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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SYLVIA WEAVER,

Plaintiff,

v.

PFIZER, INC., et al.,

Defendants.

2:14-cv-0818 KJM KJN

ORDER

Defendant Pfizer's motion to stay the proceeding and plaintiff Weaver's motion to remand both are currently pending before the court. Defendant McKesson Corporation has joined in the motion to remand. The court ordered the motions submitted on the pleadings and after considering the parties' arguments, the court GRANTS the motion to stay and DENIES the motion to remand without prejudice.

I. BACKGROUND

On March 27, 2014, plaintiff filed a complaint in Solano County Superior Court alleging generally that she developed Type II diabetes as a result of taking Lipitor, a drug manufactured by Pfizer and distributed by McKesson, and that defendants failed to advise consumers of the risk that taking Lipitor could cause Type II diabetes. She pleads eight causes of action: (1) strict liability; (2) negligence; (3) breach of express warranty; (4) breach of implied warranty; (5) fraud; (6) fraudulent concealment; (7) unfair competition, CAL. BUS. & PROF. CODE

1 § 17200, et seq.; and (8) false advertising, CAL. BUS. & PROF. CODE § 17500. ECF No. 1-2 at
2 5-21.

3 Defendant Pfizer removed the case to this court on April 1, 2014. ECF No. 1.
4 Defendant alleged McKesson's consent for removal was not required because the action is a mass
5 action, 28 U.S.C. § 1453(b), and because McKesson is fraudulently joined. See 28 U.S.C.
6 § 1446(b)(2)(A) (“[A]ll defendants who have been properly joined . . . must join in or consent to
7 the removal of the action.”); ECF No. 1 at 22-23.

8 On April 3, 2014, Pfizer filed a motion to stay the proceedings pending a decision
9 whether this action should be transferred to the multidistrict litigation (MDL) court hearing
10 similar cases against Pfizer, as well as a decision in the Ninth Circuit's *en banc* cases of *Romo v.*
11 *Teva Pharmaceuticals USA, Inc.*, No. 13-5631, and *Corber v. Xanodyne Pharmaceuticals, Inc.*,
12 No. 13-56306 concerning the removal of multiple California cases as a single mass action, which
13 may provide guidance on the question of remand. ECF No. 6.

14 Weaver filed her motion to remand on April 8, 2014. ECF No. 9.

15 II. THE MOTION TO STAY

16 Pfizer argues that staying the case pending the decision whether it will be
17 transferred to the MDL court promotes judicial economy and will not prejudice plaintiff. ECF
18 No. 6 at 6-7. Plaintiff argues the motion to remand must be considered first because it raises
19 jurisdictional issues, which are threshold matters in any suit. ECF No. 13 at 3-6. In reply Pfizer
20 says that cases in the Ninth Circuit considering the same issues in other Lipitor litigation have
21 rejected plaintiff's position that the transferor court must resolve jurisdictional issues while the
22 question of transfer is pending. ECF No. 15 at 2 (*citing, e.g., Davis v. Pfizer*, No. C 14-1204 SI,
23 2014 WL 1599005 (N.D. Cal. Apr. 21, 2014); *Little v. Pfizer Inc.*, 2014 WL 1599005 (N.D. Cal.
24 Apr. 18, 2014); *Fernandez v. Pfizer*, No. CV 14-01806-CJC (JPRx), 2014 WL 1689272 (C.D.
25 Cal. Apr. 16, 2014) (declining to lift a previously-issued stay)).
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1 The Judicial Panel on Multidistrict Litigation (JPML) is authorized to transfer
2 “civil actions involving one or more common questions of fact,” which “are pending in different
3 districts . . . to any district for coordinated or consolidated pretrial proceedings.” 28 U.S.C.
4 § 1407(a). On February 18, 2014, the JPML created a multi-district litigation proceeding in *In re:*
5 *Lipitor (Atorvastatin Calcium) Marketing, Salespractices and Products Liability Litigation*
6 *(No. II)*, MDL No. 2502 and assigned it to the Honorable Richard M. Gergel, Southern District of
7 South Carolina, for coordinated or consolidated pretrial proceedings. MDL 2502, Docket
8 No. 103. The cases initially consolidated allege generally that the plaintiffs developed Type II
9 diabetes as a result of taking Lipitor and contend that Pfizer failed to warn them adequately of the
10 risk of developing Type II diabetes from taking Lipitor. *Id.* at 1. On March 27, 2014, Pfizer
11 identified this action as a potential tag-along for potential transfer to the MDL court. MDL 2502,
12 Docket No. 270-1.

