BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re: National Prescription Opiate Litigation	)	
	)	
This document relates to:	)	
	)	**MDL No. 2804**
Doyle v. Actavis LLC et al., No. 2:18-cv-00719 (S.D. Ohio)	)	
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MANUFACTURER DEFENDANTS' OPPOSITION TO PLAINTIFF DOYLE'S MOTION TO VACATE CONDITIONAL TRANSFER ORDER NO. 47

The Manufacturer Defendants[1] respectfully submit this opposition to the motion to vacate the Judicial Panel on Multidistrict Litigation's Conditional Transfer Order 47 filed by Plaintiff Erin Doyle.

I. PRELIMINARY STATEMENT

The Panel created MDL 2804 ("MDL") for cases involving common questions of fact about "the manufacturers' alleged improper marketing of [opiates]" and cases alleging that "manufacturers of prescription opioid medications overstated the benefits and downplayed the risks of the use of their opioids[.]" *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804, Doc. 328 (December 5, 2017 Transfer Order) at 3. There is no dispute that Plaintiff's claims arise from the alleged improper marketing of FDA-approved prescription opioid medications. This alone warrants transfer of this action to the MDL.

[1] The Manufacturer Defendants are Actavis LLC; Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.; Allergan plc f/k/a Actavis plc; Endo Health Solutions Inc.; Endo Pharmaceuticals Inc.; Janssen Pharmaceutica Inc. n/k/a Janssen Pharmaceuticals, Inc; Janssen Pharmaceuticals, Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc.; Johnson & Johnson; Purdue Pharma Inc.; Purdue Pharma L.P.; The Purdue Frederick Company Inc.; Teva Pharmaceutical Industries, Ltd.; Watson Laboratories, Inc.; Allergan Finance, LLC f/k/a Actavis, Inc. f/k/aa Watson Pharmaceuticals, Inc..; Cephalon, Inc. Allergan plc, an Irish company, and Allergan Finance dispute that they were properly served and expressly reserve all defenses, including defenses related to personal jurisdiction and service of process. Johnson & Johnson disputes that it has been served properly, but joins this brief out of an abundance of caution and expressly reserves all defenses, including those related to personal jurisdiction and service of process.

To avoid transfer, Plaintiff essentially asks the Panel to second guess the MDL judge's management of the proceedings. Plaintiff argues that her case should not be transferred because (1) she is dissatisfied with the MDL Court's current case management program, (2) there is alleged friction between Plaintiff's counsel and the MDL Plaintiff's Executive Committee ("PEC"), and (3) the potential for delay in the adjudication of Plaintiff's claims. Plaintiff's arguments are without merit for three reasons.

First, the Panel empowered the MDL judge to oversee and manage this multidistrict litigation, and order remand of cases as appropriate. Toward that end, the parties in the MDL are engaged in pre-trial proceedings under the direction of Judge Polster and in accordance with his case management orders. Those orders reflect the manner in which Judge Polster seeks to administer the cases that are before him, including cases filed by Plaintiff's counsel on behalf of children diagnosed with Neonatal Abstinence Syndrome ("NAS"). As Plaintiff acknowledges, the MDL already includes eight other NAS cases. Yet Plaintiff asks the Panel to separate her action from the others. Such individualized treatment invites inefficiencies that coordination is designed to avoid given the other NAS cases currently in the MDL. Thus, Plaintiff's arguments are properly directed to Judge Polster, who can decide common issues in a coordinated manner.

Second, it is not for this Panel to resolve disputes among counsel representing plaintiffs in the MDL. As the Panel has held, such arguments should be directed to the MDL judge. Plaintiff's counsel also recognizes this, as evidenced by their motions to Judge Polster on at least some of the same issues raised in the motion to vacate. One of these motions remains pending with him. The Panel should reject Plaintiff's invitation to end-run that process.

Third, as to alleged delay in adjudication of Plaintiff's claims the Panel has held that such concerns are essentially case management issues that are best addressed by the transferee judge.

