

**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

**IN RE: NEW ENGLAND COMPOUNDING
PHARMACY, INC.
PRODUCTS LIABILITY LITIGATION**

MDL No. 2419

**DEFENDANT NEW ENGLAND COMPOUNDING PHARMACY, INC. D/B/A NEW
ENGLAND COMPOUNDING CENTER'S RESPONSE TO PLAINTIFFS MOTION FOR
TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR
CONSOLIDATED PRETRIAL PROCEEDINGS**

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I. INTRODUCTION

Plaintiffs seek to transfer cases involving the alleged injection of the steroid methylprednisolone acetate to a centralized federal district court for coordinated and consolidated pretrial proceedings under 28 U.S.C. § 1407. Given the existence of certain common facts (though individual cases will turn on highly individualized facts), the need for consistency in pretrial rulings, the convenience of parties and witnesses, and in the interest of justice, Defendant New England Compounding Pharmacy, Inc., d/b/a New England Compounding Center (hereinafter “NECC”) does not oppose, and indeed fully supports transfer and consolidation in the appropriate district court. NECC submits that the District of Massachusetts – Boston Division, specifically The Honorable F. Dennis Saylor, IV, is best suited to serve as the transferee court to preside over and promote just and efficient handling of all pretrial matters in this litigation because: (1) the relevant documents and witnesses are located in Massachusetts; (2) the alleged incident giving rise to multiple tort claims occurred within the district; (3) it is not currently overtaxed with other MDL dockets; (4) it has the judicial and court resources to handle this litigation; and (5) the District of Massachusetts is easily accessible. For these reasons, the District of Massachusetts is the preferable forum for consolidation and transfer to Judge Saylor, and not the District of Minnesota as proposed by the movant. Alternatively, the Eastern District of Michigan, before Judge Nancy Garlock Edmunds, would also be an appropriate transferee forum. Additionally, defendant requests that the name of this litigation be revised to “MDL No. 2419: In Re: Compounding Pharmacy Litigation” as the cases proposed for centralization are not products liability matters.

II. FACTUAL BACKGROUND

Methylprednisolone acetate (“MP”), around which this litigation revolves, an injectable steroid often used for pain management, is a medication only available to licensed health care practitioners, which was compounded and distributed by New England Compounding Center, in Framingham, Massachusetts. On September 26, 2012, NECC initiated a nationwide recall of MP after the Food and Drug Administration (“FDA”) and the U.S. Centers for Disease Control and Prevention (“CDC”) investigated multiple state reports of fungal meningitis among patients who received an epidural steroid injection from one of three lots of MP compounded in 2012 at NECC. The company voluntarily ceased operations, surrendered its license to the Massachusetts Board of Registration in Pharmacy on October 3, 2012 and subsequently initiated a voluntary recall of all its products.

The national media has closely followed this public health event, and has reported on it daily since NECC’s initial recall. Attorney websites quickly sprang up recruiting claimants for litigation against NECC. Within days, Complaints were filed across the country. The Complaints all name as defendants New England Compounding Pharmacy, Inc. d/b/a New England Compounding Center. Some Complaints name one or more of the following additional defendants: Ameridose, LLC, Medical Sales Management LLC, Inc., Alaunus Pharmaceuticals LLC, Barry Cadden, RPh, Gregory Conigliaro, Lisa Conigliaro Cadden, RPh, Douglas Conigliaro, Carla Conigliaro and Glenn Chin, RPh, although Ameridose, Alaunus and Medical Sales Management had absolutely no involvement in the compounding of the recalled lots of MP. The plaintiffs in these cases allege that they were injected with the contaminated steroid and claim various personal injuries, though it is apparent that several of these plaintiffs’ claims

are predicated on a “fear of” injury after exposure, with those plaintiffs not having been diagnosed with meningitis.

As of the date of this filing, the CDC has reported 424 cases of fungal meningitis, including thirty-one (31) deaths and ten (10) joint infections, in nineteen (19) states associated with an injection of NECC’s MP. *See* www.CDC.gov. Twenty-eight (28) lawsuits have been filed (including five (5) class actions) in seven (7) federal district courts in five (5) states. Based upon the current CDC reports, and based upon consultation with plaintiffs’ counsel around the country, NECC estimates that hundreds of additional personal injury and wrongful death lawsuits will eventually be filed.

