BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In Re: Effexor Products Liability Litigation MDL Docket No. _____

MEMORANDUM IN SUPPORT OF MOTION OF PLAINTIFFS GLENN AND LAUREN BOYER FOR CENTRALIZATION AND TRANSFER OF ACTIONS TO THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

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Pursuant to 28 U.S.C. § 1407, Plaintiffs Glenn and Lauren Boyer ("Plaintiffs") respectfully submit this memorandum in support of their Motion for Centralization and Transfer of fourteen (14) related actions listed in the attached Schedule of Actions (the "Effexor Cases") to the United States District Court for the Eastern District of Pennsylvania before Judge Cynthia M. Rufe. The Effexor Cases are product liability suits in which plaintiffs assert claims against Pfizer, Inc. ("Pfizer") and Wyeth Pharmaceuticals, Inc. and its related companies ("Wyeth") (collectively "Defendants") alleging that Effexor and Effexor XR (hereinafter referred to collectively as "Effexor"), a Pfizer and Wyeth medication[1], caused birth defects in children born to mothers who have used Effexor.

INTRODUCTION

Plaintiffs request coordination of the federal Effexor Cases in a multidistrict litigation ("MDL") because: (i) the complaints all assert product liability claims against Pfizer and/or Wyeth based on allegations that Effexor can and did cause congenital abnormalities when taken by women during pregnancy; (ii) the actions involve common questions of fact, including whether Effexor is capable of causing the injuries alleged; (iii) transfer to a single district will be convenient for the parties and witnesses and will promote the just and efficient conduct of the litigation; and (iv) absent transfer and coordination, the parties and courts will face the burden and expense of needlessly duplicative discovery and pretrial proceedings and possible inconsistent pretrial rulings. The creation of an MDL at this time is appropriate because there are already fourteen (14) similar actions pending before more than ten (10) different judges in seven (7) different federal courts, most all in the preliminary stages of litigation, and additional actions are expected to be filed in federal court in the future.

[1] The drugs were originally manufactured, marketed and sold by Wyeth. In 2009, Pfizer purchased Wyeth and began manufacturing, marketing and selling the drugs.

In addition, Plaintiffs request that the MDL be assigned to Judge Cynthia M. Rufe in the Eastern District of Pennsylvania, a highly accessible district in a metropolitan location where five (5) of the actions are currently pending, many of the relevant documents and witnesses are located, and because the court has the requisite resources and expertise, including a robust record with similar MDLs.

FACTUAL AND PROCEDURAL BACKGROUND

Effexor (venlafaxine hydrochloride) is a serotonin and norepinephrine reuptake inhibitor ("SNRI") which was first approved for use in the United States by the FDA in 1993 for the treatment of major depressive disorder. Effexor XR was first approved for use in the United States by the FDA in 1997 and has been approved for the treatment of major depressive disorder, generalized anxiety disorder, social anxiety disorder and panic disorder. By 2007, Effexor was the sixth-most-prescribed antidepressant drug in the United States retail market with almost 17.2 million prescriptions dispensed. From the time it received FDA approval for Effexor and Effexor XR, Defendant Wyeth manufactured, marketed and sold Effexor for the treatment of major depressive disorder, anxiety and panic disorder. Wyeth, currently a subsidiary of Pfizer, was purchased by Pfizer in October of 2009.

The injured parties in this litigation are children who were born with serious birth defects and the parents of these children. Plaintiffs allege that, even before Wyeth and Pfizer began selling Effexor to patients, they knew that the use of Effexor during pregnancy increased the risk that children exposed to the drug *in utero* would be born with serious birth defects. Despite this knowledge, Defendants did not warn mothers or the medical community of this known risk and, instead, actively misrepresented the safety of Effexor. Today, even in the face of well-established

science reflecting this risk and label changes on similar drugs, Defendants refuse to warn of the dangers to unborn children caused by Effexor use.

Between December 2011 and the present, various plaintiffs filed fourteen (14) lawsuits against Pfizer and/or Wyeth alleging that exposure to Effexor *in utero* caused birth defects. Twelve (12) of these fourteen (14) actions were filed in various state courts and removed to federal court on diversity grounds. In each case, the plaintiffs claim that Pfizer and Wyeth failed to adequately warn that the use of Effexor during pregnancy could cause birth defects and that the plaintiff mothers and exposed children were injured as a result. Five (5) of the cases are currently pending in the Eastern District of Pennsylvania, three (3) cases are pending in the Central District of California, two (2) cases are pending in the Eastern District of California, one (1) case is pending in the Southern District of California, one (1) case is pending in the Northern District of Mississippi, one (1) case is pending in the Northern District of Illinois and one (1) case is pending in the Northern District of Ohio.