Plaintiff fails to offer any compelling reason to vacate transfer. She asks this Panel to perform a quasi-appellate review of the management of the MDL proceedings, attaching hundreds of pages of motions, transcripts, letters, and emails to Plaintiff's motion to vacate. This Panel should follow its settled precedent and decline to second-guess Judge Polster's discretion to manage the MDL. Accordingly, the Panel should deny Plaintiff's motion to vacate and transfer this action to MDL 2804.

II. PROCEDURAL HISTORY AND BACKGROUND

A. The *Doyle* Action

On May 9, 2018, Plaintiff filed this putative class action in the Court of Common Pleas for Ross County, Ohio, on behalf of Plaintiff Erin Doyle and a putative class of children diagnosed with NAS. The complaint asserts claims against manufacturers and distributors of FDA-approved prescription opioid medications. Like many cases previously transferred to the MDL, the thrust of the complaint is that the Manufacturer Defendants engaged in a marketing and promotional campaign based on misrepresentations about the risks and benefits of FDA-approved opioid medications. (Compl. ¶¶ 40-98).

On July 23, 2018, Endo timely removed this action to the United States District Court for the Southern District of Ohio. *Doyle v. Actavis LLC et al.*, 2:18-cv-00719-EAS-EPD (S.D. Ohio), Doc. 1 (Not. of Removal). On August 1, the JPML conditionally transferred this action to the MDL. *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804, Doc. 2129 (Aug. 1, 2018 CTO-47). On August 8, Plaintiff filed a notice of opposition to transfer. *Id.*, Doc. 2150 (Aug. 8, 2018 Not of Opp'n). Plaintiff requested an extension of time to file her motion to vacate and supporting brief. *Id.*, Doc. 2413 (Sept. 4, 2018 Order Denying Motion to Reconsider). The Panel Clerk granted an additional week. *Id.* Plaintiff sought to shorten her time to file a reply, and to have this matter set for the Panel's September 27, 2018 hearing. *Id.* The Panel Clerk

denied both requests. *Id.* Plaintiff then moved to shorten the briefing schedule to have her reply due on September 21, 2018, "so that briefing in this matter will be in a posture for the Panel to hear this matter on September 27, 2018, should it elect to do so." *Id.* The Panel Clerk denied that request and noted that Plaintiff is free to file her reply before September 27, 2018 if she wishes. *Id.* Plaintiff requested that the Panel reconsider the Clerk's decision, arguing that her motion is urgent and that the Panel's expedited consideration of whether her case should be transferred may somehow affect the transferee court's treatment of eight other similar cases in the MDL. *Id.* The Panel was "not persuaded that expedited consideration of this matter is necessary" and denied Plaintiff's request to amend the briefing schedule. *Id.* On August 30, Plaintiff moved to vacate the JPML's conditional transfer order. *Id.*, Doc. 2398. The Manufacturer Defendants timely submit this opposition to that motion.

B. NAS Cases in the MDL

The JPML already has transferred eight other putative NAS class actions to the MDL, each brought by the same plaintiff's counsel as the *Doyle* action ("NAS counsel"). At the MDL Court's May 10, 2018 status conference, NAS counsel sought creation of a NAS track before a MDL court-appointed Special Master. The Special Master indicated that the MDL court "is going to have to address" certain categories of plaintiffs, including NAS Plaintiffs, that were not covered by the MDL court's first case management order. *In re: Nat'l Prescription Opiate Litig.*, 1:17-md-2804 (N.D. Ohio), Doc. 418 (Transcript of Status Conference Held Before the Hon. Dan Aaron Polster), at 7:12-18. On May 31, 2018, NAS counsel filed a motion for leave to file a motion to create a separate NAS track in the MDL, noting that NAS counsel had been "afforded the opportunity to advocate for the creation of a [NAS baby] track at the status conference on May 10, 2018." *Id*, Doc. 540 at 3. On June 28, 2018, the MDL judge denied that motion. On August 21, 2018, NAS counsel filed a renewed motion for leave to move for the

creation of a separate NAS class action track. *Id.* That motion remains under consideration of the MDL judge.

