

Responses to the MDL Motion were filed on November 7, 2012, with replies due by November 14, 2012. A date for the MDL Motion has not yet been established by the Panel, but it is anticipated that it will be heard when the Panel convenes on January 31, 2013.

While the Panel considers the MDL Motion, Defendants respectfully request a stay of all proceedings in this action, including all pretrial discovery and motion practice, pending the Panel's adjudication of the MDL Motion. No opposition has been filed by any party to an MDL coordination. For this Court to advance proceedings in the instant matter, would work at cross-purposes with that of the Panel, as it considers whether to consolidate and transfer the cases. Indeed, because the instant action involves virtually identical predicate factual allegations, common questions of law and facts and overlapping claims for relief, continuing proceedings before the JPML adjudicates the pending motion would needlessly waste this Court's limited time and resources, as well as that of the parties hereto. Further, it would also alter the underlying circumstances the Panel must consider in adjudicating the MDL Motion. To promote judicial economy and avoid prejudice to any party, and to allow the MDL Motion to be ruled upon without any change in circumstances, the Defendants respectfully request a stay pending the Panel's determination.¹

II.

BACKGROUND

A. The Actions Subject of the MDL Motion

The MDL Motion is brought on behalf of petitioners who, like Plaintiff herein, claim that after being injected with methylprednisolone acetate compounded by NECC, they suffered personal injuries, and/or wrongful death. The MDL Petitioners, like plaintiff herein generally seek recovery under theories of negligence, strict product liability, breach of express and implied warranties, misrepresentation, and failure to warn, among others. All of the actions pending in

¹ Defendants are filing similar motions to stay in other cases pending in various federal courts.

various federal courts are in the very early stages of litigation, issue has not been joined, and discovery has not commenced.

B. The Instant Action

The instant action is similar to the other cases submitted to the Panel for coordination. Plaintiff “John Doe” (the “Plaintiff”) commenced this action in the Superior Court of Middlesex County on October 15, 2012. This case was removed to the United States District Court for Massachusetts on November 5, 2012

Like the actions described in the MDL Motion, the instant action involves allegations that plaintiff developed personal injuries secondary to being injected with methylprednisolone acetate tainted with a fungus, allegedly compounded and distributed by NECC. Plaintiff asserts causes of action against the Defendants couched in negligence, negligent supervision, negligent informed consent, and breach of contract. Plaintiff seeks compensation for personal injuries, pain and suffering, financial loss, medical expenses, emotional distress, reduced life expectancy and possible death, including interest, costs, and attorneys fees.

While the underlying facts and circumstances of the instant case are specific to the instant Plaintiff (i.e., pre-existing medical history, surgeon and healthcare providers, dates and anatomical placement of injections, onset of disease and/or symptoms), the actions which are the subject of the MDL Motion - allege virtually identical injuries and advance similar causes of action and categories of damages.

It is respectfully submitted that, given the pendency of the MDL Motion, continuing to litigate the instant case would require the parties to engage in overlapping discovery and would entail multiple courts considering and adjudicating duplicative pretrial motions. If the JPML transfers this case to one court for coordinated pretrial proceedings, the transferee court will be responsible for resolving pending motions and presiding over coordinated discovery. To prevent duplication of efforts, the possibility of conflicting rulings, and to promote judicial economy and avoid prejudice to the parties, Defendants request a temporary stay of all proceedings in this action, pending adjudication of the MDL Motion by the JPML.

III.

ARGUMENT

A. This Court Has The Authority To Stay This Action Pending The Panel's Ruling

“[T]he power to stay 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). *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003); *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1077 (3d Cir. 1983); *Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 980 (7th Cir. 2005); 7B C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE § 1792, at 10 (3d ed. 2005) (“When similar actions, either class or individual, are proceeding before several courts, one or more of the tribunals may stay the proceeding before it pending the outcome of the other action.”); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION § 20.14, at 228 (4th ed. 2006) (“In appropriate cases, a judge may order an action stayed pending resolution of a related case in a federal court.”). Accordingly, this Court has the inherent authority to stay this case pending the Panel’s decision.

B. A Temporary Stay Is Appropriate Pending The Panel's Ruling

“Courts frequently grant stays pending a decision by the MDL Panel regarding whether to transfer a case.” *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 809 (N.D. Cal. 1998). A stay is particularly appropriate in this situation because the very “purpose of such [MDL] transfers is to further judicial economy and to eliminate the potential for conflicting pretrial rulings.” *Id.* at 809; *see also In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (“[c]onsistency as well as economy is thus served” by resolution of common issues by one transferee court); *In re New York City Mun. Sec. Litig.*, 572 F.2d 49, 51-52 (2d Cir. 1978); *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997); *In re Columbia Univ. Patent Litig.*, 313 F. Supp. 2d 1383, 1385 (J.P.M.L. 2004) (finding the benefit of an MDL is to place all related actions before one judge who can structure pretrial proceedings to consider all parties’ needs while ensuring that duplicate activity does not occur).