Most of these fourteen (14) actions are in the preliminary stages of litigation. Due to the widespread use of Effexor and the exceptionally high risk of birth defects posed by the use of Effexor, as shown in the medical literature, it is very likely that dozens of additional similar actions will be filed in or removed to federal courts in the future.

ARGUMENT

I. The Standard for Transfer and Coordination

28 U.S.C. § 1407 dictates that the Panel may transfer federal civil actions for pretrial coordination or consolidation if: (i) "civil actions involving one or more common questions of fact are pending in different districts"; (ii) transfer and coordination "will promote the just and efficient conduct of such actions"; and (iii) transfer and coordination will serve "the convenience

of parties and witnesses." 28 U.S.C. § 1407(a). As set forth below, each of these criteria are satisfied here.

Upon a Motion for Transfer, the Panel "analyzes each group of cases in light of the statutory criteria and the primary purposes of the MDL process to determine whether transfer is appropriate." *In re: Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F. 3d 1217, 1230. To that end, it considers factors including "the progress of discovery, docket conditions, familiarity of the transferee judge with the relevant issues, and the size of the litigation." *Id. citing* Multidistrict Litigation Manual § 5.16. On the specific issue of whether to centralize litigation in a single district, the Panel considers the convenience of the parties and witnesses, the number of related actions, and the complexity of common questions of fact.

A. Transfer and Coordination of the Effexor Cases is Appropriate and Necessary

The Effexor Cases are well suited for centralization under Section 1407. Though filed in or removed to different jurisdictions within the federal court system, these cases are closely related: they share the same Defendants, the same basic theory of liability, and the same basic factual allegations. All of the cases will involve the same core of discovery, fact witnesses and experts. Moreover, none of these cases have made any substantial progress toward trial, making this the ideal time to order transfer.

Discovery has not commenced in most cases, and the undersigned counsel is not aware of any substantive motions that have been ruled upon.[2] Additionally, undersigned counsel is not aware of any trial dates that have been set in the pending federal actions.

[2] The undersigned counsel is aware that discovery has occurred in the *Boyer* and *Decker* actions which are pending in the Eastern District of Pennsylvania. In addition, Defendant Pfizer has filed a Motion to Transfer the five (5) cases pending in the Eastern District of Pennsylvania. That motion has been fully briefed by the parties, but no decision has been rendered by the Court. Counsel is also aware of two (2) pending motions in the Northern District of Mississippi: Defendant's Motion for Summary Judgment and Plaintiffs' Motion to Dismiss Without Prejudice.

B. The Effexor Cases Involve Common Issues of Fact

The threshold requirement of § 1407 is that there be questions of fact common to the cases for which MDL treatment is sought; this requirement is clearly satisfied here as the Effexor Cases share a substantial overlap of factual issues. The claims in the Effexor Cases each arise from the same course of conduct. Among the numerous common questions of fact are:

a) Whether and to what extent Effexor has caused, or can cause, birth defects in children born to mothers who have used Effexor;

b) When Defendants first learned of the connection between Effexor and risks and/or complaints of birth defects;

c) Whether Effexor is defective in design because of its propensity to cause birth defects;

d) Whether Effexor was defective and unreasonably dangerous when taken by Plaintiffs because it was dangerous to an extent beyond which would be contemplated by the ordinary consumer;

e) Whether Effexor was sold without adequate warnings of the risk of birth defects to consumers;

f) Whether Defendants negligently, recklessly, or intentionally misrepresented the risk of birth defects associated with Effexor; and

g) Whether Defendants knowingly, recklessly, or negligently concealed from the FDA, physicians, and/or consumers the risk of birth defects.

