

**UNITED STATES JUDICIAL PANEL  
on  
MULTIDISTRICT LITIGATION**

**IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION**

MDL No. 2804

**IN RE: MCKINSEY & COMPANY, INC., NATIONAL  
PRESCRIPTION OPIATE LITIGATION**

MDL No. 2996

**TRANSFER ORDER**

**Before the Panel:** Defendants move under Panel Rule 7.1 to vacate the orders that conditionally transferred four actions, which are listed on Schedule A, to MDL No. 2996, simultaneously separated and remanded certain claims against various MDL No. 2804 defendants and then transferred the resulting actions to MDL No. 2804. These motions fall into two categories. First, defendant West Virginia Board of Pharmacy (WVBOP)<sup>1</sup> opposes transfer of claims against it to either MDL based on sovereign immunity. Second, defendants Johnson & Johnson (J&J) and Janssen Pharmaceuticals, Inc., seek separation and remand on a per-defendant basis (*i.e.*, transferring all claims against non-McKinsey defendants to MDL No. 2804), as opposed to separation and remand of specific claims. McKinsey defendants<sup>2</sup> do not oppose the Johnson & Johnson and Janssen motions. Plaintiffs did not respond to any of defendants' motions.<sup>3</sup>

This case arises in a rare procedural posture, involving factual allegations that relate to two MDLs: MDL No. 2804 – *In re: National Prescription Opiate Litigation* and MDL No. 2996 – *In re: McKinsey & Co., Inc., National Prescription Opiate Litigation*. The one claim (“negligence and recklessness”) plaintiffs pled against only McKinsey was conditionally transferred to the McKinsey MDL. Plaintiffs pled three claims against multiple defendants including McKinsey: public nuisance against all defendants, and negligent/intentional misrepresentation and civil conspiracy claims against McKinsey and three manufacturers – J&J, Janssen and opioid component manufacturer Noramco. Those three claims also were conditionally transferred to MDL No. 2996. Two claims that were clearly pled against only non-McKinsey defendants (*i.e.*,

---

<sup>1</sup> WVBOP filed motions to vacate CTOs in the Southern District of West Virginia *J.J.* and *Rust* actions. In the Southern District of West Virginia *K.D.* and *M.P.* actions, it responded in support of the other defendants' motions to vacate.

<sup>2</sup> McKinsey & Company, Inc., McKinsey & Company, Inc. United States, and McKinsey & Company, Inc. Washington D.C.

<sup>3</sup> Plaintiffs initially filed a notice of opposition to the CTOs in *J.J.*, *Rust*, and *M.P.*, but they did not file a motion and brief or a response to defendants' motions to vacate.

negligence against the three manufacturer defendants and intentional and malicious conduct against the WVBOP) were conditionally transferred to MDL No. 2996, but also simultaneously remanded under Section 1407 to the transferor court and the resulting actions were then conditionally transferred to MDL No. 2804. Defendants' motions to vacate followed.

After considering the arguments of counsel, we find these actions involve common questions of fact with the actions previously transferred to MDL No. 2996, and that transfer of the actions in their entirety to the McKinsey MDL 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. Moreover, transfer is warranted for the reasons set forth in our order directing centralization. In that order, we held that the Northern District of California was an appropriate Section 1407 forum for actions sharing factual questions regarding McKinsey's role in providing advice to certain opioid manufacturers, most notably Purdue, and others in the form of sales and marketing strategies aimed at increasing sales of prescription opioid drugs. *See In re McKinsey & Co., Inc., Nat'l Prescription Opiate Consultant Litig.*, 2021 WL 2351628 at \*1 (J.P.M.L. June 7, 2021).

No party disputes that these actions involve facts common to both MDL No. 2804 and MDL No. 2996. There also is no dispute that each of the non-McKinsey defendants are involved in MDL No. 2804 – even the West Virginia Board of Pharmacy (WVBOP) is named in 24 actions in MDL No. 2804. Plaintiffs in the actions before us are guardians suing on behalf of children who suffer from neonatal abstinence syndrome (NAS) as a result of *in utero* exposure to opioids. Defendants Johnson & Johnson, Janssen Pharmaceuticals, and Noramco are, or were, affiliated companies engaged in the manufacture, sale, and marketing of opioids and opioid active ingredients. McKinsey allegedly advised multiple pharmaceutical manufacturers, including Johnson & Johnson, in devising sales tactics for the wrongful promotion of their opioid products.

WVBOP opposes transfer to either MDL primarily by arguing that sovereign immunity prevents the exercise of federal jurisdiction over its case. “Section 1407 does not empower the MDL Panel to decide questions going to the jurisdiction or the merits of a case...” *See In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990). We have long held that jurisdictional objections generally do not present an impediment to transfer and can be presented to the transferee judge.<sup>4</sup> Given the undisputed factual overlap of these actions with the MDL No. 2996 proceedings, transfer is justified to facilitate the efficient conduct of the litigation as a whole. *See 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.”).

---

<sup>4</sup> *Cf. In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347 (J.P.M.L. 2001) (“[R]emand motions can be presented to and decided by the transferee judge.”). 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 threshold motion if it chooses to do so.

Defendants J&J and Janssen move to partially vacate the CTOs and transfer all claims against non-McKinsey defendants to MDL No. 2804. We have occasionally separated and remanded cases on a per-defendant basis,<sup>5</sup> but in these circumstances we view this proposed per-defendant transfer as inadvisable. First, the three claims against multiple defendants, particularly the civil conspiracy claim, appear indivisible, which renders transfer of them impracticable.<sup>6</sup> Section 1407(a) affords the Panel the power to “separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.”

