UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION *Walgreen Co. et al. v. Warner Chilcott PLC et al.,* Civil Action No. 1:14-cv-102	C.A. No. 1:13-md-2472-S

MOTION TO STAY THE WALGREEN PLAINTIFFS' ACTION

Defendants hereby move the Court to stay the action brought by Plaintiffs Walgreen Co., The Kroger Co., Safeway Inc., HEB Grocery Company L.P., and Albertson's LLC, Civil Action No. 1:14-cv-102 ("Walgreen Plaintiffs"), pending the resolution of the appeal to the First Circuit Court of Appeals of this Court's September 4, 2014 Opinion and Order dismissing certain of the purported class plaintiffs' claims, ECF No. 116.

The grounds for Defendants' motion are set forth in the accompanying memorandum of law.

Dated: November 21, 2014

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY THE WALGREEN ACTION

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INTRODUCTION

The Walgreen Plaintiffs[1] brought this antitrust suit (the "Walgreen action") as purported direct purchasers of Loestrin® 24 Fe ("Loestrin 24"). As demonstrated herein, the Walgreen action should be stayed pending the First Circuit's review of this Court's September 4, 2014 Opinion and Order dismissing substantially similar complaints filed by putative classes of direct and indirect purchaser plaintiffs. The First Circuit's decision on appeal would be dispositive of the major issue at the heart of the Walgreen action – whether the challenged patent settlements are unlawful under the Supreme Court's decision in *FTC v. Actavis, Inc*., 133 S. Ct. 2223 (2013). A stay would further the interests of justice by avoiding unnecessary and expensive litigation and conserving the resources of the parties and this Court, while imposing no prejudice or harm on the Walgreen Plaintiffs.

PROCEDURAL BACKGROUND

On February 7, 2014, the Actavis Defendants[2] moved to dismiss the Consolidated Amended Class Action Complaint (ECF No. 39) filed by putative direct purchaser class plaintiffs American Sales Company, LLC and Rochester Drug Co-Operative, Inc. ("Direct Purchaser Class Plaintiffs"), and the Actavis and Lupin Defendants[3] separately moved to dismiss the Consolidated Class Action Complaint (ECF No. 40) filed by putative indirect purchaser class

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[1] Plaintiffs Walgreen Co., The Kroger Co., Safeway Inc., HEB Grocery Co. L.P. and Albertson's LLC are referred to collectively as the "Walgreen Plaintiffs."

[2] The "Actavis Defendants" are Warner Chilcott Public Limited Company, Warner Chilcott Company, Inc., Warner Chilcott Company, LLC, Warner Chilcott (US), LLC, Warner Chilcott Laboratories Ireland Limited, Warner Chilcott Holdings Company III, Ltd., Warner Chilcott Corporation, Warner Chilcott Sales (US), LLC, Actavis, Inc., Watson Pharmaceuticals, Inc., and Watson Laboratories, Inc.

[3] The "Lupin Defendants" are Lupin Ltd. and Lupin Pharmaceuticals, Inc. The Lupin Defendants were not named as defendants in the Direct Purchaser Class Plaintiffs' Consolidated Amended Class Action Complaint.

plaintiffs ("End-Payor Class Plaintiffs," and together with the Direct Purchaser Class Plaintiffs, the "Class Plaintiffs"). *See* ECF Nos. 74 and 76. Over two weeks later, on February 25, 2014, the Walgreen Plaintiffs filed a complaint asserting claims under Section 1 of the Sherman Act which are substantially identical to the claims brought by the Class Plaintiffs. The Walgreen Plaintiffs, like the Class Plaintiffs, allege that Defendants entered into so-called "reverse payment" agreements settling patent litigation pertaining to Loestrin 24. Compl. & Jury Demand, *Walgreen Co. et al. v. Warner Chilcott Public Limited Company et al.*, Civil Action No. 1:14-cv-00102-S-PAS, ECF No. 1 ("Walgreen Complaint"). Unlike the Class Plaintiffs, the Walgreen Plaintiffs also assert claims under Section 2 of the Sherman Act, alleging that the Actavis Defendants committed *Walker Process* fraud by: (1) fraudulently procuring and enforcing U.S. Patent No. 5,552,394 ("the '394 patent"), which covers Loestrin 24; (2) listing the '394 patent in the Orange Book for Loestrin 24; (3) enforcing the '394 patent against generic manufacturers; and (4) alleged "product hopping" from Loestrin 24 to Lo Loestrin® 24 Fe. Walgreen Compl., ¶¶ 72-122, 145-155, 192-203.

