

**UNITED STATES JUDICIAL PANEL**  
**on**  
**MULTIDISTRICT LITIGATION**

**IN RE: ETHICON, INC., PELVIC  
REPAIR SYSTEM PRODUCTS  
LIABILITY LITIGATION**

MDL No. 2327

**TRANSFER ORDER**

**Before the Panel:**\* Pursuant to Panel Rule 7.1, plaintiffs in the twelve actions listed on Schedule A move to vacate our orders conditionally transferring the actions to MDL No. 2327. Responding defendants Johnson & Johnson and Ethicon, Inc. (collectively Ethicon) oppose the motions to vacate.

After considering all argument of counsel, we find these actions involve common questions of fact with the actions previously transferred to MDL No. 2327, and that transfer will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Plaintiffs do not dispute that their actions share questions of fact with MDL No. 2327. Like many of the already-centralized actions, these actions involve factual questions arising from allegations that pelvic surgical mesh products manufactured by Ethicon and related entities were defectively designed, manufactured and marketed, resulting in serious injuries, and that defendants failed to provide appropriate warnings and instructions regarding the risks and dangers posed by the devices. *See In re: Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., et al.*, 844 F. Supp. 2d 1359 (J.P.M.L. 2012).

In support of the motion to vacate as to the eleven actions pending in the Western District of Oklahoma, plaintiffs argue that these actions were improperly removed and that their motions for remand to state court are pending in the transferor courts. The Panel often has held that jurisdictional issues do not present an impediment to transfer, as plaintiffs can present such arguments to the transferee judge.<sup>1</sup> *See, e.g., In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp.

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\* Judge Ellen Segal Huvelle took no part in the decision of this matter.

<sup>1</sup> Moreover, under Panel Rule 2.1(d), the pendency of a conditional transfer order does not limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand or other motion is filed and the date the Panel finalizes transfer of the action to the MDL, a court wishing to rule upon that motion generally has adequate time to do so. Indeed, since the  
(continued...)

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2d 1346, 1347-48 (J.P.M.L. 2001).

In support of the motion to vacate as to the Eastern District of Missouri *Brannen* action, plaintiffs argue that *Brannen* was removed as a “mass action” pursuant to the Class Action Fairness Act of 2005 (CAFA) and, because they have not requested transfer, transfer pursuant to Section 1407 is prohibited by 28 U.S.C. § 1332(d)(11)(C)(i). After careful consideration of plaintiffs’ arguments, we respectfully disagree. *Brannen* and two other actions (*Valle* and *Strantz*) collectively were deemed to be a “mass action” by the Eastern District of Missouri in its order denying remand of *Brannen*. See Memorandum and Order, *Brannen, et al. v. Ethicon, et al.*, C.A. No. 4:13-cv-01251-JAR (E.D. Mo. Dec. 30, 2013). The *Valle* and *Strantz* plaintiffs, who together constitute a majority of plaintiffs in the three actions, requested and were granted Section 1407 transfer to MDL No. 2327. We are persuaded that this request by the *Valle* and *Strantz* plaintiffs satisfies the requirements of 28 U.S.C. § 1332(d)(11)(C)(i).

The *Brannen* plaintiffs argue that the language of the statute<sup>2</sup> suggests that a majority of plaintiffs in *each* action comprising a “mass action” must request Section 1407 transfer. This interpretation, based on ambiguous language, would contravene the purpose of the mass action provision itself, which allows removal of an action or actions that involve 100 or more individual plaintiffs, whose claims are proposed to be tried jointly. Allowing for removal of three actions on the basis that the claims of all plaintiffs are proposed to be tried jointly but then allowing Section 1407 transfer of only two-thirds of the plaintiffs comprising those actions would paradoxically result in the actions proceeding in two separate courts.

Plaintiffs also argue that defendants should not be permitted to manufacture a “majority of plaintiffs” by creating artificial groupings of cases, and that the number of plaintiffs 28 U.S.C. § 1332(d)(11)(C)(i) requires to request a Section 1407 transfer is indeterminable in this instance. But the transferor court, not defendants, determined that the *Brannen*, *Valle*, and *Strantz* actions—and only those actions—constitute a “mass action” under CAFA. Thus, the universe of how many plaintiffs will comprise this “mass action” already has been determined—181. Plaintiffs do not dispute that the 100 *Valle* and *Strantz* plaintiffs constitute a majority of the plaintiffs in all three actions. Therefore, we find that the *Brannen* action should be transferred to MDL No. 2327 to rejoin the two actions that constitute this “mass action.”

IT IS THEREFORE ORDERED that pursuant to 28 U.S.C. § 1407, these actions are

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<sup>1</sup>(...continued)

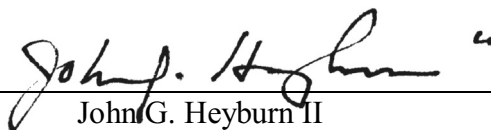
completion of briefing on plaintiffs’ motion to vacate, the Western District of Oklahoma has denied plaintiffs’ motions to remand.

<sup>2</sup> “Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or rules promulgated thereunder, unless a majority of the plaintiffs in *the action* request transfer pursuant to section 1407.” *Id.* (emphasis added).

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transferred to the Southern District of West Virginia and, with the consent of that court, assigned to the Honorable Joseph R. Goodwin for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION

A handwritten signature in black ink, appearing to read "John G. Heyburn II", is written above a horizontal line.

John G. Heyburn II  
Chairman

Marjorie O. Rendell  
Lewis A. Kaplan  
R. David Proctor

Charles R. Breyer  
Sarah S. Vance

**IN RE: ETHICON, INC., PELVIC  
REPAIR SYSTEM PRODUCTS  
LIABILITY LITIGATION**

MDL No. 2327

**SCHEDULE A**

Eastern District of Missouri

BRANNEN, ET AL. v. ETHICON, INC., ET AL., C.A. No. 4:13-01251

Western District of Oklahoma

WADE v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00691  
ALLBRITTON v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00692  
ANDERSON v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00693  
GOOCH v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00694  
HALLIBURTON v. JOHNSON & JOHNSON, C.A. No. 5:14-00696  
KILLSFIRST v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00697  
MCCAUGHTRY v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00698  
PAGE, ET AL. v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00699  
SPEARS, ET AL. v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00700  
TEAGUE v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00701  
STATES, ET AL. v. JOHNSON & JOHNSON, ET AL., C.A. No. 5:14-00702