BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

In re: Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation — MDL Docket No. 2459

PFIZER INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO TRANSFER ACTIONS PURSUANT TO 28 U.S.C. § 1407

Defendant Pfizer Inc. ("Pfizer") submits this memorandum in opposition to the motion by Plaintiffs Smalls, Kane, and Turner to establish a multidistrict litigation proceeding based on the five actions identified in their motion.

INTRODUCTION

This Panel has previously recognized the wisdom of not creating an MDL proceeding when the existing infrastructure is more than adequate to handle the pending litigation. Here, Plaintiffs identified in their motion only five actions, three of which were filed by the same counsel and are pending before a single judge in the District of South Carolina. The two other cases identified in the motion are pending in the Eastern District of Virginia (*Colbert*) and the Southern District of Illinois (*Hines*).[1]

These cases are well-suited to the kind of formal and informal coordination that this Panel has repeatedly cited as an appropriate alternative to an MDL where, as here, there are so few cases and where there are common counsel on both sides. Indeed, Pfizer's counsel has begun coordinating with counsel in the South Carolina actions (which include the first filed cases), and is ready and willing to work cooperatively with Plaintiffs' counsel in the remaining actions to appropriately coordinate any common discovery or other pretrial matters across the cases. Counsel for both Plaintiffs and Pfizer have substantial experience litigating and managing

[1] Since the filing of Plaintiffs' motion, two other cases have been identified as related, another case filed by the same counsel in the District of South Carolina (*Clark*) and a case filed in the Middle District of Louisiana (*Christopher*).

actions like these and are well poised to work cooperatively to focus and advance the litigations in ways that will conserve the resources of the parties and each of the courts involved.

It is also important to note that although Lipitor has long been one of the most widely prescribed medications, there is no history of mass filings of Lipitor product liability actions, and no party has ever previously moved to create a Lipitor products liability personal injury MDL.[2] The relatively small number of product liability actions involving Lipitor that have been filed over the years have been handled effectively and efficiently in the courts in which they have been filed, and the same approach makes eminent sense with respect to the cases at issue here.

That additional actions may be filed in the future does not justify the expense of establishing an MDL and transferring cases away from Plaintiffs' home jurisdictions. In addition, as past experience in similar litigations has confirmed, the creation of a products liability MDL, particularly where the product at issue – Lipitor – is one of the most-prescribed medicines in history, would inevitably invite the filing of numerous copycat actions with questionable merit by counsel hoping to avoid diligent prosecution of their claims and to leverage volume to coerce settlement. Absent such potentially massive filings of cases that would not otherwise have been brought, the parties will be able to more quickly and effectively reach the merits of what will be highly science-based and case-specific actions and avoid years of uncertainty, and expense, for Plaintiffs, Defendant, and the judicial system alike.

In sum and as set forth in more detail below, Pfizer requests that the Panel deny Plaintiffs' motion and instead permit the parties to continue to work together to efficiently coordinate and litigate the filed cases.

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[2] In *In re Lipitor Marketing & Sales Practices Litigation*, MDL No. 1732 (J.P.M.L.), certain plaintiffs moved to create a sales and marketing MDL, but no personal injury claims were alleged in that litigation. In addition, those plaintiffs voluntarily withdrew their motion for MDL transfer. *See id.* Dkt. Nos. 17 & 18 (Jan. 25, 2006).

FACTUAL BACKGROUND

Lipitor is a prescription medicine that is manufactured and sold by Pfizer. It was approved by the Food and Drug Administration ("FDA") in 1996 and is one of a class of medicines commonly known as statins. Statins are prescribed by physicians to regulate blood cholesterol in their patients. Among other approved uses, Lipitor is approved to reduce the risk of heart attack, stroke, and certain kinds of heart surgeries in patients with multiple risk factors for coronary heart disease. Lipitor is one of the most well-studied prescription medicines ever approved, and it has been prescribed to over 20 million patients in the United States alone. *See* "About Lipitor," at http://lipitor.com/aboutLipitor.aspx (last visited May 17, 2013). Generic versions of Lipitor began to be sold in 2011.

Plaintiffs allege that Lipitor caused them to develop type 2 diabetes, and they cite language that was added to the warning sections of the labels for Lipitor and other statins in early 2012 stating that increases in blood sugar levels have been reported in statins, including Lipitor. Pfizer submits, however, that the available epidemiological data does not support Plaintiffs' claims that Lipitor causes diabetes or that Pfizer failed to adequately warn of a potential risk.

Type 2 diabetes, or non-insulin dependent diabetes, is the most common form of diabetes. It affects millions of Americans and has numerous risk factors and potential causes. Significantly, there is an overlap among the risk factors for developing type 2 diabetes (such as obesity and elevated cholesterol) and the risk factors for developing coronary heart disease. As noted, Lipitor is approved to reduce the risk of heart attacks and stroke in patients with or without coronary heart disease. In addition, the FDA has expressly advised, with respect to the potential risk of an increase in elevated blood sugar levels with statin use, that, "FDA continues to believe that the cardiovascular benefits of statins outweigh these small increased risks." Food

and Drug Administration, FDA Drug Safety Communication: Important safety label changes to cholesterol-lowering statin drugs (February 28, 2012), at http://www.fda.gov/Drugs/DrugSafety/ucm293101.htm.