Because the Walgreen Complaint was filed after Defendants had already moved to dismiss the class action complaints, this Court entered stipulations allowing Defendants to respond to the Walgreen Complaint after a decision on Defendants' motions to dismiss the Direct Purchaser and End-Payor Class Complaints. *See* ECF Nos. 113, 115. While Defendants' motions to dismiss were pending, the parties began certain discovery related to the underlying patent litigations. The Actavis Defendants produced materials related to the patent litigations

between November 2013 and June 2014, including pleadings, the parties' respective document productions, and deposition transcripts and exhibits.[4]

On September 4, 2014, this Court dismissed Direct Purchaser and End-Payor Class Plaintiffs' Section 1 claims that the Loestrin 24 patent settlement agreements contained reverse payments – the same patent settlement agreements, containing the same claimed reverse payments that the Walgreen Plaintiffs challenge. *See* Opinion, & Order, ECF No 116 ("September Order"). On October 6, 2014, the Direct Purchaser Class Plaintiffs filed a Notice of Appeal of this Court's Opinion and Order to the United States Court of Appeals for the First Circuit. The parties are moving forward with the appeal and have entered appearances. The End-Payor Class Plaintiffs filed a Motion for Reconsideration or Alternatively to Certify the Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and to Stay the Proceeding on October 20, 2014 ("Reconsideration Motion"), ECF No. 126. Defendants will file a response to that motion opposing reconsideration but agreeing that immediate appeal is appropriate under Fed. R. Civ. P. 54(b) (rather than under 28 U.S.C. § 1292(b)) when that response is due on December 5, 2014. Assuming appellate review is granted, the End-Payor Class Plaintiffs also seek a stay of their action pending First Circuit review of this Court's ruling on their federal claims. ECF No. 126, at 13. Defendants agree that such a stay is appropriate.

ARGUMENT

"[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

[4] The Actavis Defendants have produced over 170,000 pages to date. The Actavis Defendants have provided copies of those discovery materials to the Walgreen Plaintiffs under the terms of the Protective Order entered on February 11, 2014, ECF No. 79.

counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."). Supreme Court precedent makes clear that a "district court ha[s] discretion to stay [a] suit pending resolution of another which, 'even if it should not dispose of all the questions involved, would certainly narrow the issues in the pending cas(e) and assist in the determination of the questions of law involved.'" *Taunton Gardens Co. v. Hills*, 557 F.2d 877, 879 (1st Cir. 1977) (third alteration in original) (quoting *Landis*, 299 U.S. at 253-54); *see also Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("In the exercise of a sound discretion [a court] may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same."); *Global Mar. Leasing Panama, Inc. v. M/S N. Breeze*, 349 F. Supp. 779, 784 (D.R.I. 1972) (granting stay where outcome of arbitration proceeding would be determinative in instant action); *Salomon S.A. v. Scott USA Ltd.*, 117 F.R.D. 320, 321 (D. Mass. 1987) ("A district court may, in its discretion, defer or abate proceedings where another suit, involving identical issues, is pending in either a federal or state court, and where it would be duplicative, uneconomical, and vexatious to proceed otherwise.").

Courts weigh three factors to determine whether a stay should be ordered: "(1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party without a stay; and, (3) judicial economy." *Good v. Altria Grp., Inc.*, 624 F. Supp. 2d 132, 134 (D. Me. 2009). Each of these factors weighs heavily in favor of a stay in this case pending a decision by the First Circuit. A stay at this juncture will promote judicial efficiency, lessen burdens and inefficiencies for the parties and the Court, and will not prejudice the Walgreen Plaintiffs.

