

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

**IN RE: MIRENA IUD PRODUCTS LIABILITY LITIGATION**

MDL No. 2434

**TRANSFER ORDER**

**Before the Panel:**\* Plaintiffs in the six actions listed on Schedule A move under Panel Rule 7.1 to vacate our orders conditionally transferring the actions to MDL No. 2434. Defendants Bayer HealthCare Pharmaceuticals Inc., Bayer Pharma AG, and Bayer Oy (together, Bayer) oppose the motions to vacate and support transfer.

After considering the argument of counsel, we find these actions involve common questions of fact with the actions transferred to MDL No. 2434, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Like many of the already-centralized actions, the actions involve factual questions concerning the alleged risk of uterine perforation and migration associated with the Mirena IUD and the adequacy of the product's warning label with respect to those risks. *See In re: Mirena IUD Prods. Liab. Litig.*, 938 F. Supp. 2d 1355, 1356 (J.P.M.L. 2013). The transferee court has presided over substantial discovery, including completion of generic fact and expert discovery, and issued significant pretrial rulings on *Daubert* motions and an omnibus summary judgment motion, as to which appeals recently concluded.<sup>1</sup> The court also has issued a case management order governing cases transferred to the MDL following the summary judgment decision.<sup>2</sup> The common pretrial proceedings in the MDL undoubtedly will serve the just and efficient conduct of these related actions.

In support of the motions to vacate, plaintiffs in all actions argue that defendants improperly removed their actions, and the transferor courts should decide the issues presented in their motions for remand to state court. But the pendency of jurisdictional objections are not, as a general matter,

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

<sup>1</sup> *See In re: Mirena IUD Prods. Liab. Litig.*, 169 F. Supp.3d 396 (S.D.N.Y. 2016) and 202 F. Supp. 3d 304 (S.D.N.Y. 2016), *aff'd*, — F. App'x —, 2017 WL 4785947 (2d Cir. Oct. 24, 2017).

<sup>2</sup> *See In re: Mirena IUD Prods. Liab. Litig.*, No. 13-md-2434, Case Management Order Re: Cases Transferred to MDL During Appeal, Doc. No. 3279 (S.D.N.Y. Nov. 14, 2016).

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a sufficient reason to delay or deny transfer.<sup>3</sup> *See, e.g., In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347-48 (J.P.M.L. 2001). We are not persuaded by plaintiffs' argument that their jurisdictional objections should be treated differently because remand purportedly is compelled under controlling case law. We regularly order transfer of actions over the objection that remand is required under applicable precedent. Transfer in these circumstances comports with the well-established principle that "Section 1407 does not empower the MDL Panel to decide questions going to the jurisdiction or the merits of a case, including issues relating to a motion to remand." *See In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990).

Plaintiffs in the Eastern District of Missouri actions further argue that (1) transfer will be unjust because, under the operative case management order, their actions will be conditionally dismissed without prejudice while the appeals are pending, and consequently there is no mechanism in the MDL for their remand motions to be heard; (2) the summary judgment ruling will be applied to their cases prior to resolution of their remand motions; and (3) MDL No. 2434 is too procedurally advanced for their actions to benefit from transfer.

We recently considered and rejected these arguments in ordering transfer of an indistinguishable Mirena action to MDL No. 2434. *See Transfer Order (Roberts)*, Doc. No. 1565 (J.P.M.L. Aug 2, 2017).<sup>4</sup> Plaintiffs provide no reason to reach a different conclusion on any of these issues. The recent Second Circuit decision affirming the transferee court's *Daubert* and summary judgment decisions does not warrant a different outcome, as pretrial proceedings remain to be conducted on, *inter alia*, the applicability of the transferee court's decisions to later transferred tag-along actions. Thus, we again find that the continued transfer of tag-along actions to MDL No. 2434 is appropriate.

Plaintiffs in four actions further argue that they will suffer unfair prejudice from transfer by being subjected to the *Daubert* rulings in the MDL, which allegedly are irrelevant to them as they intend to present different expert evidence subject to a different legal analysis. Their anticipated new evidence is no obstacle to transfer. Plaintiffs will have the opportunity to present those arguments to the transferee judge under the case management process described above.

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<sup>3</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 motion is filed and the date that transfer of the action to the MDL is finalized, a court generally has adequate time to rule on a remand motion if it chooses to do so.

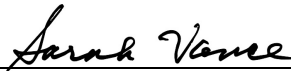
<sup>4</sup> We explained that "plaintiffs are free to petition the transferee court to rule on their remand motion," and "the case management order clearly provides that plaintiffs will have an opportunity to submit briefing before the rulings of concern are applied to their case." *See Transfer Order (Roberts)* at 2 & n.4. We further observed that, while the MDL is at an advanced stage, "the transferee judge made a well-considered determination that the MDL should remain open" for further proceedings. *See id.* at 2. We determined that "the transferee court's continued management of tag-along actions is appropriate in these circumstances." *Id.*

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Plaintiffs in the Northern District of Indiana *Denny* action separately argue that transfer of their action would be unjust and inefficient because, in addition to Bayer, they have sued local healthcare provider defendants for malpractice. But transfer under Section 1407 does not require a complete identity of factual issues or parties as a prerequisite to transfer, and the presence of additional facts or differing legal theories is not significant when, as here, the actions arise from a common factual core. *See, e.g., In re: Auto Body Shop Antitrust Litig.*, 37 F. Supp. 3d 1388, 1390 (J.P.M.L. 2014). The *Denny* plaintiffs also contend that transfer will cause inconvenience to plaintiffs, the healthcare providers, and witnesses, and result in increased litigation costs. While transfer of a particular action might inconvenience some parties to the action, transfer is appropriate where, as here, it furthers the expeditious resolution of the litigation taken as a whole. *See In re: Crown Life Ins. Co. Premium Litig.*, 178 F. Supp. 2d 1365, 1366 (J.P.M.L. 2001).

IT IS THEREFORE ORDERED that the actions listed on Schedule A are transferred to the Southern District of New York and, with the consent of that court, assigned to the Honorable Cathy Seibel for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



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Sarah S. Vance

Chair

Marjorie O. Rendell  
R. David Proctor

Charles R. Breyer  
Catherine D. Perry

**IN RE: MIRENA IUD PRODUCTS LIABILITY LITIGATION**

MDL No. 2434

**SCHEDULE A**

Northern District of Indiana

DENNY, ET AL. v. DOE, ET AL., C.A. No. 3:17-cv-00661

Eastern District of Missouri

ALLEN, ET AL. v. BAYER HEALTHCARE PHARMACEUTICALS INC., ET AL.,  
C.A. No. 4:17-cv-02026

ATKINS, ET AL. v. BAYER HEALTHCARE PHARMACEUTICALS INC., ET AL.,  
C.A. No. 4:17-cv-02028

HILLIARD, ET AL. v. BAYER HEALTHCARE PHARMACEUTICALS INC., ET AL.,  
C.A. No. 4:17-cv-02030

JONES, ET AL. v. BAYER HEALTHCARE PHARMACEUTICALS INC., ET AL.,  
C.A. No. 4:17-cv-02032

JONES, ET AL. v. BAYER HEALTHCARE PHARMACEUTICALS INC., ET AL.,  
C.A. No. 4:17-cv-02034