Indeed, “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.” *Rivers*, 980 F. Supp. at 1362; *see also Hertz Corp. v. The Gator Corp.*, 250 F. Supp. 2d 421 (D.N.J. 2003); *Smith v. Mail Boxes, Etc., Inc.*, 191 F. Supp. 2d 1155 (E.D. Cal. 2002); *Bd. of Trs. of the Teachers’ Ret. Sys. of Ill. v. Worldcom, Inc.*, 244 F. Supp. 2d 900 (N.D. Ill. 2002); *Medical Soc’y v. Conn. Gen. Corp.*, 187 F. Supp. 2d 89, 92 (S.D.N.Y. 2001); *Namovicz v. Cooper Tire & Rubber Co.*, 225 F. Supp. 2d 582 (D. Md. 2001); *Weinke v. Microsoft Corp.*, 84 F. Supp. 2d 989 (E.D. Wis. 2000); *Brault v. Merck & Co., Inc.*, No. 06-2039, 2006 WL 3924223 (S.D. Cal. Nov. 7, 2006); *Nekritz v. Canary Capital Partners, LLC*, No. 03-5081, 2004 WL 1462035, at *2 (D.N.J. Jan. 12, 2004) (“An immediate stay will permit the most efficient possible use of the courts’ and the parties’ resources.”); *Mailblocks, Inc. v. Spam Arrest, LLC*, No. 03-0077, 2003 WL 23325432 (W.D. Wash. June 9, 2003); *Republic of Venezuela ex rel. Garrido v. Philip Morris Cos.*, No. 99-0586, 1999 WL 33911677 (S.D. Fla. Apr. 28, 1999); *Am. Seafood, Inc. v. Magnolia Processing, Inc.*, Nos. 92-1030, 92-1086, 1992 WL 102762 (E.D. Pa. May 7, 1992); *Arthur-Magna, Inc. v. Del-Val Fin. Corp.*, No. 90-4378, 1991 WL 13725 (D.N.J. Feb. 1, 1991).

Factors relevant to whether a stay should be ordered include: (1) the judicial resources saved by avoiding duplicative litigation; (2) potential prejudice to the non-moving party; and (3) hardship to the moving party if a stay is not granted. *See, e.g., Rivers*, 980 F. Supp. at 1360. All of the above factors weigh heavily in favor of issuing a temporary stay pending transfer.

1. A Stay Will Conserve Judicial Resources

If the Panel grants the MDL Motion and consolidates the cases to one district, judicial resources in multiple districts throughout the country would be conserved.

Discovery has not yet been initiated. Considerable discovery, including statutory initial disclosures, written discovery, document production, party depositions, Rule 26 expert disclosures and depositions, non-party depositions and certain non-party factual discovery must be conducted. If this Court does not stay the instant case, and the Panel consolidates all the cases

in a different district, then “this Court will have needlessly expended its energies familiarizing itself with the intricacies of a case that would be heard by another judge.” *Rivers*, 980 F. Supp. at 1360. Duplicative efforts by the transferee judge also will result, for “any efforts on behalf of this Court concerning case management will most likely have to be replicated by the judge that is assigned to handle the consolidated litigation.” *Id.* at 1360-61.

The potential for conflicting rulings also exists. These cases may entail numerous procedural and substantive motions, potentially including motions to dismiss, *Daubert* motions and summary judgment motions, which can be resolved by the transferee court without risk of duplication and inconsistent rulings. *See, e.g., In re Bridgestone/Firestone, Inc.*, No. 1373, 2000 WL 33416573, at *2 (J.P.M.L. Oct. 24, 2000) (“jurisdictional and remand motions can be presented to and decided by the transferee judge”); *Bd. of Trs. of the Teachers’ Ret. Sys.*, 244 F. Supp. 2d at 902 (“[A] court may stay proceedings even where subject matter jurisdiction is uncertain.”); *Hertz Corp.*, 250 F. Supp. 2d at 427 (noting that denying a stay would potentially result in “conflicting decisions by this Court and the transferee court . . . thereby decreasing a primary benefit of consolidation, namely consistent rulings on important pretrial legal issues.”); *Hardin v. Merck & Co., Inc.*, No. 07-0070, 2007 WL 1056790, at *2 (N.D. Cal. Apr. 5, 2007) (“[D]eference to the MDL court for resolution of a motion to remand provides the opportunity for the uniformity, consistency, and predictability in litigation that underlies the MDL system.”). This motion is directed in particular at Plaintiff’s presently pending motion for approval of an attachment against all Defendants. He is seeking to attach assets notwithstanding the fact that there are dozens of other claimants all over the country who may have similar designs. This motion in particular should be resolved after consolidation as it will impact the entire group of claimants.

Moreover, rulings made currently, including those in this Court, may be vacated after a transfer. “[T]ransferee judges have been known to vacate or modify previous rulings of the transferor judge.” *Rivers*, 980 F. Supp. at 1361 (citing cases). “[T]he time and energy that this Court would devote to any rulings it might make . . . could be for naught if this action is

transferred to another court and that court modifies or vacates any of this Court's orders." *Id.* Judicial economy thus militates strongly against further investment of this Court's time in pretrial proceedings, pending the JPML decision on consolidation and transfer.

