

**UNITED STATES JUDICIAL PANEL  
on  
MULTIDISTRICT LITIGATION**

**IN RE: EPIPEN (EPINEPHRINE INJECTION, USP)  
MARKETING, SALES PRACTICES AND  
ANTITRUST LITIGATION**

MDL No. 2785

**ORDER VACATING CONDITIONAL TRANSFER ORDER**

**Before the Panel:**\* We are presented with four motions under Panel Rule 7.1 to vacate our order that conditionally transferred the *Klein* action listed on Schedule A to the District of Kansas for inclusion in MDL No. 2785. Movants include: (1) the *Klein* plaintiffs; (2) *Klein* defendants Express Scripts Holding Company and Express Scripts, Inc.; (3) *Klein* defendant Prime Therapeutics, LLC; and (4) MDL No. 2785 defendants Mylan Inc., Mylan N.V., Mylan Pharmaceuticals Inc., and Mylan Specialty L.P. (collectively, Mylan). Three other defendants in MDL No. 2785—Pfizer Inc., King Pharmaceuticals LLC, and Meridian Medical Technologies, Inc. (collectively, Pfizer)—join Mylan’s motion. The consolidated class plaintiffs in MDL No. 2785 (the MDL plaintiffs) oppose the motions to vacate.<sup>1</sup>

After considering the argument of counsel, we conclude that inclusion of *Klein* in MDL No. 2785 would not serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation.<sup>2</sup> The MDL plaintiffs are correct that there is some factual overlap between

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\* Judges Lewis A. Kaplan and Ellen Segal Huvelle took no part in the decision of this matter. Additionally, one or more Panel members who could be members of the putative classes in this litigation have renounced their participation in these classes and have participated in this decision.

<sup>1</sup> CVS Health Corporation, Caremark, LLC, Caremark Rx, LLC, and CaremarkPCS Health, LLC, which are defendants in the *Klein* action, did not respond to the motions to vacate in this docket. In a related motion for centralization under Section 1407, however, the CVS defendants filed a Notice of Presentation of Oral Argument in which they indicate that they do not oppose transfer of *Klein* to MDL No. 2785. See Notice of Presentation of Oral Argument, *In re EpiPen (Epinephrine Injection, USP) Employee Retirement Income Security Act (ERISA) Litigation*, MDL No. 2802 (J.P.M.L. Nov. 13, 2017), ECF No. 33.

<sup>2</sup> As a threshold matter, several of the movants argue that *Klein* was improperly noticed as a potential tag-along action to MDL No. 2785 by the plaintiffs in an action pending in the District of Kansas (*Brannon*) that is not part of the MDL. This argument stems from a mistaken reading of Panel Rule 7.1(a), which imposes a duty on parties or counsel in any action pending in an MDL to notify the Panel of potential tag-along actions. See Panel Rule 7.1(a) (“Any party or counsel in  
(continued...)”)

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*Klein* and the cases pending in MDL No. 2785. All of these actions arise from recent price increases for the EpiPen, a spring-loaded injector marketed by Mylan that delivers a pre-measured and pre-loaded amount of epinephrine for the emergency treatment of anaphylaxis. *See In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, MDL No. 2785, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 3297989 (J.P.M.L. Aug. 3, 2017). Both the *Klein* complaint and the consolidated class action complaint in the MDL include allegations that Mylan inflated its list price for the EpiPen so that it could pay excessive rebates to pharmacy benefit managers (PBMs) in exchange for more favorable formulary access than competing products.

In all other respects, however, these actions are quite different. *Klein* involves claims that defendants, all of which are PBMs, breached their fiduciary duty and conducted prohibited transactions under the Employee Retirement Income Security Act (ERISA) when they negotiated the enhanced rebates from Mylan.<sup>3</sup> Plaintiffs in the MDL do not assert ERISA claims or name any PBM as a defendant. Instead, they assert that Mylan and Pfizer are liable for anticompetitive conduct under antitrust and consumer protection laws, as well as the Racketeer Influenced and Corrupt Organizations (RICO) Act. The claims of the MDL plaintiffs are not limited to the alleged rebate scheme, but extend to a variety of alleged conduct by Mylan and Pfizer, such as: engaging in a “hard switch” and selling EpiPens only in packs of two; entering into discount agreements with schools that were conditioned on the schools not purchasing competing products; and securing multiple overlapping patents on minor changes to the EpiPen and engaging in “sham” patent litigation to forestall generic competition.