Section 1407 does “not authorize the Panel to transfer one issue raised by a claim . . . while remanding another issue raised by the same claim.” *In re Air Crash Disaster at Duarte, Cal. on June 6, 1971*, 346 F. Supp. 529, 530 (J.P.M.L. 1972). The Panel has long observed that “[t]his unequivocal and obviously deliberate withholding from the Panel of power to separate issues in a single civil action assigning one or more to the transferee court and one or more to the transferor court is a clear, precise and wise limitation on the powers of the Panel.” *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 489–90 (J.P.M.L. 1968).<sup>7</sup> Separating and remanding manufacturer defendants and the WVBOP named in, for instance, the civil conspiracy claim brought against “all defendants” strikes us as more akin to carving out an issue – certain defendants’ role in the alleged conspiracy – than separating and remanding a claim.

After the CTO issued, plaintiffs moved to remand the Southern District of West Virginia *J.J.* action to state court and defendant WVBOP moved to dismiss. Separation and remand of claims as defendants propose would complicate the resolution of these motions, which (presumably, given common counsel) may be filed in all actions. Doing so may result in the transferee judges in two districts reaching differing conclusions on identical motions to remand to state court and WVBOP’s sovereign immunity arguments, among other issues, in what is still

---

<sup>5</sup> See, e.g., *In re Invokana (Canagliflozin) Prod. Liab. Litig.*, 223 F. Supp. 3d 1345, 1349 (J.P.M.L. 2016) (rejecting bid to centralize entire class of drugs, separating and remanding claims against non-Janssen defendants in a “combination case.”); *In re: Aredia & Zometa Prods. Liab. Litig.*, 429 F. Supp. 2d 1371, 1372-73 (J.P.M.L. 2006) (separating and remanding claims in three actions brought against Merck and transferring for inclusion in the MDL only claims against Novartis).

<sup>6</sup> See, e.g., *In re Juul Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2913, Doc. No. 365 at 2 (J.P.M.L. Feb. 4, 2020) (“In any event, the seemingly indivisible nature of plaintiff’s claims renders a partial transfer (i.e., transferring only plaintiff’s claims against JLI and separating and remanding the claims against the other defendants) impracticable.”).

<sup>7</sup> See also *In re: Bank of Am., N.A., Mortg. Corp. Force-Placed Hazard Ins. Litig.*, 959 F. Supp. 2d 1365, 1366–67 (J.P.M.L. 2013) (“[M]ovants’ proposal to separate and remand the flood and wind insurance claims in [the S.D. Florida *Hall*] action is unworkable... Movants’ proposal for separation and remand calls for carving out the subset of hazard insurance issues from each of the individual claims pled in the *Hall* complaint and thus is not feasible.”) (footnotes omitted); *id.* at n.8 (“For example, the *Hall* breach of contract claim covers all forms of insurance, not just hazard insurance. Similarly, the *Hall* plaintiffs bring two RICO conspiracy claims against defendants and carving up those claims in the manner described by movants seems untenable.”).

theoretically a single case. Although rare, separation and remand also can complicate the finality of any judgment entered by one judge. *See Rollins v. Mortg. Elec. Registration Sys., Inc.*, 737 F.3d 1250 (9th Cir. 2013).

Transfer of the actions in their entirety to MDL No. 2996 will allow the transferee judge to resolve motions to remand to state court and the dismissal of WVBOP with the entire controversy before him. If the actions remain in federal court, then he may deem it appropriate to order the parties to consider other ways that they can more clearly delineate McKinsey-related issues from issues involving MDL No. 2804 defendants. Possible solutions include severance or repleading claims in a way that is more amenable to Section 1407 remand of the non-McKinsey claims for retransfer to MDL No. 2804. We dedicate these issues to the sound discretion of the transferee judge.

IT IS THEREFORE ORDERED that defendants' motions to vacate the conditional transfer orders encompassing the actions listed on Schedule A are DENIED.

IT IS FURTHER ORDERED that the portions of the conditional transfer orders designated in MDL No. 2804 as "CTO-203," "CTO-204," and "CTO-206" and MDL No. 2996 as "CTO-8," "CTO-10," and "CTO-12" insofar as they separated and remanded certain claims to the transferor court and transferred the resulting actions to MDL No. 2804 are VACATED.

IT IS FURTHER ORDERED that the actions listed on Schedule A are transferred in their entirety to the Northern District of California and, with the consent of that court, assigned to the Honorable Charles R. Breyer for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



---

Karen K. Caldwell  
Chair

Nathaniel M. Gorton  
David C. Norton  
Dale A. Kimball

Matthew F. Kennelly  
Roger T. Benitez  
Madeline Cox Arleo

**IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION**

MDL No. 2804

**IN RE: MCKINSEY & COMPANY, INC., NATIONAL  
PRESCRIPTION OPIATE LITIGATION**

MDL No. 2996

**SCHEDULE A**

Southern District of West Virginia

J.J., ET AL. v. JOHNSON & JOHNSON, ET AL., S.D. West Virginia,  
C.A. No. 2:21-00461

RUST, ET AL. v. JOHNSON & JOHNSON, ET AL., S.D. West Virginia,  
C.A. No. 5:21-00449

M. P. v. JOHNSON & JOHNSON, ET AL., S.D. West Virginia, C.A. No. 5:21-00463

K. D., ET AL. v. JOHNSON & JOHNSON, ET AL., S.D. West Virginia,  
C.A. No. 5:21-00473