Although the actions present certain individualized factual issues, including specific causation (whether Effexor actually caused each plaintiff's alleged injury), "Section 1407 does not require a complete identity or even a majority of common factual issues as a prerequisite to centralization." *In re: Zimmer Durom Hip Cup Prods. Liab. Litig.*, 717 F. Supp. 2d 1376, 1378 (J.P.M.L. 2010); *In re: Denture Cream Prods., Liab. Litig.*, 624 F. Supp. 2d 1379, 1381 (J.P.M.L. 2009). Instead, where, as here, the underlying factual and legal allegations are sufficiently similar, "[t]ransferee judges have demonstrated the ability to accommodate common

and individual discovery tracks, gaining the benefits of centralization without delaying or compromising consideration of claims on their individual merits." *In re: Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig.*, 597 F. Supp. 2d 1377, 1378 (J.P.M.L. 2009). Courts have applied this dual discovery approach in a number of recent product liability actions involving pharmaceutical products. *See, e.g., In re: Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, 655 F. Supp. 2d 1343. 1344 (J.P.M.L. 2009); *In re: Chantix (Varenicline) Prods. Liab. Litig.*, 655 F. Supp. 2d 1346, 1346 (J.P.M.L. 2009); *In re: Vioxx*, 360 F. Supp. 2d at 1353-54.

C. Pretrial Centralization Will Enhance the Just and Efficient Conduct of These Cases

Because the Effexor actions share common questions of fact and implicate overlapping discovery and expert and dispositive issues, coordination of these actions before a single judge will provide the most efficient approach to managing the cases at this time. As an initial matter, it is important to note that all of the Effexor Cases are in their early stages – little motion practice has taken place and limited discovery has occurred. As a result, no court has expended a significant amount of judicial resources on the Effexor Cases or become particularly familiar with the relevant issues. This is therefore the optimal time to transfer.

In each of the fourteen (14) pending actions, plaintiffs are seeking or will likely seek much of the same discovery from Pfizer and Wyeth, including documents and deposition testimony related to the testing, design, labeling, marketing, and safety of Effexor. Coordinating the actions before one judge at this early stage will allow the parties and the court to address this overlapping discovery in an organized manner and avoid the potentially very costly duplication of efforts and judicial resources that would be required if the cases were to continue to proceed on separate schedules and in separate courts.

Moreover, discovery relating to medical causation and the adequacy of product testing and warnings will overlap across the Effexor Cases. Indeed, this Panel has consistently recognized that Section 1407 coordination is a preferred way to manage individual lawsuits that raise similar questions regarding a defendant's development, design, and testing of a particular prescription medication or device. *See, e.g., In re: Zoloft (Sertraline Hydrochloride) Products Liability Litigation, 856 F. Supp. 2d 1347 (J.P.M.L. 2012); In re: Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1381-82 (J.P.M.L. 2004); *In re: Prempro Prods. Liab. Litig.*, 254 F. Supp. 2d 1366, 1367 (J.P.M.L. 2003); *In re Darvocet, Darvon and Propoxyphene Products Liab. Litig.*, 780 F. Supp. 2d 1379, 1380-81 (J.P.M.L. 2011); *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liab. Litig.*, 655 F. Supp. 2d 1343, 1343-44 (J.P.M.L. 2009); *In re Vytorin/Zetia Marketing, Sales Practices and Products Liab. Litig.*, 543 F. Supp. 2d 1378, 1380 (J.P.M.L. 2008); *In re Fosamax Products Liab. Litig.*, 444 F. Supp. 2d 1347, 1349 (J.P.M.L. 2006); *In re Vioxx Products Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005); *In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1381-82 (J.P.M.L. 2004).

Coordination is also appropriate here to avoid potentially inconsistent pre-trial rulings on the same or similar issues, including expert challenges under *Daubert*, and the uncertainty and confusion that would result. *See In re: Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, MDL No. 2272, 2011 WL 3563293, at *1 (J.P.M.L. Aug. 8, 2011) ("Centralization under Section 1407 will eliminate duplicative discovery, [and] prevent inconsistent pretrial rulings on *Daubert* and other pretrial issues . . . . "); *In re: Transocean Tender Offer Sec. Litig.*, 415 F. Supp. 382, 384 (J.P.M.L. 1976) ("[T]he likelihood of motions for partial dismissal and summary judgment in all three actions grounded at least in part on [a common issue] makes Section 1407 treatment additionally necessary to prevent conflicting pretrial rulings and conserve judicial effort.").

