

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: AVANDIA MARKETING, SALES)	MDL NO. 1871
PRACTICES AND PRODUCT LIABILITY)	07-md-01871
LITIGATION)	
)	
)	
This document relates to:)	HON. CYNTHIA RUFE
)	
)	
CASES LISTED IN EXHIBIT A)	
PERTAINING TO MATTERS FILED)	
BY THE DIAZ LAW FIRM, LAW)	
OFFICES OF PETER G. ANGELOS, P.C.,)	
THE FERRARO LAW FIRM)	
and BAUM, HEDLUND, ARISTEI, &)	
GOLDMAN)	

**PLAINTIFFS' JOINT MOTION FOR SUGGESTION OF REMAND OF
REMAINING MYOCARDIAL INFARCTION CASES**

COMES NOW counsel from (1) the Diaz Law Firm, (2) the Law Offices of Peter G. Angelos, P.C., (3) The Ferraro Law Firm, and (4) Baum, Hedlund, Aristei, & Goldman on behalf of their respective firms' myocardial infarction Plaintiffs as listed on collective Exhibit "A" attached hereto, (hereinafter collectively "Plaintiffs") and files this *Joint Motion for Suggestion of Remand of Remaining Myocardial Infarction Cases* and states to the Court as follows:

1. Pursuant to Rule 10.3(a)(i) of the Rules of the Procedure of the United States Judicial Panel on Multidistrict Litigation and 28 U.S.C. §1407(a) on Multidistrict litigation, the Plaintiffs move that this Court issue a Suggestion of Remand to the United States Judicial Panel on Multidistrict Litigation ("the Panel") with regard to their

myocardial infarction cases originally filed in the United States District Courts for the Districts of California, Nevada, Washington, Georgia, Minnesota, South Dakota, Missouri, Texas, Maryland, Mississippi, Washington D.C., and Florida, and then subsequently transferred to this MDL for common discovery and other pretrial proceedings. 28 U.S.C. §1407(a) provides in part:

- (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. . . . Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred. . . .

Id. Not only does §1407(a) authorize the Panel to transfer cases for coordinated or consolidated proceedings, it also obligates the Panel to remand any pending case when, at the latest, those pretrial proceedings have run their course. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

2. Further, while an MDL court has no authority to remand a case on its own, the MDL court “plays a vital role in the remand process by entering an order in which it suggests to the Panel that a case is ready to remand.” In re Aredia & Zometa Prod. Liab. Litig. at *1 (2010 WL 5387695 Dec. 22, 2010). A suggestion of remand from the MDL court provides indication to the Panel that the coordinated or consolidated pretrial proceedings assigned to it by the Panel have been successfully completed. Id.

3. A party seeking remand to the transferor court has the burden of showing that the remand is warranted. In re Integrated Res. Equity Corp. Real Estate Ltd. P’ship. Sec. Litig., 851 F. Supp. 556, 562 (S.D.N.Y. 1994). The Panel has discretion to remand a case when everything that remains to be done is case specific. In re Wilson, 451 F.3d 161, 173 (3d Cir. 2006). The suggestion to remand will not be well taken if the case will

benefit from further coordinated proceedings as part of the MDL. In re Aredia at *2. Remand should not be suggested if continued consolidation will eliminate duplicative discovery, prevent inconsistent rulings and conserve the resources of the parties, their counsel, and the judiciary. Id.

4. “[T]he primary purpose behind assigning multidistrict litigation to a transferee court is to promote efficiency through the coordination of discovery.” In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig., No. 09-md-2059 (RHK/JJK), 2012 WL 72844, *5 (D. Minn. Jan. 10, 2012) (*citing* In re Nuvaring Prod. Liab. Litig., MDL No. 1964, 2009 WL 4825170, *1 (E.D.MO. Dec. 11, 2009)). Judicial focus upon efficiency is of paramount importance when an MDL court considers making a suggestion of remand. In determining “whether the case will benefit from further coordinated proceedings as part of the MDL,” Id. at *5, the court must decide whether the involvement of the transferee court continues to promote efficiency, or whether remaining issues are so fact specific and/or dependent upon interpretation and application of varying state laws that “the transferor courts, each of which is familiar with the state law of their respective jurisdictions, are in a better position to assess” and resolve them. Id. at *6 (*quoting* In re Light Cigarettes Mktg. Sales Practices Litig., 832 F. Supp. 2d 74, 77 (D. Me. 2011)).

In Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig., 659 F. Supp. 2d 1371 (J.P.M.L. 2009), the Judicial Panel on Multi-District Litigation held that inclusion of two cases factually similar to previously transferred cases was no longer necessary to achieve just and efficient conduct of the litigation. In so holding, the Court wrote:

[m]ultidistrict litigation is not static, however. The Panel created MDL No. 1373 in October 2000. Over the past nine years, we have

transferred over 820 cases to the Southern District of Indiana for centralization within MDL No. 1373. ... By now, however, the work of the transferee court has reached an advanced stage. **All common discovery was completed in the transferee district.** Judge Sara Evans has made many well considered and useful rulings on procedural, substantive and evidentiary issues....

Over the course of time, the relative merits of transferring additional cases can change as the transferee court completes its primary tasks. The point of diminishing benefit in tag-along transfers is never absolutely clear. After a certain point, however, the benefits of transfer should not be assumed to continue.

Id. at 1371-72 (emphasis added). *See also* In re Seroquel Prod. Liab. Litig., Order Vacating Conditional Transfer Order, MDL No. 1769 (J.P.M.L. 2010); In re State St. Bank and Trust Co. Fixed Income Funds Inv. Litig., MDL No. 1945, 2011 WL 1046162, *1 (S.D.N.Y. 2011)(remand granted from MDL court with the court noting that “coordinated fact and expert discovery is complete ... which is among the primary purposes of multidistrict litigation” at *4); In re Activated, 840 F. Supp.2d 1193 (D. Minn. 2012)(remand granted from the MDL court with the court stating “in reaching that conclusion [to transfer], the key factor is that discovery in these actions is now complete....The primary purpose of consolidation, therefore, has been achieved.” at 1198); In re Aredia, 2010 WL 5387695, *2 (M.D. TN. 2010)(suggestion of remand granted with the court stating “these cases have gone through the ‘weeding out’ process identified by Defendants and have not been dismissed. Discovery, other than case-specific damages discovery, is complete in these cases, so the procedures for orderly discovery and depositions have worked and are finished.” at *2).

5. The Avandia MDL began via a Transfer Order from the Panel on October 16, 2007. *See* Transfer Order dated October 16, 2007. Over the ensuing 52 months, this Court in conjunction with several versions of the Plaintiff's Steering Committee and counsel for defendant GlaxoSmithKline (GSK) engaged in extensive pre-trial activity, narrowing the issues in the thousands of matters through a series of decisions. As a result of the collective work of this Court and the attorneys that represented the collective plaintiffs along with the attorneys who continue to represent GSK, a Status Conference was held on February 14, 2012. At that status conference, Judge Rufe reviewed the state of the litigation, noting that a vast majority of cases pending nationwide had settled in the previous months pursuant to the hopes encapsulated in PTO 146 which strongly encouraged parties to enter into voluntary mediation. *See* PTO 146. In specific, Judge Rufe stated that "we have, pursuant to PTO 146, spent virtually the last two to three months in heavy mediation. . . mediation, which by all respects. . . was a major success." Transcript of Status Conference held on February 14, 2012 at p. 5. Further, attorney for GSK Nina Gussack stated that as a result of PTO 146 GSK was "remarkably pleased to be able to resolve over 23,000 cases pursuant to Pretrial Order 146." Transcript of Hearing at p. 18. As a result of that effort, Judge Rufe further stated "this Court's efforts now has to turn back to whatever cases remain in the MDL and resolve them through litigation because I believe that is the only thing left for us to do." Transcript of Hearing at p. 5.