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<sup>2</sup>(...continued)

actions previously transferred under Section 1407 shall promptly notify the Clerk of the Panel of any potential tag-along actions in which that party is also named or in which that counsel appears.”). This rule does not limit other parties from providing the Panel notice of potential tag-along actions—indeed, the Panel routinely receives notice of such actions from the transferor courts themselves. Panel Rule 7.1(b) provides that the Clerk of the Panel may enter a conditional transfer order “[u]pon learning of the pendency of a potential tag-along action.”

<sup>3</sup> The *Klein* plaintiffs also allege that the PBM defendants may be liable under ERISA as co- or non-fiduciaries for knowing participation in breaches of fiduciary duty or prohibited transactions committed by others.

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In short, *Klein* and the MDL actions involve different defendants,<sup>4</sup> different claims and theories of liability, different putative classes, and seek different relief.<sup>5</sup> There is little risk of inconsistent pretrial rulings in these actions as discovery and pretrial proceedings will differ extensively. For instance, discovery in *Klein* can be expected to focus heavily on the contracts between the PBM defendants and the plaintiffs' health care plans, as well as the PBM defendants' alleged efforts to secure larger rebates and other payments from Mylan. Much of this discovery will not be relevant to the antitrust actions in the MDL. There may be circumstances where antitrust and ERISA actions sufficiently overlap as to merit centralization, but this is not such an instance. Transferring *Klein* to the MDL offers few efficiencies, while the inclusion of ERISA claims in the MDL could significantly complicate the efficient management of this already complex litigation.

Although we vacate the conditional transfer order, we recognize that there likely will be some overlapping discovery with respect to the alleged rebate scheme. As *Klein* effectively is the only ERISA action pending outside the District of Kansas,<sup>6</sup> informal coordination of such discovery by the parties and the involved courts is both practicable and preferable to expanding the scope of the MDL. See, e.g., *In re Eli Lilly and Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. 242, 244 (J.P.M.L. 1978); see also Manual for Complex Litigation, Fourth, § 20.14 (2004). During oral argument on a related motion to centralize involving the same parties,<sup>7</sup> counsel for all parties agreed that they will cooperate and coordinate with one another with respect to any common discovery.

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<sup>4</sup> There is an ERISA action (*Brannon*) pending in the District of Kansas in which plaintiffs seek leave to amend their complaint to add Mylan as a defendant. That action, however, is not part of MDL No. 2785. In an order issued concurrently with this one, we deny a motion under Section 1407 to centralize the *Brannon* and *Klein* actions in a separate EpiPen ERISA MDL. See Order Denying Transfer, *In re EpiPen (Epinephrine Injection, USP) Employee Retirement Income Security Act (ERISA) Litigation*, MDL No. 2802 (J.P.M.L. Dec. 5, 2017).

<sup>5</sup> The *Klein* plaintiffs seek various types of equitable relief, such as disgorgement and restitution, while the MDL plaintiffs primarily seek damages.


<sup>6</sup> The Panel has been notified of a second ERISA action filed in the District of Minnesota in which plaintiff is represented by the same counsel that represents plaintiffs in *Klein*.

<sup>7</sup> MDL No. 2802 – *In re EpiPen (Epinephrine Injection, USP) Employee Retirement Income Security Act (ERISA) Litigation*.

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IT IS THEREFORE ORDERED that the Panel's conditional transfer order designated "CTO-3" is vacated.

PANEL ON MULTIDISTRICT LITIGATION

A handwritten signature in cursive script, reading "Sarah S. Vance".

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Sarah S. Vance  
Chair

Marjorie O. Rendell  
R. David Proctor

Charles R. Breyer  
Catherine D. Perry

**IN RE: EPIPEN (EPINEPHRINE INJECTION, USP)  
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**SCHEDULE A**

District of Minnesota

KLEIN, ET AL. v. PRIME THERAPEUTICS, LLC, ET AL., C.A. No. 0:17-01884