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FOR THE JUDICIAL PANEL OF
MULTIDISTRICT LITIGATION

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DOCKET NO. 1477

DEC 10 2003

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE SERZONE PRODUCTS LIABILITY LITIGATION

TERESA L. DEPPNER, CLERK
U.S. District & Bankruptcy Court
Southern District of West Virginia

Myra Frana, et al. v. Ortho-McNeil Pharmaceutical, Inc., et al., N.D. Iowa, C.A. No. 1:03-79 2:03-24
Gina Archie, et al. v. Bristol-Myers Squibb Co., Inc., et al., S.D. Mississippi, C.A. No. 3:02-1762 2:03-2
Emma J. Twiner v. Bristol-Myers Squibb Co., Inc., et al., S.D. Mississippi, C.A. No. 5:03-320 2:03-2
Josephine Adams, et al. v. Bristol-Myers Squibb Co., N.D. Texas, C.A. No. 3:03-1430 2:03-2447
Barbara Adams-Sharp, et al. v. Bristol-Myers Squibb Co., N.D. Texas, C.A. No. 3:03-1669 2:03-22
Dixie Atencio, et al. v. Bristol-Myers Squibb Co., et al., S.D. Texas, C.A. No. 4:03-2772 2:03-2448

**BEFORE WM. TERRELL HODGES,* CHAIRMAN, JOHN F. KEENAN,
BRUCE M. SELYA,* JULIA SMITH GIBBONS, D. LOWELL JENSEN,* J.
FREDERICK MOTZ AND ROBERT L. MILLER, JR., JUDGES OF THE
PANEL**

TRANSFER ORDER

Before the Panel are motions brought, pursuant to Rule 7.4, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001), by the plaintiffs in two Southern District of Mississippi actions, two Northern District of Texas actions, and one Southern District of Texas action to vacate the Panel's orders conditionally transferring the actions to the Southern District of West Virginia for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket. The defendant doctors in the Southern District of Texas action also move to vacate the conditional transfer order with respect to that action. Defendant Bristol-Myers Squibb Company (Bristol-Myers) opposes the motions to vacate and favors inclusion of the actions in MDL-1477.

Ortho-McNeil Pharmaceutical, Inc.; Johnson & Johnson Pharmaceutical Research and Development, L.L.C.; and Johnson & Johnson (collectively Ortho-McNeil), which are named as defendants in the Northern District of Iowa action (*Frana*), move to vacate a conditional transfer order as it applies to the claims against them in that action. The Ortho-McNeil defendants ask the Panel, pursuant to 28 U.S.C. § 1407(a), to separate and remand the claims asserted against them in the *Frana* action to the Northern District of Iowa should the Panel transfer the claims against Bristol-Myers to the Southern District of West Virginia for inclusion in the MDL-1477 proceedings. The Ortho-McNeil defendants do not oppose transfer of the claims pertaining to Serzone against Bristol-Myers, and, similarly, Bristol-Myers does not oppose the limited motion to vacate sought by its co-

* Judges Hodges and Selya took no part in the decision of this matter. Judge Jensen took no part in this decision with respect to the Northern District of Iowa action (*Frana*).

defendants to separate and remand the claims against them. Plaintiffs in the Northern District of Iowa action resist the motion to vacate filed with respect to their action.

On the basis of the papers filed and hearing session held, the Panel finds that these six actions involve common questions of fact with the actions in this litigation previously transferred to the Southern District of West Virginia, and that transfer of these actions to the Southern District of West Virginia for inclusion in the coordinated or consolidated pretrial proceedings in that district will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The Panel further finds that transfer of these actions is appropriate for reasons expressed by the Panel in its original order directing centralization in this docket. The Panel held that the Southern District of West Virginia was a proper Section 1407 forum for actions involving claims of liability related to the prescription drug Serzone. *See In re Serzone Products Liability Litigation*, 217 F.Supp.2d 1372 (J.P.M.L. 2002).

The plaintiffs opposing transfer of their actions premise much of their opposition to transfer on their argument that federal jurisdiction is lacking in their actions. These parties urge the Panel not to order transfer before motions to remand to state court are resolved by the transferor court. We note that remand and other motions, if not resolved in the transferor court by the time of Section 1407 transfer, can be presented to and decided by the transferee judge. *See, e.g., In re Ivy*, 901 F.2d 7 (2nd Cir. 1990); *In re Prudential Insurance Company of America Sales Practices Litigation*, 170 F.Supp.2d 1346, 1347-48 (J.P.M.L. 2001).

The defendant doctors who oppose transfer of the Southern District of Texas action argue that the claims against them in that action do not involve common questions of fact with the claims against Bristol-Myers in the MDL-1477 actions. The Ortho-McNeil defendants ask the Panel to separate and simultaneously remand the claims asserted against them in the *Frana* action, thereby effectively denying transfer of those claims, which relate to their product, Levaquin. These defendants oppose transfer of the claims against them on the grounds that neither they nor their product are currently at issue in the MDL-1477 proceedings and thus the claims will not share sufficient questions of fact with the previously centralized MDL-1477 actions to warrant transfer. We find these contentions unpersuasive. We emphasize that transfer under Section 1407 does not require a complete identity or even majority of common factual issues as a prerequisite to transfer. Nor is the presence of an additional defendant or product significant when the underlying action still contains, as here, product liability claims and factual allegations focusing on the safety of Serzone. We observe that transfer under Section 1407 has the salutary effect of placing all actions in this docket before a single judge who can formulate a pretrial program that allows discovery with respect to any non-common issues to proceed concurrently with discovery on common issues. *See In re Joseph F. Smith Patent Litigation*, 407 F.Supp. 1403, 1404 (J.P.M.L. 1976).

It may be, on further refinement of the issues and close scrutiny by the transferee judge, that the claims against the Ortho-McNeil defendants relating to Levaquin can be remanded in advance of other claims in the transferee district. But we are unwilling, on the basis of the record before us, to make a determination at this time that the degree of interconnection between the claims against

these defendants and the claims against Bristol-Myers in the affected action is so small as to warrant exclusion of the claims pertaining to Levaquin from Section 1407 proceedings from the outset. We point out that whenever the transferee judge deems remand of any claims or actions appropriate, procedures are available whereby this may be accomplished with a minimum of delay. *See* Rule 7.6, R.P.J.P.M.L., 199 F.R.D. at 436-38.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, these six actions are transferred to the Southern District of West Virginia and, with the consent of that court, assigned to the Honorable Joseph R. Goodwin for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

FOR THE PANEL:

A handwritten signature in cursive script that reads "John F. Keenan". The signature is written in black ink and is positioned above a horizontal line.

John F. Keenan
Acting Chairman

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