2. A Stay Will Prevent Prejudice To All Parties

Duplicative litigation wastes the parties' resources as well. Absent a temporary stay of this action, the parties will litigate complex issues before this Court and others, including potentially esoteric scientific issues, even though the cases may ultimately be transferred. The same issues may then be re-litigated in the transferee court. A temporary stay will alleviate this potential waste of effort and resources. *See, e.g., Am. Seafood*, 1992 WL 102762, at *2 ("[D]uplicative motion practice and discovery proceedings demonstrate that judicial economy and prejudice to the defendants weigh heavily in favor of the stay.").

The same is true of discovery. Given that the allegations in all the complaints are similar, discovery herein would substantially overlap with discovery in other cases. If discovery efforts commence here, and in other cases, the parties will likely be forced to duplicate significant efforts. *Rivers*, 980 F. Supp. at 1362. By contrast, a stay followed by multidistrict coordination would enable the parties to propound and respond to coordinated sets of comprehensive discovery requests on a going-forward basis. Thus, this Court should issue a stay herein pending the Panel's decision on the MDL motion.

Should this case proceed while the Panel is considering the motion, either or both parties may be prejudiced by inconsistent rulings on significant issues common to all cases. To avoid such prejudice, courts often stay proceedings in anticipation of the possibility that those issues will be addressed by the transferee court selected by the Panel. *See In re Bridgestone/Firestone, Inc.*, 2000 WL 33416573, at *2; *see also In re Ivy*, 901 F.2d at 9; *Weinke*, 84 F. Supp. 2d at 989-90 (staying action pending MDL ruling despite remand motion); *Calder v. A.O. Smith Corp.*, No. 04-1481, 2004 WL 1469370 (D. Minn. June 1, 2004) (staying defendant's motion to dismiss pending Panel's decision); *Falgoust v. Microsoft Corp.*, No. 00-0779, 2000 WL 462919, at *2 (E.D. La. Apr. 19, 2000) (staying action in deference to pending coordination motion,

notwithstanding the filing of a motion to remand to state court); MANUAL FOR COMPLEX LITIGATION, supra, § 20.14, at 228. Plaintiff's motion for approval of attachment is also impacted by this element as Defendants will be prejudiced in having to address this issue in multiple courts with multiple potential outcomes.

3. A Stay Will Not Prejudice Plaintiff

Plaintiff will not be substantially prejudiced by staying this action pending the decision of the JPML, particularly where this case has only recently been filed and removed to federal court, discovery has not initiated, and no scheduling order has yet been entered. The short-term stay requested is only until the JPML issues its decision. There will not be an extended delay on Plaintiffs' ability to prosecute the action. *See Am. Seafood*, 1992 WL 102762, at *1; *see also Aikins v. Microsoft Corp.*, No. 00-0242, 2000 WL 310391, at *1 (E.D. La. Mar. 24, 2000) ("Plaintiffs have failed to show any significant prejudice they would suffer, beyond the slight delay pending the JPML decision"); *Republic of Venezuela*, 1999 WL 33911677, at *1 ("[U]pon consideration of what effect a brief stay may have on [plaintiff], the Court finds that Plaintiff will not be prejudiced by the granting of a stay pending the JPML's decision.").

As other courts have noted, "even 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." *Egon v. Del-Val Fin. Corp.*, No. 90-Civ-4338, 1991 WL 13726, at *1 (D.N.J. Feb 1, 1991); *see also Rivers*, 980 F. Supp. at 1362, n.5 ("[E]ven if a temporary stay could be characterized as a delay that would be prejudicial . . . there are still considerations of judicial economy that outweigh any prejudice."); *Am. Seafood*, 1992 WL 102762, at *2 ("[A]ny prejudice to the plaintiffs is clearly outweighed by the considerations of judicial economy and possible prejudice to the defendants.").

CONCLUSION

For the foregoing reasons, Defendants respectfully requests a temporary stay of all proceedings in this action, including pretrial discovery and pending and future motion practice, awaiting a Panel decision on the MDL motion.

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| Date: | November 13, 2012 | Respectfully submitted, Defendants New England Compounding Pharmacy, Greg Conigliaro, Barry Cadden and Lisa Cadden By their Attorneys, <i>/s/ Daniel E. Tranen</i> <hr/> Geoffrey M. Coan, BBO # 641998 Daniel E. Tranen, BBO # 675240 Hinshaw & Culbertson LLP 28 State Street, 24th Floor Boston, MA 02109-1775 Tel: (617)213-7000 / Fax: (617)213-7001 |
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CERTIFICATE OF SERVICE

I, Daniel Tranen, hereby certify that on this 13th day of November, 2012, the documents filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF)

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| | <i>/s/ Daniel E. Tranen</i> |
| | Daniel Tranen |