As noted above, personal injury actions involving Lipitor have been efficiently managed in the past as individual actions, with appropriate coordination where claims have shared common issues, and there is no need to change that course now just because two law firms have moved for an MDL after filing a few cases. Any overlapping discovery of Pfizer that may be sought in these cases can be readily coordinated – through, among other things, cross-noticed depositions, shared document discovery, and cooperative conversations among counsel – without the need to transfer cases. Indeed, the cases were just filed and coordination is already underway. The moving Plaintiffs have not made any showing that such coordination is or will be inadequate to accomplish the objectives of justice and efficiency in the proceedings.

ARGUMENT

Transfer Will Not Promote the Just and Efficient Conduct of These Proceedings

As this Panel has explained, "[t]he 'just and efficient conduct' of the actions is the most important of the statutory criteria [under section 1407]. And, as the statute and congressional reports emphasize, the existence of a common fact is not enough to justify transfer of litigation to a single district; there must be a showing that the transfer will produce 'significant economy and efficiency of judicial administration.'" *In re Equity Funding Corp. of Am. Sec. Litig.*, 375 F. Supp. 1378, 1393-94 (J.P.M.L. 1974) (Wisdom, J., dissenting).[3]

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[3] *See also* 15 CHARLES ALAN WRIGHT, ARTHUR MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 3863 at 535-36 (2d ed. 1987) ("The third and most important prerequisite to obtaining a transfer under Section 1407 is a showing that the just and efficient conduct of the actions will be served thereby. Indeed, it has been argued that the crucial issue in determining whether to grant transfer is not whether there are common questions or whether the parties will be *(cont'd)*

Here, with fewer than ten filed cases in just a few different courts, the formation of an MDL will have the opposite effect by transferring cases away from Plaintiffs' home courts and generating a proliferation of other lawsuits that would not otherwise be filed. Indeed, the Panel has noted that where, as here, there are only a few actions pending, "'it is doubtful the transfer would enhance the convenience of parties and witnesses or promote judicial efficiency.'" *In re Scotch Whiskey*, 299 F. Supp. 543, 544 (J.P.M.L. 1969) (quoting S. Rep. No. 90-454, at 4-5 (1968)); *accord In re Highway Accident in Buffalo County., Neb., on Aug. 22, 2000*, 305 F. Supp. 2d 1359, 1360 (J.P.M.L. 2004). For these reasons, this Panel has repeatedly declined to establish an MDL where the litigation involves a small number of individual product liability cases. *See, e.g., In re Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) (denying centralization of five personal injury and wrongful death actions involving alleged defects in a surgical device); *In re Abbott Labs., Inc., Similac Prods. Liab. Litig.*, 763 F. Supp. 2d 1376, 1376-77 (J.P.M.L. 2011) (denying centralization of nine actions alleging injury from recalled baby formula); *In re Blair Corp. Chenille Robe Prods. Liab. Litig.*, 703 F. Supp. 2d 1379, 1380 (J.P.M.L. 2010) (denying centralization of four personal injury and wrongful death actions); *In re Depo-Provera Prods. Liab. Litig.*, 499 F. Supp. 2d 1348, 1349 (J.P.M.L. 2007) (denying certification of oral contraceptive medical monitoring class action and two personal injury actions); *accord In re Michaels Stores, Inc., Pin Pad Litig.*, 844 F. Supp. 2d 1368, 1368 (J.P.M.L. 2012) (denying transfer of seven individual consumer actions); *In re Air Crash Near Islamabad, Pak.*, 777 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011); *cf. In re Professional Basketball Antitrust Litig.*, 344

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inconvenienced, but whether 'the economies of transfer outweigh the resulting inconvenience to the parties.' *Read broadly, of course, this third requirement really subsumes the other two.*") (emphasis added) (citation omitted).

F. Supp. 1405, 1407 (J.P.M.L. 1972) (denying transfer of eight cases without prejudice because centralization was premature).[4] As in the foregoing, these cases should be allowed to proceed in their home jurisdictions, with appropriate coordination by counsel as to any overlapping discovery, and be efficiently decided on the merits of each individual complaint.

Plaintiffs try to obscure the fact that there is no urgent need for centralization here by asserting that "numerous additional filings are expected." (Pls.' Br. at 3.) But the Panel need not and should not speculate about whether and how the litigation might expand and should instead look to the currently filed cases. *See In re Intuitive Surgical*, 883 F. Supp. 2d at 1340 (denying motion to transfer, noting, "[w]hile proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, we are presented with, at most, five actions"). Of course, it is possible that Plaintiffs' counsel or others might choose to file more suits in other jurisdictions. But – absent active solicitation on the part of plaintiffs' attorneys and the filing of cases without proper screening – a rush of lawsuits is unlikely. The claims at issue are not based on new information that would prompt mass filings. The label change Plaintiffs cite took place in early 2012, well over a year ago. No further label change has been requested, and Plaintiffs do not cite any new data or evidence to support their claims that Pfizer failed to adequately warn of a risk that Lipitor can cause diabetes.