I. A Stay Will Not Prejudice the Walgreen Plaintiffs

The Walgreen Plaintiffs face no prejudice or injury from any temporary stay of this case. The Walgreen Plaintiffs do not allege that they need immediate resolution of their claims to preserve or protect their businesses from any alleged injury, or that they are in danger of going out of business as a result of Defendants' alleged misconduct. Rather, the Walgreen Plaintiffs seek to recover damages which were allegedly sustained in a finite window, ending on January 22, 2014, when generic entry admittedly occurred.[5] Therefore, there is no claim that the requested stay could cause the Walgreen Plaintiffs additional or ongoing alleged injury. *See King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, slip op., Nos. 2:06-cv-1797, 2:06-cv-1833, 2:06-cv-2768, 2:08-cv-2141, at 4-5 (E.D. Pa. Aug. 29, 2012), ECF No. 479 (granting motion to stay in part because plaintiffs could not suffer additional alleged injury when plaintiffs were limited to monetary damages for period that brand allegedly precluded generic competition, "a period which may now be closed by virtue of the entry of generic competition into the market"); *see also SmithKline Beecham Corp. v. Apotex Corp.*, No. 99-CV-4304, 2004 WL 1615307, at *8-9 (E.D. Pa. July 16, 2004) (finding that stay would not harm party that continued to sell materials to generic producers despite pending litigation).

Additionally, the Walgreen Plaintiffs already have access to a significant amount of discovery including almost 200,000 pages of patent litigation materials. Those patent litigation

[5] The Walgreen Plaintiffs admit that generic entry occurred on January 22, 2014, Compl. ¶¶ 125, 155, 205, and further admit that the '394 patent expired on July 22, 2014, *id.* at ¶ 137. Indeed, there are two FDA-approved generic versions of Loestrin 24. Amneal Pharmaceuticals has approval to sell its generic version of Loestrin 24 under Abbreviated New Drug Application ("ANDA") No. 78-267 and Famy Care Ltd. has approval to sell its generic version under ANDA No. 202742. *See Therapeutic Equivalents (Loestrin 24 Fe)*, U.S. Food and Drug Admin., http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm?fuseaction=Search.Generics&Mkt=1 (last visited Nov. 18, 2014).

materials include the challenged patent settlement agreements, patent litigation pleadings, and written discovery responses, document productions, and deposition transcripts and exhibits from the patent litigations, and contain the core documents relevant to the Walgreen Plaintiffs' claims.

Moreover, the requested stay will be reasonably short in duration, particularly when balanced with the significant benefit to judicial efficiency discussed below. Defendants seek to stay the Walgreen action only through the resolution of the Class Plaintiffs' First Circuit appeals of the September Order. The First Circuit's median time interval for merit terminations of appeals is currently 11.54 months.[6] "When a court grants a stay, the time period of the stay is reasonable if the period is limited to the termination of a pending appeal." *Rivera v. P.R. Tel. Co.*, No. 09-1723 (JP), 2009 WL 3160839, at *1 (D.P.R. Sept. 29, 2009) (citing *Taunton*, 557 F.2d at 879); *see also Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, No. 11-0011, 2011 WL 4056318, at *2 (D.N.J. Sept. 12, 2011) (staying case pending decision within the year); *Resco Prods., Inc. v. Bosai Minerals Grp. Co.*, No. 06-235, 2010 WL 2331069, at *6 (W.D. Pa. June 4, 2010) ("[T]he court does not agree with plaintiff's position that staying the proceedings for six to twelve months would be substantially prejudicial."); *Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. CV F 04-6663 AWI LJO, 2007 WL 135688, at *15 (E.D. Cal. Jan. 16, 2007) ("[A]s a practical matter, Plaintiffs are unlikely to suffer any inequity or hardship from a six-month stay of proceedings . . . .").

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[6] *See U.S. Court of Appeals – Judicial Caseload Profile*, U.S. Courts, 6 (June 2014) http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2014/appeals-fcms-profiles-june-2014.pdf#page=5.