III. LAW AND ARGUMENT

A. These Cases Involve Common Issues of Fact and Should be Transferred for Coordination and Consolidated Pretrial Proceedings Pursuant to 28 U.S.C. § 1407

Defendant agrees that the actions enumerated in plaintiffs’ Motion and associated actions identified in the annexed Schedule of Actions rest on many common questions of fact and should be coordinated for pretrial proceedings in a single district. Although there are twenty-eight (28) federal cases pending today, new lawsuits are being filed daily, and the complexity and anticipated volume of cases warrants consolidation. Consolidation is necessary “to avoid duplicative discovery, prevent inconsistent rulings and to conserve judicial resources” and reduce the overall litigation management burden on the parties. *See e.g. In re Neurontin Marketing and Sales Practices Litig.*, 342 F. Supp. 2d 1350, 1351 (J.P.M.L. 2004) (where cases involved common allegations, “[c]entralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings . . . and conserve the resources of the parties, their counsel and the judiciary”); *In re Prograf Antitrust Litig.*, 789 F. Supp. 2d 1380

(J.P.M.L. 2011); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 435 F. Supp. 2d 1342, 1345 (J.P.M.L. 2006); *In re Visa/Mastercard Antitrust Litig.*, 295 F. Supp. 2d 1379, 1380 (J.P.M.L. 2003).

B. The District of Massachusetts is the Most Appropriate Transferee Forum Before Judge Saylor

The selection of an appropriate transferee forum depends greatly on the specific facts and circumstances of the litigation being considered for consolidation and involves a “balancing test based on the nuances of a particular litigation”, which considers several factors. *See* Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 214 (1977). While geographic centralization and relative docket conditions are valid considerations, they are to be measured alongside other considerations such as (1) the location of relevant documents and witnesses; (2) the size and nature of the pending actions; (3) the potential for coordination with state court proceedings; and (4) the overall docket conditions. David F. Herr, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, §§ 6:9, 6:10, 6:13, 6:17. All of the above factors relevant to this litigation militate in favor of the District of Massachusetts.

1. Massachusetts is the Location of Documents and Witnesses.

The Panel frequently considers the location of the evidence in selecting a transferee district. A district is a strong candidate for transfer when the witnesses and documents that are inextricably intertwined in pretrial proceedings are located within that district. The Panel often looks to the location of the defendant corporation when determining the appropriate transferee forum. *See In re M3Power Razor System Marketing & Sales Practices Litig.*, 398 F. Supp. 2d 1363, 1365 (J.P.M.L. 2005) (“We are persuaded that the District of Massachusetts is an appropriate transferee forum for this litigation. The District of Massachusetts is a likely source

of relevant documents and witnesses inasmuch as Gillette's headquarters are located there."'). See also *In re Lead Contaminated Fruit Juice Products Marketing and Sales Practices Litig.*, 777 F. Supp. 2d 1353, 1355 (J.P.M.L. 2011) (transferring to the District of Massachusetts because the district was the most conveniently located to the headquarters of the various defendant); *In re Guidant Corp. Implantable Defibrillators Products Liability Litig.*, 398 F. Supp. 2d 1371 (J.P.M.L. 2005); *In re: LifeLock, Inc., Marketing and Sales Practices Litig.*, 582 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008) (transferring cases to the District of Arizona in part because relevant evidence would likely be found there given Defendant's Arizona corporate headquarters); *In re American Continental Corporation/Lincoln Savings and Loan Securities Litig.*, 130 F.R.D. 475, 476 (J.P.M.L. 1990) (same); *In re Avandia Marketing, Sales Practices and Products Liability Litig.*, 528 F. Supp. 2d 1339 (J.P.M.L. 2007) (transferring cases to Eastern District of Pennsylvania, Defendant's principal place of business).

For the case at bar, the District of Massachusetts has the greatest interest in the flood of anticipated cases. New England Compounding Pharmacy, Inc. is incorporated in Massachusetts and has its principal place of business in Framingham, Massachusetts. The core witnesses reside in Massachusetts and documents relevant to the litigation are located in Massachusetts. Moreover, the additional defendants named in some, but not all cases (Ameridose, LLC, Medical Sales Management LLC, Inc., Alaunus Pharmaceuticals LLC, Barry Cadden, Gregory Conigliaro, Lisa Conigliaro Cadden, Douglas Conigliaro, Carla Conigliaro and Glenn Chin) are all Massachusetts resident defendants. The pharmacy where the MP was compounded and from where it was distributed, which gave rise to the suits, is located in Massachusetts, as are the pharmacists and pharmacy technicians involved in the compounding process.