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[4] Indeed, when the Panel has decided to establish product liability MDLs that are comprised of a relatively small numbers of actions, they typically involve multiple putative class actions rather than individual personal injury claims. *See, e.g., In re Canon U.S.A., Inc., Digital Cameras Prods. Liab. Litig.*, 416 F. Supp. 2d 1369, 1370 (J.P.M.L. 2006) (coordinating two putative class actions and one potential tag-along class action); *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 344 F. Supp. 2d 755, 756 (J.P.M.L. 2004) (coordinating five putative class actions); *In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, MDL 1396, 2001 WL 36292052, at *1-2 (J.P.M.L. Apr. 18, 2001) (coordinating eight putative class actions).

Finally, Plaintiffs argue that consolidation is necessary to avoid duplicative discovery. But as the Panel has recognized, courts and parties can employ numerous mechanisms to minimize the possibility of duplicative discovery without resorting to the formation of an MDL:

> We observe that suitable alternatives to Section 1407 transfer are available in order to minimize the possibility of duplicative discovery. For example, notices for a particular deposition could be filed in all actions, thereby making the deposition applicable in each action; the parties could seek to agree upon a stipulation that any discovery relevant to more than one action may be used in all those actions; and any party could seek orders from the three courts directing the parties to coordinate their pretrial efforts. Moreover, the parties may seek stays of two of the actions pending the outcome of the third.
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> Additionally, consultation and cooperation among the . . . concerned district courts, if deemed appropriate by those courts, coupled with the cooperation of the parties, would be sufficient to minimize the possibility of conflicting pretrial rulings.

In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig., 446 F. Supp. 242, 244 (J.P.M.L. 1978) (citations omitted); *see also In re Fout & Wuerdeman Litig.*, 657 F. Supp. 2d 1371, 1371 (J.P.M.L. 2009) (transfer of four personal injury actions denied because "alternatives to transfer exist that may minimize whatever possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings"); *In re Children's Pers. Care Prods. Liab. Lit.*, 655 F. Supp. 2d 1365, 1366 (J.P.M.L. 2009) (discussing range of informal coordination mechanisms); *accord In re Waggin' Train Chicken Jerky Pet Treat Prods. Liab. Litig.*, 893 F. Supp. 2d 1357, 1357 (J.P.M.L. 2012).

Indeed, this Panel has admonished that where, like here, a litigation is comprised of a small number of cases, "informal cooperation among the involved attorneys and courts is both practicable and preferable." *In re Northeast Contaminated Beef Prods. Liab. Litig.*, MDL No. 2346, 856 F. Supp. 2d 1354, 1355 (J.P.M.L. 2012); *see also In re Intuitive* Surgical, 883 F. Supp. 2d at 1340 ("We consider voluntary coordination among the parties and the involved courts of

these relatively few [five] actions to be a preferable alternative to centralization at this time."); *accord In re Abbott Labs., Inc., Similac Prods. Liab. Litig.*, 763 F. Supp. 2d 1376, 1377 (J.P.M.L. 2011).

The Panel's guidance applies directly here, where: (1) the majority of the few cases are before one judge, Judge Richard Gergel in the District of South Carolina; (2) there is only one Defendant with common counsel in all the cases; (3) the same group of Plaintiffs' lawyers are involved in nearly all the cases (with the same firms involved in at least the South Carolina cases and the Illinois case); (4) those lawyers have already begun to work cooperatively, and with Judge Gergel's support, to coordinate pretrial proceedings; and (5) all the cases were recently filed and discovery has not yet commenced. *See, e.g., In re Northeast Contaminated Beef*, 856 F. Supp. 2d at 1355 ("Plaintiffs in two actions are represented by common counsel. . . . In these circumstances, informal cooperation among the involved attorneys and courts is both practicable and preferable."); *In re Rite Aid Corp. Wage & Hour Employment Practices Litig.*, 655 F. Supp. 2d 1376, 1376 (J.P.M.L. 2009) (transfer denied "where plaintiffs in four of the six actions encompassed by the motion share counsel"); *Multidistrict Litigation Manual* § 5:52 (2012 ed.) ("The Panel has also noted that the fact that the parties in numerous cases were represented by the same counsel militated in favor of finding that 'alternatives to transfer' exist.").

In short, the interest of promoting judicial economy and efficiency in the filed cases is best served by denying Plaintiffs' motion.

CONCLUSION

For the foregoing reasons, Pfizer respectfully requests that the Panel deny Plaintiffs' Motion for Transfer.

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