

**BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

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In re:)	
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NATIONAL PRESCRIPTION OPIATE LITIGATION)	MDL Docket No. 2804
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Relates to: *Doyle v. Actavis LLC, et al.*, No. 2:18-cv-00719 (S.D. Ohio)

City of Portland v. Purdue Pharma, L.P., et al., No. 2:18-cv-00282 (D. Me.)

County of Camden v. Purdue Pharma L.P., et al., No. 1:18-cv-11983 (D.N.J.)

BRIEF IN OPPOSITION BY CARDINAL HEALTH, INC., CARDINAL HEALTH 110, LLC, AMERISOURCEBERGEN CORP., AMERISOURCEBERGEN DRUG CORP., AND MCKESSON CORP. (“DISTRIBUTOR DEFENDANTS”) TO MOTIONS TO VACATE CONDITIONAL TRANSFER ORDER 47 (CTO 47)

The Plaintiffs in the *Doyle*, *City of Portland*, and *City of Camden* cases move for CTO 47 to be vacated as to their cases. In addition, a defendant in the *City of Portland* case, Dr. Mark Cienawski, moves to vacate the CTO as to the claims against him specifically. These motions should be denied.

I. The City of Portland and County of Camden’s Motions Should Be Denied.

The City of Portland and County of Camden base their motions primarily on an argument that the Panel has already rejected three times in this litigation—that the motion to vacate should be granted because the case ought to be in state court. This argument cannot succeed because “arguments concerning the propriety of federal jurisdiction are insufficient to warrant vacating conditional transfer orders covering otherwise factually-related cases.” Transfer Order, ECF No. 2133 (Aug. 1, 2018) at 2; Transfer Order, ECF No. 1750 (June 6, 2018) at 2 (same); Transfer Order, ECF No. 1134 (Apr. 5, 2018) at 2 (same); *see also, e.g., In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005) (“The pendency of a motion to remand to state court

is not a sufficient basis to avoid inclusion in [a] Section 1407 proceeding[.]”); *In re Ford Motor Co. DPS6 PowerShift Transmission Prods. Liab. Litig.*, 289 F. Supp. 3d 1350, 1352 (J.P.M.L. 2018). Nor can these Plaintiffs avoid transfer by “assert[ing] that the removals were patently improper.” *In re Ford Motor Co.*, 289 F. Supp. 3d at 1352; *see also In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, MDL No. 1720, 2017 WL 4582708, at *1 (J.P.M.L. Aug. 2, 2017) (“[T]he Panel does not have the authority to determine the applicability of a judge’s remand ruling in one case to other arguably similar cases.”).

The City of Portland and County of Camden both argue that the delays that may accompany being in the MDL will harm their cases, as well. City of Portland’s Br. in Supp. of Mot. to Vacate, ECF No. 2345 (Aug. 23, 2018) at 8–9 (“Portland Br.”); County of Camden’s Br. in Supp. of Mot. to Vacate, ECF No. 2355–1 (Aug. 29, 2018) at 9 (“Camden Br.”). The Panel has previously denied similar arguments in this case, recognizing that, in cases where there is an “undisputed factual overlap with the MDL proceedings, transfer is justified in order to facilitate the efficient conduct of the litigation as a whole.” Transfer Order, ECF No. 2133 (Aug. 1, 2018) at 2; *see also* Transfer Order, ECF No. 656 (Feb. 1, 2018) at 2 (“[I]n deciding issues of Section 1407 transfer, the Panel looks to the overall convenience of the parties and witnesses in the litigation as a whole.”). These cases share common questions of fact with those already in the MDL, and their inclusion in the MDL certainly would promote the efficient conduct of this litigation as a whole.

Camden County also argues that its case does not have a sufficient factual and legal overlap with those in the MDL. Camden Br. at 5–8. But the fact that its claims involve New Jersey law, or that its witnesses are in New Jersey, does not distinguish it from any of the other local government cases in the MDL, all of which involve the law of the respective locality’s

home state as well as local witnesses. Indeed, the panel has transferred multiple actions from New Jersey over similar objections. *See* Transfer Order, ECF No. 2133, at A2 (transferring *County of Hudson v. Purdue Pharma L.P., et al.*, No. 2:18-cv-09029 (D.N.J.)); Transfer Order, ECF No. 1134 (Apr. 5, 2018) at A1 (transferring *City of Paterson v. Purdue Pharma, L.P., et al.*, No. 2:17-cv-13433 (D.N.J)).¹

Finally, the Panel should decline the requests to delay transfer until the transferor courts rule on remand. Portland Br. at 5; Camden Br. at 9. Where there is an objection to transfer, “as a practical matter, there is a lag time of at least three or four months” between the filing or removal of an action and its transfer to the MDL court. *In re: Asbestos Prod. Liab. Litig. (No. VI)*, 560 F. Supp. 2d 1367, 1368 n.2 (J.P.M.L. 2008); *see also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347 (J.P.M.L. 2001) (same). “[A]ccordingly, those courts wishing to address [remand] motions have adequate time in which to do so.” *Id.* The Panel need not delay its own process to accommodate the transferor courts’ ability to address these motions.