II. Judicial Economy Strongly Favors a Stay

Courts strongly favor stays when judicial economy would be furthered by the entry of the stay, particularly in complicated multidistrict litigation involving multiple parties and multiple complaints. Here, allowing the Walgreen action to proceed ahead of the Class Plaintiffs' actions would lead to duplicative efforts, lack of coordination between the parties, and/or potentially inconsistent results. *See Irving Acquisition, Inc. v. Kaplan*, Nos. 2:13–cv–271–JAW, 2:13–cv–275–JAW, 2014 WL 359496, at *3 (D. Me. Jan. 31, 2014) (granting stay "to avoid the possibility of inconsistent outcomes within this District, particularly when there has been no showing that a stay will harm either side of this dispute unduly"); *G.R. Homa v. Am. Express Co.*, No. 06-2985 (JAP), 2010 WL 4116481, at *9 (D.N.J. Oct. 18, 2010) (finding stay to be "most efficient means . . . to prevent the possibility of having any advancement nullified" and avoid "redundant resolutions of issues"). The failure to grant a stay risks at least the following significant duplications and inefficiencies:

> First, with their Section 1 claims, the Walgreen Plaintiffs assert the very same challenges to the Warner Chilcott-Watson and Warner Chilcott-Lupin patent settlement agreements as do the Direct Purchaser and End-Payor Class Plaintiffs. Indeed, since the Walgreen Plaintiffs assert no different alleged "reverse payments" than the Class Plaintiffs (and certainly no new "cash" payments), this Court's September Order covers and disposes of these claims. It therefore makes little sense for the parties to brief and argue the Walgreen Plaintiffs' Section 1 claims before receiving guidance from the First Circuit. *See Rivera*, 2009 WL 3160839, at *1 ("If the motion to stay is not granted, Defendants will have to spend time, money, and effort re-litigating an issue that could become moot upon resolution of the appeal by the First Circuit."); *see also Bechtel Corp.*

v. Local 215, Laborers' Int'l Union of N. Am., 544 F.2d 1207, 1215 (3d Cir. 1976) ("possibility" that arbitration would eliminate legal claims "sufficient justification to warrant the stay"); *Bais*, 2011 WL 4056318, at *2 ("[P]roceeding with the case despite the possibility of dismissal would be a waste of judicial resources.").

Second, although the Walgreen Plaintiffs assert Section 2 claims including *Walker Process* fraud, sham patent enforcement, and a product improvement theory which Plaintiffs pejoratively label a "product hop," addressing those claims on a different track poses risks of undue burden on the Court and the parties including:

(a) Both the Walgreen Plaintiffs' Section 1 and Section 2 claims allege the same competitive harm—a delay in the entry of generic alternatives to Warner Chilcott's Loestrin 24 products.[7] There can only be one "but for" entry date for generic Loestrin 24. Allowing the Walgreen Plaintiffs to move forward with their Section 2 claims, with the risk that the Class Plaintiffs will possibly reenter the case at a later date and argue their own versions of when generic competition would have commenced absent Defendants' alleged wrongdoing, is a recipe for potentially inconsistent and generally confusing outcomes.

[7] For both sets of claims, the Walgreen Plaintiffs must plead and ultimately prove: (a) anticompetitive conduct and (b) a substantially adverse impact on competition in a relevant market. *See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("It is settled law that [§ 2 of the Sherman Act] requires . . . monopoly power in the relevant market . . . accompanied by an element of anticompetitive *conduct*."); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 459 (1993) (noting that antitrust plaintiffs must prove "that the defendant has engaged in predatory or anticompetitive conduct . . . [and] the defendant's ability to lessen or destroy competition in [the relevant] market").

(b) Both the Walgreen Plaintiffs' claims and the Class Plaintiffs' claims allege the same relevant product market and are premised on the same claimed market power on the part of Defendants in that alleged market. A determination on the relevant product market is potentially dispositive of the Walgreen Plaintiffs' Section 1 and Section 2 claims. In the September Order, this Court did not decide whether the Class Plaintiffs adequately pled market power in a relevant market, September Order, at 32 n.19, but such a determination would be necessary if the Class Plaintiffs re-enter the case following their First Circuit appeals. To allow the Walgreen Plaintiffs' Section 2 claims to move forward now could therefore lead to duplicative briefing, argument, and possibly rulings on the relevant product market and/or market power.

