

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

**IN RE: ZOSTAVAX (ZOSTER VACCINE LIVE)  
PRODUCTS LIABILITY LITIGATION**

MDL No. 2848

**REMAND ORDER**

**Before the Panel:** Defendants Merck & Co., Inc., and Merck Sharpe & Dohme Corp. (“Merck”) move under Panel Rule 10.2 to vacate the Panel’s order conditionally remanding the action listed on Schedule A (*Gentile*) to the Southern District of Ohio, its transferor court. Plaintiff opposes the motion to vacate and supports remand.

After considering the argument of counsel, the Panel finds that remand of this action under 28 U.S.C. § 1407 is warranted. As an initial matter, “[i]n considering the question of remand, the Panel has consistently given great weight to the transferee judge’s determination that remand of a particular action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings.” *In re Holiday Magic Sec. & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977).

In his suggestion of remand, the transferee judge, the Honorable Harvey Bartle III, observed that “[t]his MDL now consists of over 1,300 product liability cases,” which he contrasted with the putative class action claims in *Gentile*. See Suggestion of Remand at 2. He determined that “*Gentile* is outside the purview of MDL 2848,” and thus suggested remand, explaining:

In essence, plaintiff claims that she and the class members were duped into obtaining Zostavax vaccines in Ohio as a result of false and deceptive marketing by Merck in stating that Zostavax was effective for long-term prevention against shingles. Significantly, there are no allegations in the complaint in *Gentile* that plaintiff or any putative class member has suffered any illness or injury, physical or mental, from taking or being vaccinated with Zostavax. Simply stated, this is not a products liability case.

*Id.* at 2. His focus on the absence of personal injury allegations comports with our determination in the initial transfer order that centralization of this litigation was warranted based on “common factual questions arising out of allegations that Zostavax, a live vaccine for the prevention of shingles, caused plaintiffs to develop *shingles or other injuries triggered by exposure to the live, attenuated varicella zoster virus* contained in the vaccine.” See *In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.*, 330 F. Supp. 3d 1378, 1379 & n.2 (J.P.M.L. 2018) (emphasis added). In other words, the common allegation of personal injuries arising from exposure to the live virus component of Zostavax is at the crux of the actions in the MDL.

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In opposing remand, defendants assert that (1) *Gentile* shares common factual questions with the actions in the MDL as to the “efficacy” of Zostavax, highlighting numerous factual allegations in the MDL complaints concerning Zostavax’s efficacy; (2) *Gentile* thus involves common discovery on core issues such as the marketing, design, and efficacy of Zostavax; and (3) centralization of personal injury actions with economic loss class actions involving the same product is well-supported by precedent and appropriate here because of overlapping discovery, *Daubert* issues, and the transferee judge’s familiarity with the subject matter of this litigation. Undoubtedly, *Gentile* presents some factual overlap with the actions in the MDL, and centralization of product liability and consumer class action claims in the same MDL often is appropriate. However, the record before us indicates that, nearly two years into this particular MDL, there have been no class action claims aside from the recently-transferred *Gentile* action. Thus, although consumer class action claims often will be appropriate for inclusion in a product liability MDL, “[e]ach multidistrict litigation is unique, and transferee judges have broad discretion to determine the course and scope of pretrial proceedings.” See *In re Light Cigarettes Mktg. and Sales Practices Litig.*, MDL No. 2068, Remand Order, at 2 (J.P.M.L. Apr. 16, 2012). This is particularly so where, as here, the transferee judge finds that a single putative class action is an outlier among a large number of individual product liability actions, and the MDL has reached an advanced stage of discovery. We find it well within the discretion of the transferee judge, who undoubtedly is most familiar with whether *Gentile* would fit into the MDL pretrial proceedings, to determine that *Gentile* is too different from the MDL actions for inclusion. We decline to second-guess the transferee judge’s considered determination that *Gentile* does not belong in the MDL.

Merck also argues that remand is “premature” because the transferee court suggested remand before conducting pretrial proceedings in *Gentile*. This argument is unpersuasive. The Panel has remanded actions within just a few months of transfer where the transferee judge determined the actions were not within the scope of the MDL. See *In re Holocaust Era German Industry, Bank & Insurance Litig.*, MDL No. 1337, Transfer Order at 1-2 (J.P.M.L. 2002) (discussing Section 1407 remand of two actions “within two months of the Section 1407 transfers”).

The Panel repeatedly has emphasized that “[w]hether Section 1407 remand is appropriate for an action in any particular multidistrict docket is based upon the totality of circumstances involved in that docket.” See, e.g., *In re Columbia/HCA Healthcare Corp. Qui Tam Litig. (No. II)*, 560 F. Supp. 2d 1349, 1350 (J.P.M.L. 2008); *In re Brand-Name Prescription Drugs Antitrust Litig.*, 170 F. Supp. 2d 1350, 1352 (J.P.M.L. 2001). Here, considering the totality of the circumstances, we conclude that the transferee court reasonably concluded that remand of *Gentile* is warranted.

To the extent that coordination among the MDL actions and *Gentile* is appropriate, we encourage the parties to employ various cooperative efforts which may minimize the risk of duplicative discovery.<sup>1</sup> The parties, who are well-familiar with the common pretrial proceedings,

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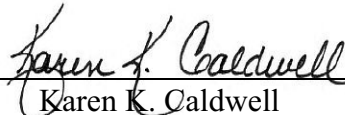
<sup>1</sup> See *Regions Morgan Keegan Secs., Derivative and Employee Ret. Income Security Act (ERISA) Litig.*, MDL No. 2009, Remand Order at 2 (J.P.M.L. June 7, 2013).

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should be able to avail themselves of the documents and depositions accumulated under Judge Bartle's supervision of MDL No. 2848, and should direct the transferor court to any relevant pretrial rulings.

IT IS THEREFORE ORDERED that the action listed on Schedule A is remanded to the Southern District of Ohio.

PANEL ON MULTIDISTRICT LITIGATION



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Karen K. Caldwell

Chair

Ellen Segal Huvelle  
Catherine D. Perry  
Matthew F. Kennelly

R. David Proctor  
Nathaniel M. Gorton  
David C. Norton

**IN RE: ZOSTAVAX (ZOSTER VACCINE LIVE)  
PRODUCTS LIABILITY LITIGATION**

MDL No. 2848

**SCHEDULE A**

Eastern District of Pennsylvania

GENTILE V. MERCK & CO., INC., ET AL., C.A. No. 2:20-20000  
(S.D. Ohio, C.A. No. 2:19-04174)