III. ARGUMENT

A. This Action Shares "One or More Common Questions of Fact" with Actions Previously Transferred to the MDL Proceeding

A case is properly subject to transfer and coordination in an MDL proceeding when it involves "one or more common questions of fact" with other actions. 28 U.S.C. § 1407(a). This Panel created MDL No. 2804—the National Prescription Opiate Litigation—for actions sharing "common factual questions about . . . the manufacturers' alleged improper marketing of [opiates]" and cases alleging that "manufacturers of prescription opioid medications overstated the benefits and downplayed the risks of the use of their opioids[.]" *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804, Doc. 328 (December 5, 2017 Transfer Order) at 3.

These common factual questions are present here. Plaintiff alleges that the Manufacturer Defendants engaged in a "negligent marketing . . . scheme" that "spread misrepresentations about the risks and benefits of long-term opioid use," Compl. ¶ 40, and "negligently trivialized and failed to disclose the risks of long-term opioid use," *id.* ¶ 55. The complaint further alleges that these purported "longstanding misrepresentations minimizing the risk of long-term opioid use persuaded doctors and patients to discount or ignore the true risks" of opioids. *Id.* ¶ 73.

Thus, this case presents the common factual questions that lay at the heart of every case transferred to the MDL: how defendants marketed their prescription opioid medications, what warnings defendants provided, whether prescribing physicians were exposed to and deceived by defendants' marketing, and whether, as a result of defendants' marketing, the physicians improperly prescribed opioid medications. Centralization here will eliminate duplicative

discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel, and the judiciary.

Plaintiff argues that her claims "are unique in that they seek damages by way of a medical monitoring trust to provide future care" for NAS Plaintiffs (Mot. at 1), and that "the unique status of children under the law" compels this Panel to hold the NAS cases outside of this MDL," Mot. 12. But the Panel has consistently held that "[t]ransfer under Section 1407 does not require a complete identity of common factual issues or parties as a prerequisite to transfer, and the presence of additional facts or differing legal theories is not significant where, as here, the actions still arise from a common factual core." *In re: Auto Body Shop Antitrust Litig.*, 37 F. Supp. 3d 1388 at 1390; *In re: Walgreens Herbal Supplements Mktg. & Sales Practices Litig.*, 109 F. Supp. 3d 1373, 1376 (J.P.M.L. 2015) (same); *In re: Home Depot, Inc.*, 65 F. Supp. 3d 1398, 1399 (J.P.M.L. 2014) (same). Thus, any alleged differences in the remedies sought or the legal status of the Plaintiff are not reasons to vacate transfer.

B. Plaintiff's Arguments Are Without Merit

Plaintiff argues that transfer is inappropriate because MDL 2804 is not managed to Plaintiff's liking. Plaintiff contends that transfer would violate her right to due process because the MDL judge has not, at this early stage in the litigation, created a separate litigation track for NAS class actions[2] and because NAS Plaintiffs babies have no representation on the Plaintiff's Executive Committee. Mot. 8-12. These arguments are simply not relevant to the Panel's determination regarding whether to transfer this case to the MDL. The Panel should refrain from second-guessing the considered judgment of the transferee judge.

[2] Plaintiff quotes Judge Polster in a blatantly misleading fashion, asserting that, as to the NAS cases,he would "just leave them hanging." Mot. at 3. He said no such thing. Judge Polster made that comment ***three months before*** this Panel transferred the first NAS case into the MDL. Judge Polster's comment referred to pending remand motions. *See* Transcript of Teleconference Proceedings Had Before The Honorable Judge Dan A. Polster on Wednesday, December 13th, 2017 at, 14:12-15:5,.

1. The Management of the MDL is Left to the Discretion of the Transferee Judge

Plaintiff argues that transfer is improper because the MDL judge "rejected NAS [Plaintiffs'] motion for a separate . . . track within the MDL and has yet to rule on a renewed motion" filed a few weeks ago. Mot. 9. JPML precedent dictates that Plaintiff should direct these administrative issues to the transferee judge.