6. With that as the backdrop at the Hearing, her Honor then stated that she was not reconstituting the PSC. Transcript of Hearing at p. 24. Specifically, Judge Rufe stated "I don't see a need to feed into more lawyers who are now responsible for their

own cases. . . . It's going to be time where if someone has not settled their case, they need to get it ready to be tried. They will have to handle it themselves, that includes responding to motions and arguing them if necessary." Transcript of Hearing at pp. 24 – 25. Most importantly, Judge Rufe then stated that with respect to pending motions and future motions in the MDL that it "will now be on an individual counsel on behalf of an individual case, and if that establishes a bellwether ruling, fine. But I think that is how we should be proceeding. Because *there comes a time when it's not a common goal anymore.*" (emphasis added) Transcript of Hearing at p. 25.

7. Subsequent to that ruling, Judge Rufe entered PTO 155 which compelled counsel with cases remaining in the MDL to produce expert reports on cases amongst their clients where myocardial infarction was the injury at issue. Counsel for Plaintiffs at that time moved for reconsideration of the issuance of PTO 155 and at the same time filed their original Motions for Suggestion of Remand.

8. The Court denied the motions for reconsideration of PTO 155 and further denied the motions for suggestion of remand, the denial of the motions for suggestion of remand encapsulated in PTO 159. In PTO 159, Judge Rufe stated, "the JPML panel is obligated to remand pending cases to the originating courts when pre-trial proceedings have run their course. . . *at this point in the litigation*, remand to the transferor courts is purely discretionary. The Court has determined that remand would be premature." PTO 159 (emphasis added).

9. The parties remaining in this litigation then responded to PTO 155 and produced expert reports for their clients who suffered from myocardial infarctions as a result of taking Avandia.

10. Concurrent with PTO 155, the Court also established a protocol for moving remaining cases filed in the Eastern District of Pennsylvania toward trial dates, the first five of which were originally set for November of 2012. A trial of one of those cases or others pursuant to the Court's case-selection process will yield a bellwether-type verdict that will help to shape the remaining litigation. Generally, case-specific discovery in cases not selected for trial-tracks in an MDL is stayed to avoid unnecessary discovery and motion practice multiplied across many cases, which will inevitably overwhelm an MDL court's time.

11. As noted above, the touchstone for MDL litigation under 28 U.S.C. §1407(a) is the need for coordinated and consolidated proceedings where there are common questions of fact. Here, due to the four plus years of hard work of this Court and counsel for GSK and all prior versions of the now-defunct PSC, we have reached a point where there is not a "common goal" that ties together all remaining non-settled myocardial infarction cases to this litigation. The remaining work to be done is "case-specific" as to all remaining unsettled myocardial infarction litigants. Rulings from this Court based on expert reports, depositions, and hearing testimony have narrowed the science on the myocardial infarction cases to a point where the attorneys of non-settling cases can take that body of established rulings and try their cases. Again, per this Court, "one of the things the MDL did was work with the states in common discovery and common efforts on motions such as science hearings to develop a body of information that attorneys could rely on." Transcript of Hearing at p. 26.

12. Indeed, depositions of fact witnesses with regard to liability have been conducted, all depositions of common experts on links between ingestion of Avandia and

an increased risk for myocardial infarction have been conducted, and millions of documents have been produced and reviewed by the former versions of the PSC and are ready for use at a trial. As a result of this work and the existing body of rulings, testimony, and produced and reviewed documents, what is left to be done is case specific in each instance. This Court's statements in not re-constituting the PSC on February 14, 2012 are consistent with that view.