D. Coordination Will Serve the Convenience of Witnesses and Parties

Transfer is appropriate when it would enhance the convenience of the litigation as a whole. *See, e.g., In re: Library Edition of Children's Books*, 2.97 F. Supp. 385, 386 (J.P.M.L. 1968) ("[T]he Panel must weigh the interests of all of the plaintiffs and all other defendants, and must consider multiple litigation as a whole in light of the purposes of the law.") Here, pretrial transfer will undoubtedly ease the burdens on all involved – particularly if, as Plaintiff requests, these cases are transferred to the Eastern District of Pennsylvania.

Both Defendants and Plaintiffs stand to benefit from pretrial centralization. Pretrial transfer will reduce the burdens of discovery and costs significantly for all parties. Similarly, consolidation will permit Plaintiffs' counsel to coordinate their efforts so as to share the pretrial workload amongst various plaintiffs' counsel. The Panel has specifically endorsed this rationale noting, "[p]rudent counsel will combine their forces and apportion the workload in order to streamline the efforts of the parties and witnesses, their counsel and the judiciary, thereby effectuating an overall savings of cost and a minimum of inconvenience to all concerned." *See, e.g., In re: Baldwin–United Corp. Litig.*, 581 F. Supp. 739, 741 (J.P.M.L. 1984). Consolidation of these cases will effectuate this purpose and make this litigation far more efficient and convenient for all involved.

Given this Panel's interest in choosing a forum that will promote the just and efficient conduct of the litigation while reducing litigation costs and saving time and effort on the part of the parties, the attorneys, the witnesses, and the judiciary, Plaintiffs respectfully submit that the Eastern District of Pennsylvania is the district best suited to manage this litigation as a transferee district. Furthermore, Plaintiffs aver that the Honorable Cynthia M. Rufe has the experience and skill to successfully manage this MDL as transferee judge.

In sum, coordination of these actions is appropriate because it would "eliminate duplicative discovery, prevent inconsistent pretrial rulings . . . and conserve the resources of the parties, their counsel and the judiciary." *In re: Temporomandibular Joint (TMJ) Implants*, 844 F. Supp. at 1554.

II. The Eastern District of Pennsylvania is the Most Appropriate Venue for the MDL Transfer and Coordination of the Effexor Cases

Transfer of the Effexor Cases to the Eastern District of Pennsylvania would best serve the purposes of 28 U.S.C. § 1407. The selection of an appropriate transferee forum depends greatly on the specific facts and circumstances of the litigation being considered for transfer and consolidation and involves a "balancing test" of several factors "based on the nuances of a particular litigation." *See* Robert A. Cahn, A Look at the Judicial Panel of Multidistrict Litigation, 72 F.R.D. 211, 214 (1977). These factors include: (i) the location of parties, witnesses, and documents; (ii) the accessibility of the transferee district for parties and witnesses; and (iii) the respective case loads and experience of the proposed transferee district courts. *See, e.g., In re: Camp Lejeune, N.C. Water Contamination Litig.*, 763 F. Supp. 2d 1381, 1382 (J.P.M.L. 2011); *In re: Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001*, 203 F. Supp. 2d 1379, 1380-81 (J.P.M.L. 2002); *In re: Corn Derivatives Antitrust Litig.*, 486 F. Supp. 929, 931-32 (J.P.M.L. 1980). As set forth below, these factors support coordination of these actions in the Eastern District of Pennsylvania before Judge Cynthia M. Rufe.

First, the Panel places great weight on the district where the litigation has most advanced. *See, e.g. In re Wireless Tele. Fed. Cost Recovery Fees Litig.*, 293 F. Supp. 2d 1378, 1380 (J.P.M.L. 2003); *In re Fourth Class Postage Regs.*, 298 F. Supp. 1326, 1328 (J.P.M.L. 1969). Since the pendency of the initial action in the Eastern District of Pennsylvania, *Boyer*, four other actions have been consolidated before Judge Edmund Ludwig of the Eastern District of

Pennsylvania, and, since then, the parties have been actively engaged in litigation. These cases are far more advanced than any other cases in the country as:

- The parties exchanged Initial Disclosures in *Boyer* and *Decker*.
- Judge Ludwig has held initial case management conferences with the parties in all cases.
- As a result of those conferences, Judge Ludwig has set a full discovery schedule and entered Case Management Orders in the *Boyer* and *Decker* actions.
- The parties negotiated a Protective Order and Judge Ludwig has entered the Order.
- Plaintiffs and defendants have both served discovery, including Interrogatories and Requests for Production.
- Parties have met and conferred about discovery issues on multiple occasions.
- Plaintiffs have conducted three (3) 30(b)(6) depositions and currently have a fourth 30(b)(6) deposition set for April 30, 2013.