In a litigation of this magnitude, the Panel elected to have "a single judge who can formulate a pretrial program that . . . ensures that pretrial proceedings will be conducted in a manner leading to a just and expeditious resolution of all actions to the overall benefit of the parties." *In re Avanda Mktg., Sales Practices & Prods. Liab. Litig.*, 543 F. Supp. 2d 1376, 1378 (J.P.M.L. 2008). As this Panel has repeatedly recognized, the MDL judge is best situated to manage this litigation and decide whether to create separate litigation tracks or remand actions to their transferor courts. *See In re: National Prescription Opiate Litigation*, MDL No. 2804 (Feb. 1, 2018 Transfer Order), Doc. 656 ("If the transferee judge determines that Section 1407 remand of any claim or type of action is appropriate, then he can suggest remand with minimum of delay). For example, in *In re: Walgreens Herbal Supplements Mktg. & Sales Practices Litig.*, several parties requested that the Panel "order the creation of separate tracks" in the MDL. *In re: Walgreens Herbal Supplements Mktg. & Sales Practices Litig.*, 109 F. Supp. 3d 1373, 1376 (J.P.M.L. 2015). The Court declined to do so because the Panel has "long left the degree of coordination of involved actions to the sound discretion of the transferee judge." *Id.* (citing *In re: Frito–Lay North America, Inc. "All Natural" Litig.*, 908 F. Supp. 2d, 1379, 1380 (J.P.M.L.2012)). As the Panel observed, "the transferee court can employ any number of pretrial techniques, such as establishing separate discovery and motion tracks, to manage pretrial proceedings efficiently" and it was "incumbent upon the parties to bring their concerns to the

attention of the transferee court and to propose ways to resolve them." *Id.* Ultimately, issues related to case management, including the creation of separate tracks, "is a matter dedicated to [the transferee judge's] discretion." *Id.*[3]

Indeed, when creating this MDL, the Panel explained:

> Should the transferee judge deem remand of any claims or actions appropriate (or, relatedly, the subsequent exclusion of similar types of claims or actions from the centralized proceedings), then he may accomplish this by filing a suggestion of remand to the Panel. . . . ***As always, we trust such matters to the sound judgment of the transferee judge***.

In re Nat'l Prescription Opiate Litig., MDL No. 2804, Doc. 328 (December 5, 2017 Transfer Order) (emphasis added). Thus, Judge Polster's denial of the NAS Plaintiffs' first motion for leave to create a separate litigation track serves as no impediment to transfer; it reflects a decision by Judge Polster to first proceed with other litigation tracks created in the initial MDL case management orders.

Furthermore, Plaintiff's motion to vacate does not account for the eight NAS cases that are already part of the MDL - transfers that NAS counsel did not challenge. That NAS counsel has not previously filed a motion to vacate a transfer order underscores that Plaintiff's objection here is based on displeasure with the MDL administrative proceedings. Nowhere does Plaintiff explain how vacating transfer in this single action will cure the problems she alleges exist with the other NAS cases in the MDL. Instead, vacating transfer would open the door to the inconsistency and inefficiency that coordinated proceedings are designed to avoid. Thus, the

[3] *See also In re Sundstrand Data Control, Inc. Patent Litig.*, 443 F. Supp. 1019, 1021 (J.P.M.L. 1978) ("[T]he Panel has neither the power nor the inclination to dictate in any way the manner in which the coordinated or consolidated pretrial proceedings are to be conducted by the transferee judge."); *In re Holiday Magic Sec. & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977) (Panel lacks statutory authority to review decisions of transferee courts); *In re Plumbing Fixtures*, 332 F. Supp. 1047, 1048 (J.P.M.L. 1971) ("Section 1407 does not authorize the Panel to act as an appellate forum for every litigant disgruntled by the rulings of a transferee judge.").

proper course is to transfer this case to the MDL and let the MDL transferee judge decide these adminstrative issues.

2. Plaintiff's Relationship with the PEC Is Not a Reason to Vacate Transfer

Plaintiff also contends that transfer must be vacated because the NAS Plaintiffs have no representation on the PEC, and the PEC has rebuffed all their requests to participative in discovery, monitor its progress, or review what has been produced. Mot. at 8-9. Plaintiff's efforts to embroil the Panel with the alleged friction between Plaintiff's counsel and the MDL leadership should be rejected. Again, the proper course is for Plaintiff to raise her grievances with the transferee judge.

