

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

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

MDL No. 2419

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS ERKAN AND COLE'S
MOTION FOR EXPEDITED CONSIDERATION OF MOTION TO TRANSFER
FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS
AT THE NOVEMBER, 29 2012 SESSION**

Plaintiffs Michele Erkan and Robert Cole ask the Panel to schedule the pending motion for transfer and coordinated or consolidated pretrial proceedings in *In re Compounding Products Liability Litigation* (MDL 2419) for argument and consideration at the November 29, 2012 session.¹ Otherwise, the motion to transfer will not be heard until the Panel's January 31, 2013 hearing, almost three months from now. The apparent insolvency (and rumored forthcoming bankruptcy filing) of defendant New England Compounding Pharmacy, Inc. d/b/a New England Compounding Center coupled with some plaintiffs' individual efforts to obtain piecemeal prejudgment security against the defendants warrants the Panel's expedited consideration.

I. ARGUMENT

Judicial Panel on Multidistrict Litigation's Rule 6.3 contemplates that parties may move the Panel for expedited consideration of any motion. Motions for accelerated briefing schedule

¹ *In re New England Compounding, Inc. Pharmacy Product Liab. Litig.*, Brenda and Robert Bansale's Motion for Transfer of Actions to the District of Minnesota pursuant to 28 U.S.C. §1407 for Coordinated or Consolidated Pretrial Proceedings, MDL No. 2419, Docket No. 1 (Oct. 16, 2012) ("motion to transfer").

or special hearing date may be appropriate “in a case presenting unusual need for such relief.”² Here, the likely insolvency of the defendants in light of the number of seriously injured victims counsels for immediate resolution of the motion to transfer and coordinate. Given New England Compounding’s’ rumored insolvency, the Panel should resolve the motion for transfer soon, so that the transferee court can comment on the appropriate mechanism to address various plaintiffs’ fractionated injunctive and attachment claims.

A. Defendant New England Compounding’s likely insolvency warrants expedited consideration of the motion to transfer and coordinate.

1. The sheer number of victims suggests the defendants will not be able to make them all whole.

The number of potential compounding products liability actions is staggering. Over 14,000 individuals were injected with contaminated methylprednisolone manufactured and distributed by New England Compounding. So far, the CDC has identified 409 cases of fungal meningitis and 30 deaths. The death toll continues to climb. And the investigation into other medical consequences of being injected with the poisonous product (and other contaminated products) continues.

The number of civil actions climbs daily. Two days ago, when Plaintiffs Erkan and Cole filed their response to the motion to transfer and coordinate, there were 24 cases against New England Compounding pending in federal court. Four additional actions were removed from state court just today. The number of analogous state court actions is unknown.

The sheer number of actual and potential lawsuits suggest that the privately held New England Compounding Company and Ameridose (even along with the individually named

² David F. Herr, MULTIDISTRICT LITIGATION MANUAL §4:25 (2012).

defendants) will not have enough assets to make every victim whole. Let alone cover the significant fines that could result from the ongoing state and federal investigations.

2. New England Compounding's insolvency is allegedly imminent; Ameridose's financial future looks similarly bleak.

New England Compounding and Ameridose are small, privately held companies. Plaintiffs have no detailed information about their assets or valuation.³ But both entities have recalled all of their products.⁴ Neither is shipping new products.⁵ Both have either fired or laid off the majority (if not all) of their employees.⁶ New England Compounding's pharmacists have lost their pharmacy licenses.⁷ And the press has reported that New England Compounding's bankruptcy filing is imminent.⁸ At minimum, it does not appear that either company will be earning any revenue in the near future.

³ The corporate defendants likely have some insurance, but the terms and amount of that coverage is unknown. It is unlikely to be significant enough to resolve all potential claims.

⁴ *Amid Purity Questions, Drug Company Recalls Products*, NY TIMES, Oct. 21, 2012 (available at <http://www.nytimes.com/2012/11/01/us/ameridose-announces-recall-amid-questions-about-drugs-sterility.html>); FDA recall: New England Compounding Center Issues Voluntary Nationwide Recall of All Products (available at <http://www.fda.gov/Safety/Recalls/ucm322901.htm>).

