

**UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION**

**IN RE: LIPITOR (ATORVASTATIN CALCIUM)
MARKETING, SALES PRACTICES AND
PRODUCTS LIABILITY LITIGATION (NO. II)**

MDL No. 2502

TRANSFER ORDER

Before the Panel: Plaintiffs in the Central District of California action (*Whitney*) listed on the attached Schedule A move under Panel Rule 7.1 to vacate our order conditionally transferring the action to the District of South Carolina for inclusion in MDL No. 2502. Defendant Pfizer Inc. (Pfizer) opposes the motion.

Pfizer removed the *Whitney* action to the Central District of California on Class Action Fairness Act (CAFA) “mass action”¹ and diversity grounds – the latter based on the contention that defendant McKesson Corporation (McKesson) was fraudulently joined. In their motion to vacate, the *Whitney* plaintiffs argue that in the MDL, the assigned magistrate judge has issued a ruling on remand motions filed in previously-transferred California actions removed on those same grounds, in which he held that (1) McKesson had not been fraudulently joined, and thus diversity jurisdiction did not exist; and (2) because a majority of plaintiffs in the subject actions had not requested Section 1407 transfer, the actions had to be sent back to the California federal courts for determination of the CAFA jurisdictional issue.² Plaintiffs contend that the magistrate’s ruling is equally applicable to their case.

We are not convinced by plaintiffs’ argument. First, Pfizer has objected to the magistrate judge’s ruling, and those objections are currently under review by the transferee judge, the Honorable Richard M. Gergel. Second, and more significantly, even if Judge Gergel rejects those objections, “we do not have the authority to determine the applicability of a transferee judge’s ruling in one case to other arguably similar cases.” MDL No. 1871, In re: Avandia Marketing, Sales Practices and Products Liability Litigation, Transfer Order, at 1 (J.P.M.L. Oct. 2, 2013) (ECF No. 1159). The quoted Avandia order is squarely on point. The involved cases there were 53 actions removed to California federal court on diversity and CAFA mass action grounds, and the removing defendant contended – as Pfizer does here – that the plaintiffs had fraudulently joined McKesson as a defendant. In moving to vacate our conditional transfer order, the plaintiffs argued that the Avandia

¹ See 28 U.S.C. § 1332(d)(11).

² CAFA prohibits Section 1407 transfer, of an action removed on mass action grounds, absent a request by a majority of the plaintiffs therein. See § 1332(d)(11)(C)(i).

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transferee judge previously had remanded like cases in the MDL to state court, finding that McKesson was not fraudulently joined. We rejected the argument, and ordered transfer.³

After considering all argument of counsel, we find that the *Whitney* action involves common questions of fact with actions previously transferred to MDL No. 2502, and that transfer will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The actions in the MDL “share factual issues arising from common allegations that taking Lipitor can cause women to develop type 2 diabetes.” *See In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 997 F. Supp. 2d 1354, 1357 (J.P.M.L. 2014). The *Whitney* plaintiffs do not dispute that their action shares multiple factual issues with those already in the MDL.

IT IS THEREFORE ORDERED that the *Whitney* action is transferred to the District of South Carolina, and, with the consent of that court, assigned to the Honorable Richard M. Gergel for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



Sarah S. Vance
Chair

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

Charles R. Breyer
Ellen Segal Huvelle
Catherine D. Perry

³ Similarly, and more recently, in MDL No. 2418, *In re: Plavix Marketing, Sales Practices and Products Liability Litigation* (No. II), we transferred two District of Delaware actions over those plaintiffs’ objection that a judge in that district (but not the judge presiding over plaintiffs’ actions) had ordered remand of similar cases removed to that district on the same theory invoked by defendants in their cases. *See Transfer Order at 1* (J.P.M.L. Apr. 3, 2015) (ECF No. 428) (“The Panel does not have the authority to determine the applicability of one judge’s remand ruling in one case to other arguably similar cases.”).

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SCHEDULE A

Central District of California

WHITNEY, ET AL. v. PFIZER, INC., ET AL., C.A. No. 2:15-01638