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15 Because the pendency of the MDL notice does not prevent the court from acting
16 on pretrial matters, *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. 1997), “a court
17 may stay proceedings . . . or may consider a motion to remand.” *Jennings v. Fresenius USA, Inc.*,
18 Case. No. 13-cv-03795-WHO, 2013 WL 5487224, at *2 (N.D. Cal. Oct. 2, 2013). In addition,
19 the pendency of the jurisdictional issues raised by the motion to remand does “not deprive the
20 MDL panel of the ability to transfer the case.” *Grispino v. New England Mut. Life Ins. Co.*, 358
21 F.3d 16, 19 n.3 (1st Cir. 2004); *see also In re Vioxx Prod. Liab. Litig.*, 360 F. Supp. 2d 1352,
22 1354 (J.P.M.L. 2005) (“The pendency of a motion to remand to state court is not a sufficient basis
23 to avoid inclusion in Section 1407 proceedings.”).

24 Neither party disputes that district courts have the inherent power to stay
25 proceedings. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (“The power to stay
26 proceedings is incidental to the power inherent in every court to control the disposition of the
27 causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”)
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1 (Cardozo, J.). In ruling on motions to stay, district courts must “exercise [their] judgment, which
2 must weigh competing interests and maintain an even balance.” *Id.* at 255–56. Courts consider
3 the following factors when deciding whether to grant a motion to stay proceedings pending the
4 MDL Panel’s decision: “(1) potential prejudice to the non-moving party; (2) hardship and
5 inequity to the moving party; and (3) the judicial resources that would be saved by avoiding
6 duplicative litigation” *Rivers*, 980 F. Supp. at 1360.

7 As noted, plaintiff contends that before the court can even consider the propriety
8 of a stay, it must determine whether it has subject matter jurisdiction based on the removal
9 because jurisdiction is a threshold matter. ECF No. 13 at 3. It is true that “a federal court may
10 not rule on the merits of a case without first determining that it has jurisdiction” *Sinochem*
11 *Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430-31 (2007). Nevertheless, a
12 court may address threshold questions before considering its jurisdiction. *Id.* at 431 (holding that
13 a court could consider *forum non conveniens* before deciding jurisdictional questions because that
14 involves a “determination that the merits should be adjudicated elsewhere”). As a stay is not a
15 decision on the merits, there is no bar to considering the question before considering the
16 jurisdictional questions presented by the motion to remand.

17 Questions of jurisdiction aside, the Ninth Circuit has not prescribed the order in
18 which this court should address the questions. The parties each cite a number of district court
19 cases supporting their positions, a clear demonstration of the lack of consensus on the issue.
20 District courts in the Ninth Circuit and even courts in this district have reached opposite
21 conclusions. *Compare Alanis v. Pfizer*, No. 1:14-cv-00365 LJO MJS, 2014 WL 1711702, at *2
22 (E.D. Cal. May 1, 2014) (addressing the motion for a stay even though a motion for remand was
23 pending and discussing the question of the proper order) *with K.E.R. v. Pfizer, Inc.*, No. CIV-S-
24 13-1401 LKK/AC, 2013 WL 5755076, at *2 (E.D. Cal. Oct. 23, 2013) (remanding a case even
25 though a motion to stay was pending without addressing the question of the proper order); *see*
26 *also Hatherley v. Pfizer, Inc.*, No. CIV 1:13-00719-WBS-CKD, 2013 WL 3354458, at *9 (E.D.
27 Cal. Jul. 3, 2013) (remanding case despite the pendency of a motion to stay without addressing
28 the question of the proper order); *Rubio v. Arndal*, No. 1:13-cv-0027 LJO BAM, 2013 WL

1 796669, at *4-5 (E.D. Cal. Mar. 4, 2013) (granting a stay despite the pendency of a motion to
2 remand after rejecting the idea that the jurisdictional issues presented by the remand must be
3 decided first). Some courts have observed that “[w]here a motion to remand and a motion to stay
4 are pending, courts have held that ‘deference to the MDL court for resolution of a motion to
5 remand often provides the opportunity for the uniformity, consistency, and predictability in
6 litigation that underlies the MDL system.’” *Alanis*, 2014 WL 1711702, at *2 (quoting *Rifenberry*
7 *v. Organon USA, Inc.*, No. 13-cv-05463-JST, 2014 WL 296955, at *1 (N.D. Cal. Jan. 26, 2014)).
8 Finding the latter consideration persuasive, this court turns to the merits of the motion to stay the
9 proceedings.