Second, Wyeth, which is a defendant in all of the actions, has its corporate headquarters and nerve center located in the Eastern District of Pennsylvania. Thus, a significant number of parties, witnesses and documents are likely to be located in and immediately around the Eastern District of Pennsylvania. *See In re: Pfizer Inc., Sec., Derivative & "ERISA" Litig.*, 374 F. Supp. 2d 1348, 1350 (J.P.M.L. 2005) (centralizing 29 actions in the Southern District of New York where "Pfizer" has its headquarters and many individual defendants reside, and therefore relevant witnesses and documents will likely be found there"); *see also In re: Navistar 6.0 L Diesel Engine Prods. Liab. Litig.*, 777 F. Supp. 2d 1347, 1348 (J.P.M.L. 2011) (transferring multiple actions to the Northern District of Illinois because "[d]efendants' headquarters, and therefore relevant documents and witnesses, are located in or relatively near [the] district"); *In re: Canon U.S.A., Inc., Digital Cameras Prods. Liab. Litig.*, 416 F. Supp. 2d 1369, 1371 (J.P.M.L. 2006) (transferring cases to the Southern District of New York in part because it would

"likely provide a source of relevant documents and witnesses, inasmuch as [defendant]'s principal place of business is located there").

Third, the Eastern District of Pennsylvania, and Philadelphia in particular, is a geographically accessible and convenient forum for all parties and witnesses. Plaintiffs in these actions are geographically dispersed across the country, making no single district most convenient to plaintiffs. Plaintiffs' counsel are similarly scattered, with counsel based in cities across the country, including New Orleans, Houston, Philadelphia, Los Angeles, and Jackson, Mississippi. A large international airport serves Philadelphia and provides daily, non-stop service to most metropolitan areas. The panel has previously recognized Philadelphia's central location and accessibility in finding that the Eastern District of Pennsylvania was an appropriate MDL forum.

Finally, "[t]ransfer under Section 1407 will have the salutary effect of assigning the present actions to a single judge who can formulate a pretrial program that 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 and the courts." *In re Brimonidine Patent Litigation*, 607 F. Supp. 2d 1381, 1382 (J.P.ML. 2007). There is an "obvious need for a transferee judge with the ability and temperament to manage this large and growing litigation in an efficient and expeditious manner." *In re Diet Drugs Products Liability Litigation*, 990 F. Supp. 834, 836 (J.P.M.L. 1998).

Judge Rufe has the ability and temperament to manage this litigation as shown by previous MDLs that she has presided over, and she is well-equipped to handle and manage these Effexor Cases. In October 2007, the Panel consolidated thousands of cases before Judge Rufe in *In re: Avandia Marketing, Sales Practices & Prods. Liab. Litig*, MDL No. 1871. Under Judge

Rufe's guidance, over 50,000 Avandia cases have been resolved and the Avandia litigation is currently near completion.

In April of 2012, this Panel consolidated the *In re: Zoloft Products Liability Litigation, MDL 2342* (hereinafter referred to as "the Zoloft cases"), before Judge Rufe. The plaintiffs in the Zoloft cases make almost identical allegations to those being made by the *Boyers* and other plaintiffs in the Effexor Cases. As a result, Judge Rufe is well-acquainted with the legal and factual issues that are relevant to antidepressant birth defect cases. Her experience in the Zoloft cases makes her an ideal Judge to handle the Effexor Cases.

Most importantly, Judge Rufe operates in a very efficient, effective and professional manner. These attributes have helped her to assist the parties in resolving a large majority of cases in the *In re: Avandia Marketing, Sales Practices & Prods. Liab. Litig.*, 528 F. Supp. 2d 1341 (J.P.M.L. 2007) and to efficiently and effectively manage the Zoloft cases.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request an Order transferring the actions identified in the accompanying Schedule of Actions to Judge Cynthia M. Rufe in the Eastern District of Pennsylvania for pretrial coordination and granting such other and further relief as the Panel may deem just and proper.

Dated: April 24, 2013

Respectfully submitted,

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