companies, including Defendant, violated section 7200 of the California Business and Professions Code by
15 manipulating the AWP of certain pharmaceuticals. See Larrabee Decl., Exh. J (*Geller Complaint*) at p. 2.
16 Defendant (SmithKline Beecham) removed the case to federal court in the Central District of California.
17 See Larrabee Decl., Exh. A (*Geller Order*) at p. 2. Although plaintiff filed a motion to remand, the court
18 issued an order to stay the proceedings until the JPML ruled on Defendant's motion to transfer. See
19 Larrabee Decl., Exh. A (*Geller Order*) at p. 14.

20 "Geller was subsequently consolidated and transferred to Judge Patti B. Saris and the United
21 States District Court for the District of Massachusetts." Larrabee Decl., Exh. M (Hangens Berman
22 Letter); see also Larrabee Decl., Exh. D (JPML's initial transfer order). Notwithstanding this
23 consolidation, the plaintiff has expressed her intent to renew her motion to remand before Judge Saris. See
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28 ⁴ *Geller* was transferred as part of the JPML's initial transfer order on April 30, 2002. See Larrabee Decl., Exh. D (JPML's initial transfer order). On October 16, 2002, the JPML issued an order transferred the *Montana*, *Nevada I*, and *Nevada II* to the MDL proceedings. See MDL 1456, October 16, 2002 Transfer Order.

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1 *id.* Thus, Judge Saris will already be deciding a jurisdictional issue identical to the one presented here.⁵

2 C. Propriety of Staying these Proceedings

3 1. Judicial Economy and Uniformity

4 Under these circumstances, issuing a stay would promote judicial economy and uniformity. See
5 *Good v. Prudential Ins. Co.*, 5 F.Supp.2d 804, 809 (N.D. Cal. 1998) ("Courts frequently grant stays
6 pending a decision by the MDL Panel regarding whether to transfer a case."). To begin, if this Court were
7 to rule on Plaintiff's motion to remand, it would have to familiarize itself with the legal and factual intricacies
8 of a case that has already been conditionally transferred to Judge Saris in the District of Massachusetts.
9 The inefficiency of this endeavor is underscored by the fact that Judge Saris will be hearing identical or
10 similar jurisdictional issues in at least four other AWP cases already transferred and consolidated in MDL
11 1456 (including one case brought under the same California statute at issue in this case).⁶

12 In addition to the waste of judicial resources, there is also the possibility of conflicting pretrial
13 rulings. See *In Re Multidistrict Private Civil Treble Damage Litigation Involving Plumbing Fixtures*,
14 298 F.Supp. 484, 491-92 (J.P.M.L. 1968) ("The purpose of Section 1407...is to eliminate the potential for
15 conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict
16 related civil actions.").

17 2. Balancing of Hardships

18 The Court must now consider the (1) prejudice that would be suffered by the non-moving party if
19 the stay were granted, and (2) hardship and inequity to the moving party if the action is not stayed. See
20 *Rivers*, 980 F.Supp. at 1360. This is essentially a balancing of hardships.

21 Here, Plaintiff does not assert that it will suffer any prejudice if the action is stayed pending the
22 JPML's transfer decision. Rather, Plaintiff simply contends that "Defendants have not demonstrated that
23

24
25 ⁵ Moreover, since this action was filed, two nearly identical AWP actions have been filed in San Francisco
26 Superior Court and removed to this district. See Thompson Decl., Exh. A (*Thompson v. Abbott Laboratories* Complaint);
Turner v. Abbott Laboratories, C 02-5006 MJJ. In *Thompson*, defendant Abbott Laboratories has already filed notice of
related action with the JPML. See Thompson Decl., Exh. A (*Thompson* Notice of Related Action).

27
28 ⁶ In addition, if the stay is denied and the case is subsequently transferred, any case management decisions
would have to be duplicated by the MDL court. See *Rivers*, 980 F.Supp. at 1360-61; see also Larrabee Decl., Exh. A (*Galler*
Order) at 12. Moreover, if the Court were to rule on more substantive motions, "there are no guarantees that an order by this
Court would not later be vacated and this Court's investment of time and resources would not have been in vain." See *id.*

EXHIBIT 5



UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

) **IN RE: PHARMACEUTICAL INDUSTRY**)
) **AVERAGE WHOLESAL PRICE**)
) **LITIGATION**)
_____)

THIS DOCUMENT RELATES TO:)

County of Suffolk v. Abbott)
Laboratories, et al.)
Civ. Action No. 1:03-cv-10643)
_____)

MDL NO. 1456
CIVIL ACTION NO.
01-12257-PBS

MEMORANDUM AND ORDER

April 8, 2005

Saris, U.S.D.J.

In ruling on the Defendants' motions to dismiss, the Court required Suffolk to present more particular information about its allegation that the published Average Wholesale Price ("AWP") for each drug was fraudulent. Specifically, Suffolk was asked to provide its basis for calculating a spread between the published AWP and the actual average price at which the drug is sold by wholesalers. See In re Pharm. Indus. Average Wholesale Price Litig., No. 01-12257, 2004 WL 2387125, at *2 (D. Mass. Oct. 26, 2004).

Suffolk presented the affidavit of Aaron Hovan, an associate at Kirby McInerney & Squire LLP, who explained that his technique for calculating the spread was to compare the published AWP with what he calculated as an actual average wholesale price for each drug. He first obtained a sampling of retail prices from four



online drug stores. Relying on a statement in an article comparing the Canadian and American drug systems, he assumed that retail prices for American drugs are on average 1.27 times their wholesale prices. See John R. Graham & Beverly A. Robson, Prescription Drug Prices in Canada and the United States - Part 1: A Comparative Survey, n.1, at http://oldfraser.lexi.net/publications/pps/42/s7_notes.html#FN_03 (last modified Aug. 23, 2000). He confirmed the reasonableness of this ratio with several of Suffolk's industry experts. He then used this average difference between actual wholesale and retail prices to obtain the estimated actual sale prices found in the Complaint. Suffolk compared this "actual sale price" to AWP minus 10%, the rate contained in New York's reimbursement formula, to obtain the alleged spread.

This method is not sufficient to plead allegations of fraud with particularity. In light of the fact that there are approximately 60,000 prescription drugs in the United States, the use of the purported average difference between wholesale and retail, 1.27, to calculate the actual wholesale prices for each drug is inadequate.



ORDER

The motion to dismiss the remaining AWP claims against the "Suffolk 13" and Defendants Amgen, Inc., Chiron Corporation, Fujisawa Pharmaceutical Company, Ltd., Johnson & Johnson, Warrick Pharmaceuticals, and Wyeth for failure to comply with Rule 9(b) is **ALLOWED**.

S/PATTI B. SARIS
United States District Judge