II. Doyle’s Motion Should Be Denied.

The plaintiff in *Doyle* seeks to vacate the CTO because she is dissatisfied that the MDL Court has not up until this point chosen to create a separate track for Neonatal Abstinence Syndrome (NAS) cases and she believes that the Plaintiffs’ Executive Committee has not sufficiently taken her concerns into account. Today, counsel for the *Doyle* plaintiff filed a motion to consolidate the NAS cases in a separate MDL which would include both *Doyle* and the eight NAS cases currently in the MDL. *See In re: Children Born Opioid-Dependent*, Case

¹ Camden County is also incorrect to suggest that its state RICO claim is unique. Camden Br. at 6. Multiple cases in the MDL contain state RICO claims, and indeed both Hudson County and

Pending No. 83 (Sept. 20, 2018). The Distributor Defendants disagree that a new MDL is warranted and will respond to the consolidation motion in due course. As for the current motion to vacate, the Distributor Defendants submit that the pending consolidation motion demonstrates that the *Doyle* motion to vacate should be denied. By moving for separate consolidation, counsel for the plaintiff in *Doyle* indicate that *Doyle* should be consolidated with the other NAS cases. For now at least, that means that *Doyle* should be in the MDL.

In any event, the Panel is not the proper forum for the plaintiff to air her concerns about proceedings in the MDL. As the Panel has recognized many times, the organization of the MDL is committed to the transferee court's discretion. *See, e.g., In re: Walgreens Herbal Supplements Mktg. and Sales Practices Litig.*, 109 F. Supp. 3d 1373, 1376 (J.P.M.L. 2015) (“[W]e have long left the degree of coordination of involved actions to the sound discretion of the transferee judge.”); *In re: Federal Home Loan Mortg. Corp. Securities Litig.*, 643 F. Supp.2d 1378, 1380 (J.P.M.L. 2009) (transferring case over “reservations concerning the management of [the] action” in the MDL and recognizing that “plaintiffs can present their concerns regarding the manner and extent of coordination or consolidation of the pretrial proceedings to the transferee judge”). *Doyle* may disagree with the transferee court's decision not to create a separate track for NAS cases, but “[t]he Panel has neither the statutory authority nor the inclination to review decisions of district courts, whether they are transferor or transferee courts.” *In re Wells Fargo Inspection Fee Litig.*, 158 F. Supp. 3d 1366, 1367 (J.P.M.L. 2016) (quoting *In re Holiday Magic Sec. & Antitrust Ltiig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977)). *Doyle* acknowledges that eight other NAS cases are currently in the MDL, *see Doyle's Br. in Supp. of Mot. to Vacate*,

the City of Paterson brought claims under the New Jersey statute. *See* ECF No. 422-3 at 65 (*City of Paterson Complaint*); ECF No. 1429-3 at 116 (*Hudson County Complaint*).

ECF No. 2398-1 (Aug. 30, 2018) at 7, and it would disserve the conduct of this litigation to keep this ninth one out of it.

Finally, Doyle's due process concerns, *see* Doyle Br. at 8–12, are misplaced. The MDL procedure merely aggregates cases for pre-trial convenience; once that purpose is served, the case will be remanded to the transferor court so that it may proceed to trial as if it were any other matter in federal court. *See* 14 U.S.C. § 1407(a) (requiring that actions transferred under section 1407 “shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated”). The Supreme Court's class settlement jurisprudence, *see* Doyle Br. at 9, has no bearing on this case, as no final settlement has been proposed. Moreover, this MDL has existed for less than a year, and the oldest NAS cases were brought only about seven months ago. *See* Decl. of Scott R. Bickford Esq., ECF No. 2398-5 (Aug. 30, 2018) ¶ 1. Relative to litigations of this size, this litigation is still in the early stages, and drastic action to remake this litigation, such as Doyle appears to want, is premature.

III. Dr. Cieniawski's Motion To Vacate Should Be Denied.

Dr. Cieniawski requests that the claims against him in the *City of Portland* case be excluded from transfer. The Panel has denied similar requests in this litigation. *See* Transfer Order, ECF No. 2133 (Aug. 1, 2018) at 3 (denying “request[s] that we exclude the claims against [several defendants] from the MDL”). Dr. Cieniawski bases this request on an argument that the claims against him specifically present factual and legal issues that are distinct from the rest of the *City of Portland* case. *See* Cieniawski's Br. in Supp. of Mot. to Vacate, ECF No. 2382-1 (Aug. 30, 2018) at 3–8. But the Panel has denied arguments that the presence of “unique claims and/or defenses” justifies avoiding transfer. Transfer Order, ECF No. 1750 (June 6, 2018) at 2.

Moreover, Dr. Cieniawski's belief that he has a high chance of succeeding in a motion to dismiss does not justify refusing to transfer the case, either. Transfer Order, ECF No. 2133 (Aug. 1, 2018) at 3 (arguments concerning "likelihood of success of numerous defenses" did not justify denying transfer because "[t]hese requests invite us to make substantive judgments about the merits of these claims, which we historically have declined").

CONCLUSION

For the above reasons, the motions to vacate CTO 47 should be denied and these cases should be transferred to the MDL.

Respectfully submitted,

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² In joining this response, AmerisourceBergen Corporation does not concede that it is a proper party to *Doyle v. Actavis LLC, et al.*, No. 2:18-cv-00719 (S.D. Ohio), and *County of Camden v. Purdue Pharma L.P., et al.*, No. 1:18-cv-11983 (D.N.J.).