The Panel has rejected similar arguments and made clear that the MDL Court, not the Panel, is the proper forum to raise such concerns. For example, in *In re: Oil Spill by the Oil Rig "Deepwater Horizon" In the Gulf of Mexico, On April 20, 2010*, the plaintiff argued that "the MDL Plaintiffs' Steering Committee cannot adequately or ethically represent" both the plaintiff and the other plaintiffs in that MDL. MDL No. 2179, Doc. 1561 at 2 (Aug. 9, 2013 Transfer Order). The Panel held that "[s]uch an argument . . . is properly directed to [the MDL judge] and not to us." *Id.* The Panel observed that "plaintiffs' argument that transfer would deprive them of their constitutional rights to due process and equal protection is unsupported by any authority," *id.* at 3. The same is true here. The Panel further observed that "[w]hat has happened and what remains to happen in this MDL will inure to the substantial benefit of litigants in later-filed actions such as these. Permitting plaintiffs, at this juncture, to go their own way and litigate outside the MDL would severely disrupt the ongoing proceedings, as well as threaten to undo much of the substantial progress achieved to date." *Id.*; *see also In re: Equifax, Inc., Customer Data Sec. Breach Litig.*, MDL No. 2800, Doc. 841 (Aug. 7, 2018 Transfer Order with Simultaneous Separation and Remand) (rejecting plaintiff's argument that "transfer violates his

rights to due process, in that he will be unable to prosecute his claim without interference by [the MDL] leadership counsel.").[4]

Like their dissatisfaction with the management of the MDL, Plaintiff's counsel's concerns about their relationship with the PEC are "properly directed to [the MDL judge] and not to [the Panel]." *Deepwater Horizon*, MDL No. 2179, Doc. 1561 at 2. Notably, NAS Plaintiff's first motion for leave to file a motion to create a separate NAS track did not mention any issues with the PEC, and NAS Plaintiffs' second motion is still pending with the MDL judge. *See In re: Nat'l Prescription Opiate Litig.*, 1:17-md-2804 (N.D. Ohio), Docs. 540 & 895. The Panel should allow the MDL judge to consider that motion in due course.

3. Concerns of Potential Delay and Prejudice Do Not Warrant Denial of Transfer

Plaintiff also opposes transfer on the basis of potential delay in resolving her claims. Mot at 12. As this Panel has noted, all transfers involve some delay, but such delays are warranted where, as here, transfer will ultimately yield greater benefits through the coordinated, efficient resolution of actions that share common questions of law or fact. *See In re: Johnson & Johnson Talcum Powder Prods. Liab. Litig.*, MDL No. 2738, Doc. 1325 (J.P.M.L 2018) (finding Plaintiff's arguments as to delay and prejudice "not persuasive" and stating that "[t]ransfer of an action is appropriate if it furthers the expeditious resolution of the litigation taken as a whole, even if some parties to the action might experience inconvenience or delay"); *In re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351-52 (J.P.M.L. 2012) ("[W]e look to the overall convenience of the parties and witnesses, not just those of a single plaintiff or defendant in isolation."). Moreover,

[4] Plaintiff's reliance on decisions interpreting class action requirements is misplaced. These cases concern final settlement of claims, *see Amchem Prods. Inc.v. Windsor*, 521 U.S. 591, 620 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 854 (1999), whereas consolidation under § 1407 is for pretrial purposes only. Further, the conflicts of interest identified by *Amchem* and *Ortiz* arose because different classes of plaintiffs were represented by the *same* counsel, which is not the case here. *See Amchem*, 521 U.S. at 627; *Ortiz*, 527 U.S. at 856-57.

Plaintiff's concerns about prejudice from litigation delays are, at their core, "case management issues" that are best addressed by Judge Polster. *In re Ford Motor Co. DPS6 PowerShift Transmission Prod. Liab. Litig.*, 289 F. Supp. 3d 1350, 1352 (J.P.M.L. 2018).

IV. CONCLUSION

For the reasons set forth above, the Panel should deny Plaintiff's motion to vacate and transfer the *Doyle* action, pursuant to 28 U.S.C. § 1407, to the Prescription Opiate MDL for centralized proceedings.

Dated: September 20, 2018

Respectfully submitted,

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