⁵ *Id.*

⁶ Kay Lazar and Todd Wallack, *Ameridose, sister company to pharmacy linked to fungal meningitis outbreak, laying off hundreds*, BOSTON.COM, Nov. 8, 2012 (available at <http://www.boston.com/whitecoatnotes/2012/11/08/ameridose-sister-company-pharmacy-linked-fungal-meningitis-outbreak-laying-off-hundreds/8P28fq3COWyBk2qICMGNuK/story.html>); *Sterility Found Lacking at Drug Site in Outbreak*, NY TIMES, Oct. 23, 2012 (available at <http://www.nytimes.com/2012/10/24/health/sterility-found-lacking-at-drug-site-in-meningitis-outbreak.html?pagewanted=all>).

⁷ NECC Preliminary Investigation Findings, Massachusetts Board of Registration of Pharmacy Report, October 23, 2012 (available at <http://www.mass.gov>).

⁸ *See, e.g.,* Todd Wallack, *Bankruptcy likely for Framingham firm linked to meningitis infections*, BOSTON GLOBE, Oct. 19, 2012 (available at <http://www.boston.com/business/technology/2012/10/19/new-england-compounding-center-likely-file-bankruptcy-stop-flood-lawsuits/PuUIIvr1CVFy7nubfbTbwO/story.html>).

3. Individual plaintiffs have and will file for piecemeal prejudgment security.

The Panel should resolve the motion to transfer as soon as possible, so that the transferee Court will have an opportunity to weigh in on the preservation of defendants' assets in the face of countless claims to a limited fund.

Some individual plaintiffs have moved for preliminary injunctions prohibiting defendants from selling, transferring, or assigning any assets outside of the ordinary course of business and sought liens against the defendants' property. As an example, an emergency hearing on a motion to place liens against the personal property of three defendants – Gregory Conigliaro, Lisa Conigliaro Cadden, and Barry Cadden – was scheduled for November 6, 2012 in Middlesex Superior Court in Massachusetts.⁹ (The hearing was cancelled when the defendants removed the case to federal court.)

The impetus is understandable, in light of media reports about New England Compounding's insolvency in the face of potentially thousands of legitimate product liability claims. We certainly do not mean to suggest that any plaintiff should be prevented from pursuing these ends. In fact, plaintiffs Erkan and Cole intend to secure their own claims by seeking similar prejudgment security. But, given the likely limited fund available, any proceedings asserting claims to the defendants' assets may be best dealt with by the transferee court in a coordinated fashion that preserves all plaintiffs' claims – not handled piecemeal in a manner that may prioritize some plaintiffs' claims over others.

⁹ See, e.g., Abby Goodnough, et al., *Spotlight Put on Founders of Drug Firm in Outbreak*, NY TIMES, Oct. 24, 2012 (available at <http://www.nytimes.com/2012/10/25/health/with-meningitis-outbreak-a-spotlight-on-family-behind-compounding-pharmacy.html>).

B. The motion to transfer is already fully briefed, three weeks before the November 29, 2012 hearing.

Procedurally, briefing on the pending motion to transfer and coordinate is complete. The motion to transfer was filed on October 16, 2012.¹⁰ Per the Panel's briefing schedule, responses were due on November 7, 2012.¹¹ The Panel received five responses, including a response from defendant New England Compounding.¹² All of the responses support transfer and coordination or consolidation. Three advocate for the District of Minnesota. Plaintiffs Erkan and Cole and defendant New England Compounding urged the Panel to transfer all actions to the District of Massachusetts, New England Compounding's home jurisdiction.

The next scheduled Panel hearing is 22 days from now, on November 29, 2012. The Panel will have three full weeks to review the briefing before oral argument would be heard. Given the completed briefing and the urgency of these issues, the Panel should hear argument on the motion to transfer on November 29, 2012.

II. CONCLUSION

For these reasons, Plaintiffs Erkan and Cole respectfully request that the Panel hear argument and consider the pending motion to transfer and coordinate the *In re Compounding Products* MDL.

¹⁰ Brenda and Robert Bansale's Motion for Transfer of Actions to the District of Minnesota pursuant to 28 U.S.C. §1407 for Coordinated or Consolidated Pretrial Proceedings, MDL No. 2419, Docket No. 1 (Oct. 16, 2012).

¹¹ MDL No. 2419, Docket No. 4 (Oct. 17, 2012).

¹² MDL No. 2419, Docket nos. 21, 25, 26, 27, 28 (Nov. 7, 2012).

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Respectfully submitted,

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