10 1. Judicial Efficiency

11 Plaintiff alleges that she developed Type II diabetes as the result of her use of
12 Lipitor, yet defendants did not adequately warn her of the danger of this outcome; the cases
13 before the MDL court raise similar issues. Given the identity of the issues, granting the stay
14 pending the MDL court’s transfer decision would relieve this court of any duty to address pretrial
15 issues that might well ultimately be heard by another judge. Staying the action would thus
16 promote judicial efficiency. *Jennings*, 2013 WL 5487224, at *2 (“If other cases pending before
17 the JPML raise similar issues, it weighs strongly in favor of staying the proceedings.”) (internal
18 citation and quotation marks omitted); *Couture v. Hoffman-La Roche, Inc.*, No. C–12–2657 PJH,
19 2012 WL 3042994, at *2 (N.D. Cal. Jul. 25, 2012)

20 In addition, some of the California plaintiffs whose cases have already been
21 transferred to the MDL are arguing their cases were improperly removed under CAFA and
22 because defendant McKesson was not fraudulently joined. MDL No. 2502, Docket No. 286-1.
23 Plaintiff’s motion to remand raises the same challenges. *See* ECF No. 9. The fact that “the MDL
24 Court will be called upon to adjudicate the same jurisdictional questions posed in this case” also
25 supports the issuance of the stay to “promote[] judicial efficiency, avoid[] duplicative litigation,
26 and avoid[] the risk of inconsistent results.” *Alanis*, 2014 WL 1711702, at *2.

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1 2. Potential Prejudice to the Non-Moving Party

2 Plaintiff claims that staying this matter so the MDL court can hear the remand
3 motion after transfer will cause her extreme prejudice because of the delay in any resolution of
4 her motion to remand and the distance she will have to travel for proceedings on the motion. ECF
5 No. 13 at 7. Citing to no evidence or case law, plaintiff’s counsel asserts that he has observed
6 more than one year delays between filing a lawsuit and a hearing on motions to remand in other
7 MDLs; he then opines that a similar delay is likely in the Lipitor MDL, particularly because
8 remand was not addressed in the latest case management order. *Id.* at 7-8.

9 If the case is transferred, resolution of plaintiff’s motion to remand will
10 undoubtedly be delayed, but “such delay does not constitute prejudice sufficient to outweigh the
11 efficiency gains of staying this action.” *Little v. Pfizer*, No. C-14-1177 EMC, 2014 WL 1569425,
12 at *3 (N.D. Cal. Apr. 18, 2014). If the case is not transferred, plaintiff may then renew with a
13 simple notice its motion to remand and the court will resolve it as expeditiously as possible.

14 Plaintiff does complain that requiring her to travel to South Carolina to argue her
15 motion to remand is “substantially inconvenient.” ECF No. 13 at 8. She cites nothing suggesting
16 this inconvenience constitutes the kind of prejudice that would outweigh the benefits of staying
17 this case until the MDL court has acted.

18 3. Hardship to the Moving Party

19 The potential burden on Pfizer of having to defend itself in multiple fora favors
20 entry of a stay pending the decision of the MDL court. *Falk v. Gen’l Motors Corp.*,
21 No. C 07-01731 WHA, 2007 WL 3101649, at *3 (N.D. Cal. Oct. 22, 2007). Moreover, defendant
22 may have to relitigate any decisions this court reaches if the case is transferred to the MDL court.
23 *Gibson v. Bristol-Myers Squibb Co.*, No. C 13–01416 SBA, 2013 WL 2081964, at *1 (N.D. Cal.
24 May 14, 2013). This too favors a stay.

25 Because the court finds it proper to stay the case pending a decision on transfer to
26 the MDL court, it does not address whether a stay would also be proper pending the Ninth
27 Circuit’s en banc decision in *Romo v. Teva Pharmaceuticals USA, Inc.*, No. 13-5631, and
28 *Corber v. Xanodyne Pharmaceuticals, Inc.*, No. 13-56306.

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IT IS THEREFORE ORDERED that:

1. Defendant Pfizer's motion to stay, ECF No. 6, is granted;
2. Plaintiff's motion to remand, ECF No. 9, is denied as moot, without prejudice;

and

3. All dates and hearings currently set in this case are VACATED until after the MDL Panel's ruling is issued. The parties are directed to notify the court of the MDL Panel's decision within 7 days of the Panel's ruling.

DATED: May 15, 2014.


UNITED STATES DISTRICT JUDGE