2. The District of Massachusetts Has the Resources this Litigation Will Require.

Other factors to be considered by the Panel, which favors the District of Massachusetts, are the resources available to the district and the relative congestion of the district's docket. *See e.g., In re Immunex Corp. Average Wholesale Price Litig.*, 201 F. Supp. 2d 1378, 1381 (J.P.M.L. 2002) (noting that the District of Massachusetts has the resources to manage the litigation); *see also United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 694 F. Supp. 2d 48, 54-55 (D. Mass. 2010) (*reversed* on other grounds, 647 F.3d 377 (1st Cir. 2011)) (“The District of Massachusetts...on a per judge basis has a far lighter caseload and only 197 civil cases over three-years old. Any rational calculus of actual judicial economy thus strongly favors keeping this case in the judicial workload of the District of Massachusetts.”).

The District of Massachusetts currently has eight active MDL dockets (comprised of 82 pending actions) and is therefore not overburdened with pending MDLs. *See* Distribution of Pending MDL Dockets.¹ Further, the District of Massachusetts has experience managing complex MDL cases, and also has the resources and administrative experience to handle such matters. *See e.g., In re Prograf Antitrust Litig.*, 789 F. Supp. 2d 1380 (J.P.M.L. 2011); *In re Lead Contaminated Fruit Juice Products Marketing and Sales Practices Litig.*, 777 F. Supp. 2d 1353 (J.P.M.L. 2011); *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litig.*, 746 F. Supp. 2d 1359 (J.P.M.L. 2010); *In re Wellnx Marketing and Sales Practices Litig.*, 505 F. Supp. 2d 1380 (J.P.M.L. 2007).

¹ www.jpml.uscourts.gov/.../jpml/.../Pending_MDL_Dockets-By-District-September-2012.pdf

3. The District of Massachusetts is Easily Accessible.

NECC submits that consideration should be given to a transferee district which is metropolitan and readily accessible for all involved. The District of Massachusetts – Boston Division is a convenient location for the parties. Boston is a major hub served by all major airlines via numerous domestic and international flights (over 197,000 domestic flights between August and January 2012²), and is also easily accessible via Amtrak for those located on the Northeast Corridor between Washington D.C. and Boston. Boston’s business district is centrally located, hotels are plentiful, and the federal courthouse is venued 3 miles from Boston’s Logan Airport. The District of Massachusetts is extremely convenient to all parties and the witnesses involved with NECC’s compounding and distribution of pharmaceuticals. *See In re Wellnx*, 505 F. Supp. 2d at 1381 (noting that the District of Massachusetts is a convenient forum for the geographically dispersed parties).

The Panel has previously considered such factors in reaching its determination. *See In re Jamster Marketing Litig.*, 427 F. Supp. 2d 1366 (J.P.M.L. 2006) (selecting the Southern District of California because it is an accessible metropolitan location equipped with resources that the docket was likely to require); *In re Educational Testing Service PLT 7-12 Test Scoring Litig.*, 350 F. Supp. 2d 1363, 1365 (J.P.M.L. 2004) (choosing the Eastern District of Louisiana which “provides an accessible, metropolitan location with favorable caseload conditions”); *In re Inter-Op Hip Prosthesis Products Liability Litig.*, 149 F.Supp. 2d 931, 933 (J.P.M.L. 2001) (noting that the Northern District of Ohio “is an accessible, geographically central metropolitan district.”).

² <http://www.massport.com/logan-airport/about-logan/Pages/LoganStatistics.aspx>

4. Judge Saylor has the Experience Necessary to Handle This Litigation.

The Honorable F. Dennis Saylor, IV - assigned to the *Erkan* and *Doe* cases – has a wealth of experience overseeing complex civil litigation. *Erkan v. New England Compounding Pharmacy, Inc.*, No. 12-cv-12052 (D. Mass. Filed Nov. 2, 2012); *Doe v. New England Compounding Pharmacy, Inc.*, 1:12-cv-12057 (D. Mass Filed Nov. 5, 2012). Judge Saylor has already been assigned two cases in this litigation, which are related to at least four other cases pending in the district (*see* Attached Schedule of Actions). *See In re M3Power Razor System*, 398 F.Supp. at 1365 (centralizing the litigation before the Judge who presided over all the actions pending in the district). Judge Saylor is an experienced, well-qualified judge, currently handling MDL 2375, *In re: Body Science LLC Patent Litigation*, No. 12-md-02375 (D. Mass. filed Sept. 7, 2012), which presently has only five active cases.