13. With the dissolution of the PSC, it has been, per the Court, incumbent upon all remaining counsel to litigate their cases proactively. We note, however, that this unique approach, where an MDL remains but the PSC is gone, has proven problematic. For instance, no counsel on this *Joint Motion for Suggestion of Remand of Remaining Myocardial Infarction Cases* was served with Nina Gussack's letter of August 2, 2012, nor were any of the attachments thereto served upon any counsel. A copy of that letter and attachments was served upon liaison counsel Paul Kiesel, but there was an understandable and inevitable delay in his receipt of the correspondence and it being disseminated to affected counsel.

14. The diversity of the remaining parties in terms of geographic location, differing bodies of law that govern those diverse parties, the lack of a PSC to track and make all counsel aware of issues that affect remaining cases, and the significant work of the court and counsel on coordinated issues are all evidence this MDL is no longer an appropriate or necessary vehicle for the efficient resolution of remaining myocardial infarction cases.

15. The MDL previously quite admirably served its purpose in narrowing the scope of issues to be tried, establishing a body of rulings based on testimony and

argument with respect to the science of the general link between Avandia usage and myocardial infarction, and providing counsel via the various versions of the PSC the ability to develop the liability case against GSK. The “Lone Pine II Order” which mandated full Rule 26(b) expert reports for clients who suffered a myocardial infarction as a result of taking Avandia highlights that this litigation has moved beyond common purpose to case specific discovery.

16. With the compliance from joint counsel to this Motion with the Lone Pine I and II orders, counsel for GSK has sufficient information to evaluate the claims of the remaining myocardial infarction Plaintiffs to this litigation.

17. As a result, the work that needs to be accomplished with respect to the myocardial infarction clients of the firms in this joint motion includes depositions of the treating physicians of clients, the depositions of individual plaintiffs, their families and other fact witnesses as well as the depositions of any experts on specific causation and damages – all case specific work necessary to prepare each case for trial. That these are the sole tasks that remain to be accomplished signals that the benefits of the MDL with respect to coordinated potential discovery in individual cases and the resolution of issues common to all cases are at an end. Such case-specific matters highlight, in light of compliance with PTO 155, the readiness of these cases to be remanded to their home jurisdictions.

18. Counsel for Plaintiffs specifically request this *Joint Motion for Suggestion of Remand of Remaining Myocardial Infarction Cases* be given a hearing to address these issues.

WHEREFORE, Plaintiffs respectfully request this Court to grant the instant “*Joint Motion for Suggestion of Remand of Remaining Myocardial Infarction Cases*” and forward the suggestion that these matters be remanded to the United States Judicial Panel on Multidistrict Litigation for further proceedings to have these cases remanded there.

Respectfully submitted,

/s/Joey Diaz

/s/ Christopher Williams

/s/ Brandon Jones

/s/ Laurel Harris

THE DIAZ LAW FIRM

208 Waterford Square, Ste. 300

Madison, MS 39110-6857

(800) 459-2222

/s/ Patricia J. Kasputys

/s/ Aaron R. Parker

/s/ Glenn E. Mintzer

LAW OFFICES OF PETER G. ANGELOS

One Charles Center

100 N. Charles St.

Baltimore, MD 21201

(410) 649-2000

/s/ JanPaul Portal

/s/ David A. Jagolinzer

THE FERRARO LAW FIRM

4000 Ponce de Leon Blvd., Suite 700

Miami, Florida 33146

(305)375-0111

/s/ Michael Baum

/s/ Cynthia Garber

BAUM, HEDLUND, ARISTEI, &

GOLDMAN

12100 Wilshire Blvd, Ste. 950

Los Angeles, CA 90025

(310) 207-3233

CERTIFICATE OF SERVICE

I, Patricia J. Kasputys, hereby certify that on the date specified below that the foregoing documents were electronically filed using the ECF system which sent notification of such filing to all parties listed on the Electronic Mail Notice List to receive e-mail notices for this case.

This the 13th day of September, 2012.

BY: /s/ Patricia J. Kasputys
ATTORNEY FOR PLAINTIFFS
LAW OFFICES OF PETER G. ANGELOS