(c) The merits of the underlying patent disputes related to the '394 patent figure prominently in both the Walgreen Plaintiffs' *Walker Process* fraud and sham patent enforcement claims and all plaintiffs' challenges to the patent settlement agreements (among other things, there can have been no antitrust injury if Warner Chilcott would have prevailed in the patent cases had they not settled). As above, the risks of overlap and duplication are apparent.

Moreover, if discovery were to further proceed in the Walgreen action ahead of the Class Plaintiffs' actions (and Defendants do not believe that it should), Defendants may be subject to different demands for documents by the various plaintiff groups, witnesses – including potential third-party witnesses – may be required to testify on more than one occasion, and the like.

Staying the Walgreen action, including any further discovery, pending resolution of the First Circuit appeals would avoid the undue burden and expense – including administrative burdens on the Court – of piecemeal and duplicative discovery. *See Resco*, 2010 WL 2331069, at *7 ("It does not comport with fairness or economy to allow the parties further discovery at this stage in the case, when the court believes such efforts could soon be proven wasteful."); *United States ex rel. FLFMC v. William Bounds, Ltd.*, No. 10-0420, 2010 WL 2990725, at *3 (W.D. Pa. July 28, 2010) (granting stay to avoid "lengthy discovery and depositions" where pending appeal "could require dismissal of this case").

Finally, permitting the cases to proceed on separate and simultaneous tracks in the context of what is intended to be coordinated pretrial proceedings is inconsistent with the purpose of multidistrict litigation. Defendants note that even the End-Payor Plaintiffs acknowledge the wisdom of a stay pending guidance from the First Circuit Court of Appeals. As noted above, assuming that appellate review of the September Order is granted with respect to their federal claims, the End-Payor Class Plaintiffs have moved to stay the End-Payor action pending resolution of the appeal. Reconsideration Mot., ECF No. 126, at 13 ("Staying this action pending resolution by the First Circuit will promote efficiency and judicial economy while protecting the interests of the parties."). End-Payors cite to the reasons articulated by this Court in *Lincoln-Dodge, Inc. v. Sullivan*, Nos. 06-70 S, 06-69 S, 2009 WL 578541 (D.R.I. Mar. 4, 2009), and argue that a stay is warranted to permit both sets of Class Plaintiffs to "jointly, effectively, and efficiently present their arguments to the Court." *Id.* Defendants agree that those principles point to a stay here.

III. A Stay Would Lessen Burdens and Inefficiencies for the Court and the Parties

The risk of significant inefficiencies if the now-coordinated proceedings begin to move on different tracks will impose hardship on Defendants and the Court. Such hardships could be avoided if briefing and argument on the various issues occurred once – after guidance is given by the First Circuit – and if any further discovery proceeds with coordination of all parties instead of in piecemeal fashion. *See, e.g.*, *Irving Acquisition*, 2014 WL 359496, at *2 (granting stay pending decision in related case that would effectively moot issues in stayed case, holding that "if a stay is not granted and the court decides the motion to dismiss, it is quite possible that the court's time and effort will ultimately prove to have been wasted in that exercise"); *Villafañe-Colon v. B Open Enters., Inc.*, 932 F. Supp. 2d 274, 281 (D.P.R. 2013) (granting stay pending outcome of related appeal to conserve "judicial resources and the resources of the parties"). Granting a stay of the Walgreen action, including with respect to the filing of a motion to dismiss, pending the First Circuit appeals would simplify the issues ultimately to be decided by this Court and therefore lessen inefficiencies and avoid hardships for both the Court and the parties.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court stay the Walgreen action pending the Class Plaintiffs' appeals of this Court's September Order to the First Circuit Court of Appeals.

Dated: November 21, 2014

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Certificate of Service

I hereby certify that on the 21 day of November 2014, I did send a true copy of the within Motion **by electronic means (ECF)** to all counsel of record in MDL No. 2472.

/s/ John A. Tarantino