The Panel has previously stated its preference for transferring multidistrict cases to courts experienced in handling complex cases. *See e.g., In re Ampicillin Antitrust Litig.*, 315 F.Supp.317 (J.P.M.L. 1970); *In re Paxil Products Liability Litig.*, 296 F. Supp. 2d 1374 (J.P.M.L. 2003). Defendant submits that Judge Saylor has the judicial experience needed to steer this anticipated massive litigation on a prudent course to an expeditious conclusion, and would be the appropriate choice in the right jurisdiction for this assignment.

C. If the Panel Does Not Centralize these Cases in the District of Massachusetts, The Eastern District of Michigan Would Be an Appropriate Alternative Transferee Forum.

The Eastern District of Michigan would be an appropriate alternative transferee forum if the Panel determines not to send these cases to the District of Massachusetts. There are thirteen (13) pending lawsuits in the Eastern District of Michigan. Moreover, Michigan has the highest

number of reported cases of fungal meningitis across the country (as of the date of this filing, 119). This factor alone weighs strongly in favor of transfer to the Eastern District of Michigan. *See e.g., In re Packaged Ice Antitrust Litig.*, 560 F. Supp.2d 1359, 1361 (J.P.M.L. 2008); *In re Publication Paper Antitrust Litig.*, 346 F. Supp. 2d 1370, 1372 (J.P.M.L. 2004). Further, docket conditions in the Eastern District of Michigan are favorable.

Detroit is centrally and conveniently located. *See Packaged Ice*, 560 F.Supp. 2d at 1361. There are sufficient hotels in the metropolitan Detroit area and Detroit Metropolitan Wayne County Airport is serviced daily by flights to and from all regions of the United States. The Eastern District of Michigan is convenient to the parties, though not as geographically convenient for the parties or witnesses as the District of Massachusetts.

The Eastern District of Michigan, specifically the Honorable Nancy Garlock Edmunds, has the experience to manage this complex litigation, and the Court has both the resources and administrative experience to handle the litigation. Judge Edmunds is currently assigned to the *Raab* and *Adkins* cases (see attached Schedule of Actions). She also has a tremendous amount of experience overseeing complex cases, most recently presiding over the Cardizem MDL (MDL 1278), involving a pharmaceutical. In short, the Honorable Nancy Garlock Edmunds is an experienced jurist capable of handling complex litigation and has ample administrative experience within the district. The Eastern District of Michigan is an excellent alternative transferee forum for the Panel to consider.

D. The Attributes of Both the District of Massachusetts and the Eastern District of Michigan Make Those Venues Better Choices Compared to Plaintiffs' Proposed Venue

Plaintiffs' argument that the District of Minnesota is an appropriate transferee forum, simply because the first case was filed in that district, is unpersuasive. Moreover, since

counsel's apparent rush to the courthouse steps to claim the first filed case, numerous other lawsuits have been filed in many other districts. Each of those cases, like that filed by Barbe Puro, remains at the initial pleadings stage, with issue not being joined in any case. There are currently eight (8) lawsuits filed in Massachusetts, thirteen (13) suits pending in Michigan, with only three (3) cases filed in Minnesota. Many plaintiffs have commenced actions in venues other than their home states, including in Massachusetts where NECC is located, and will continue to do so.

Movants contend that Minnesota is centrally located and accessible. This proximity-to-the-district argument could apply equally or more forcefully to any number of potential jurisdictions, and pales in comparison to the obvious and more pertinent issue, that the center of gravity for the company witnesses is the Boston area and environs, and NECC's documents are located in Massachusetts, and the MP was compounded and distributed in Massachusetts. None of these decisive factors apply to Minnesota. The situs of evidence and convenience of witnesses and other discovery factors overwhelmingly favor the District of Massachusetts as the transferee forum, where the litigation work will occur regardless of the location of the consolidated proceedings.

IV. CONCLUSION

For the foregoing reasons, the District of Massachusetts, or alternatively, the Eastern District of Michigan, are the forums best situated to economically, efficiently, and justly manage this litigation. Defendant NECC respectfully requests that the portion of plaintiff's motion for transfer and consolidation pursuant to 28 U.S.C. § 1407 be granted, and that the litigation be transferred to the District of Massachusetts to be managed by the Honorable F. Dennis Saylor, IV, or, in the alternative, to the Eastern District of Michigan to be managed by the Honorable Nancy Garlock Edmunds.

Respectfully Submitted,

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