

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

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THE STATE OF WISCONSIN

Plaintiff,

v.

ABBOTT LABORATORIES, INC., et al.,

CASE NO. 05 C 408 C

Defendants.

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**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE  
TO FILE SUPPLEMENTAL AUTHORITY REGARDING PLAINTIFF'S  
MOTION TO REMAND AND DEFENDANTS' MOTION FOR STAY**

Defendants do not oppose plaintiff's motion for leave to file the decision in *Commonwealth of Pennsylvania v. Tap Pharma. Prod., Inc., et al.*, No. 2:05-cv-03604 (E.D. Pa. Sept. 9, 2005) (Sánchez, J.) ("Op."), in which the court granted plaintiff's motion to remand and denied defendants' motion to stay. However, defendants respectfully submit that there are four reasons why this Court should not follow that decision.

First, in denying the motion to stay, Judge Sánchez refused to apply the widely followed test set forth in *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044 (E.D. Wis. 2001), for determining whether a court should stay a motion to remand pending transfer to the MDL court (Op. at 6 n.3).<sup>1</sup> Indeed, plaintiff in this case has urged this Court to apply *Meyers*.

Second, in adopting the view that he could not rule on the motion to stay unless he first made a conclusive determination that there is federal jurisdiction (Op. at 5-7), Judge

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<sup>1</sup> Under *Meyers*, the court makes a preliminary assessment whether the jurisdictional question at issue is "factually or legally difficult" and is identical or similar to the issue raised by other cases that have been or may be transferred to the MDL court. *Id.* at 1048-49.

Sánchez ignored numerous cases holding that courts can enter stays before ruling on remand motions.<sup>2</sup>

Third, in ruling that Pennsylvania's case does not present a federal question, Judge Sánchez completely ignored Judge Saris's decision that the meaning of AWP was an "essential element" of identical *parens patriae* claims brought by the State of Minnesota to recover Medicare payments based on AWP because such claims required "proof of a discrepancy between AWP's reported by [the defendant] and the meaning of AWP under the Medicare statute." *State of Montana v. Abbott Lab.*, 266 F. Supp. 2d 250, 255 (D. Mass. 2003). Similarly, Judge Sánchez's view that a court "does not need to ascribe any meaning to the words 'average wholesale price' for the Commonwealth to prevail" (Op. at 12) is directly contrary to another of Judge Saris' opinions. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 263 F. Supp. 2d 172, 181 (D. Mass. 2003) (plaintiff's claims require a court to perform the "heartland task of construing statutory language" to determine the meaning of AWP as it is used in the Medicare statute). Judge Saris has spent over three years grappling with the factual and legal intricacies of the AWP litigation and the meaning of AWP under the Medicare Act. With the Pennsylvania

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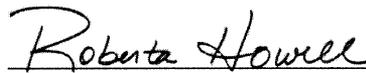
<sup>2</sup> *See, e.g., In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (recognizing authority to stay action despite pending remand motion); *Gaffney v. Merck & Co.*, 2005 WL 1700772, at \*1 (W.D. Tenn. July 19, 2005) ("Although some courts have opted to rule on pending motions to remand prior to the MDL Panel's decision on transfer, ... there are many more that have chosen to grant a stay, even if a motion to remand is filed.") (citations omitted); *Michael v. Warner-Lambert Co.*, 2003 U.S. Dist. LEXIS 21525, at \*3 (S.D. Cal. Nov. 20, 2003); *Bd. of Trustees v. WorldCom, Inc.*, 244 F. Supp. 2d 900, 902 (N.D. Ill. 2002); *Med. Soc'y v. Conn. Gen. Corp.*, 187 F. Supp. 2d 89, 91 (S.D.N.Y. 2001); *Aikins v. Microsoft Corp.*, 2000 WL 310391, at \*1 (E.D. La. Mar. 24, 2000); *Tench v. Jackson Nat'l Life Ins. Co.*, 1999 WL 1044923, at \*1-2 (N.D. Ill. Nov. 12, 1999); *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997); *Johnson v. AMR Corp.*, 1996 WL 164415, at \*3-4 (N.D. Ill. Apr. 3, 1996); *In re Amino Acid Lysine Antitrust Litig.*, 910 F. Supp. 696, 700 (J.P.M.L. 1995).

case on his docket for just under two months, Judge Sánchez reached conclusions that directly conflict with Judge Saris's previous decisions.

Finally, Judge Sánchez erred regarding the timeliness of defendants' removal. In deciding that the term "other paper" was limited to "an event within the proceeding itself" (Op. at 16-17), his opinion impermissibly re-writes the statute to impose a condition that does not appear in the text of the statute. *See* 28 U.S.C. § 1446(b) (second paragraph). This reading conflicts with the Third Circuit's decision in *Red Cross v. Doe*, 14 F.3d 196 (3d Cir. 1993), which held that an "order" need not come from the same proceeding, and leads to the contradictory result that the broader term "other paper" must be construed more narrowly than the specific term "order."

The recently remanded cases in Pennsylvania and Alabama are in direct conflict with Judge Saris's decisions. This court should decline to follow either of these decisions.

Dated: September 16, 2005.



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James R. Clark, SBN 1014074  
Roberta F. Howell, SBN 1000275  
Michael D. Leffel, SBN 1032238  
FOLEY & LARDNER LLP  
150 East Gilman Street  
Post Office Box 1497  
Madison, Wisconsin 53701-1497  
Tel: 608.257.5035  
Fax: 608.258.4258

*Attorneys for Defendant Bristol-Myers Squibb  
Company and filing on behalf of all defendants*

Of Counsel:  
Steven M. Edwards  
Lyndon M. Tretter  
Hogan & Hartson LLP  
875 Third Avenue  
New York, New York 10022  
Tel: 212.918.3000  
Fax: 212.918.3100