BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE:	**§**	**MDL NO. 2804**
NATIONAL PRESCRIPTION	**§**	
OPIATE LITIGATION	**§**	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR CONSOLIDATED PRETRIAL PROCEEDINGS[1]

[1] Plaintiffs' brief complies with J.P.M.L. Local Rule 3.2(a)(iii) and 6.1(d).

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I. INTRODUCTION

The public health crisis caused by the opioid epidemic has engulfed the nation. Indeed, the parties' responses to this proceeding show a rapid growth in the number of related cases seeking to remedy this national health epidemic. Under the circumstances, centralization is not only appropriate, it is necessary. The subject actions involve common questions of fact and law, and as a result, centralization will facilitate a uniform and efficient pretrial approach to this litigation by eliminating duplicative discovery and preventing inconsistent rulings on *Daubert* and other pretrial issues. Moreover, centralization of the subject actions will conserve the resources of the parties, their counsel, and the judiciary, and in addition to furthering the convenience of parties and witnesses, it will promote the just and efficient conduct of the subject actions. In light of the above, there is a consensus between the majority of plaintiffs and certain Manufacturers[2] and Distributor Defendants,[3] who all agree that this Panel should create an MDL to centralize these cases.[4]

Despite this consensus among the majority of the parties, a handful of defendants[5] and plaintiffs[6] oppose centralization. As discussed below, however, the parties opposing

[2] As defined in their joint brief, "Manufacturers" means Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc.; Teva Pharmaceuticals USA, Inc. and Cephalon Inc.; Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica Inc.; Endo Health Solutions Inc. and Endo Pharmaceuticals Inc.; and Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. (*See* Dkt. 158 n.1.)

[3] As defined in their joint brief, "Distributor Defendants" means AmerisourceBergen Drug Corp., Cardinal Health 110, LLC, and McKesson Corp. (Dkt. 148 at 1.) Miami-Luken joined the Distributor Defendants' brief. (*See* Dkts. 148 and 161.)

[4] Doctor defendants Scott Fishman, M.D., Perry Fine, M.D., Lynn Webster, M.D. and Russell Portenoy, M.D. support centralization in the Southern District of Ohio. (*See* Dkts. 131 and 142.) The People of the State of Illinois and St. Clair County Illinois, City of Tacoma, and IBEW Local No. 38 Health and Welfare Fund support centralization. (*See* Dkts. 140, 147, 160.)

[5] A small group of distributor defendants and Pfizer, Inc. oppose centralization. (*See* Dkts. 110, 129, 136, 139, 144, 149, 150, 151, 156, 157.)

[6] A small group of plaintiffs filed responses in opposition and a handful of other plaintiffs and defendants argued against centralization because of motions to remand, including the West Virginia Attorney General. (*See* Dkts. 101, 105, 110, 138, 154, 164.)

centralization erroneously dispute that common questions of law and fact exist, and that centralization will facilitate a uniform and efficient pretrial approach to this litigation. Disputes aside, such concerns can be, and in other MDL proceedings, regularly are, resolved by the transferee court, through its inherent authority to resolve unique procedural or factual issues, including using separate tracks for motion practice and discovery. At bottom, there is no reason why the subject actions should not be centralized.

With respect to venue, to the extent that this Panel orders centralization, the supporting and opposing briefs propose the Southern District of Ohio, Southern District of Illinois, Southern District of West Virginia, Northern District of Ohio, Southern District of New York, Eastern District of Pennsylvania, Eastern District of Texas, and Western District of Washington as potential transferee districts. Movants maintain that the subject actions should be transferred either to Judge Sargus, in the Southern District of Ohio, or Judge Yandle, in the Southern District of Illinois. Additionally, Movants do not oppose transfer to Judge Faber, in the Southern District of West Virginia.

II. "MANUFACTURERS," THE "DISTRIBUTOR DEFENDANTS," AND THE MAJORITY OF PLAINTIFFS ALL AGREE THAT THERE ARE COMMON FACTUAL AND LEGAL ISSUES, AND THAT CENTRALIZATION WILL FACILITATE UNIFORM AND EFFICIENT PRETRIAL LITIGATION OF THE SUBJECT ACTIONS

Here, the Manufacturers, Cephalon, Inc., Mallinckrodt LLC, and Distributor Defendants, along with the majority plaintiffs, support centralization. (Dkts. 131, 142, 147, 148, 158, 159, 160, 161, 162.) These supporting parties recognize that centralization is appropriate under 28 U.S.C. § 1407 because common facts and legal issues exist and consolidation will facilitate uniform and efficient pretrial litigation. (*See id.*) Moreover, to the extent that any plaintiff, defendant, or other interested party did not respond to Movant's petition, their silence is deemed to be acquiescence to centralization. JMPL Rules 6.1(c).

Although a handful of plaintiffs and defendants oppose centralization,[7] their arguments do not justify denial of centralization. On the contrary, their concerns can be resolved by the transferee judge. A transferee judge possesses "broad discretion" in managing MDL-centralized pretrial proceedings. *See*, *In re Proton-Pump Inhibitor Prod. Liab. Litig. (No. II)*, __ F. Supp. 3d __, 2017 WL 3309647, at *2 (J.P.M.L. Aug. 2, 2017) ("As we repeatedly have stated, a transferee judge can employ any number of techniques, such as establishing separate discovery and motion tracks, to manage pretrial proceedings efficiently."); *In re Mirena IUS Levonorgsstrel-Related Prod. Liab. Litig. (No. II)*, 249 F. Supp. 3d 1357, 1360 (J.P.M.L. 2017) ("the transferee judge possesses broad discretion to formulate a pretrial program that accounts for any significant differences among the actions and ensures that duplicative activity is minimized or eliminated").

A. The Subject Actions Involve Common Questions of Fact

Here, centralization is appropriate because common questions of fact exist. This Panel has held that common questions of fact exist where two or more complaints assert comparable allegations against similar defendants based on similar transactions and events. *See, e.g.*, *In re UnumProvident Corp. Sec., Derivative & ERISA Litig.*, 280 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003) (centralization was appropriate where "all actions [could] be expected to focus on a significant number of common events, defendants, and/or witnesses" and "core factual allegations" were consistent among the actions); *In re Japanese Elec. Prods. Antitrust Litig.*, 388 F. Supp. 565, 567 ("Transfer under §1407 is not dependent on a strict identity of issues and parties but rather on the existence of one or more common questions of fact."). However, "[t]ransfer under Section 1407 ***does not*** require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer." *In re Kugel Mesh Hernia Patch*

[7] Oppositions fall into four categories, including: (1) arguments that transfer is inappropriate because of motions to remand (*See* Dkts. 101, 105, 128, 164; (2) arguments by small distributors in West Virginia (*See* Dkts. 110, 129, 136, 139, 144, 149, 150, 157; (3) small groups of plaintiffs (the "Opposing Plaintiffs") (*See Dkts.* 151, 154. 163, 165); and (4) one manufacturer , Pfizer, Inc. ("Pfizer") (*See* Dkt. 156).

Prod. Liab. Litig., 493 F. Supp. 2d 1371, 1373 (J.P.M.L. 2007) (emphasis added); *see also, In re Epipen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation*, 2017 WL 3297989, *3 (J.P.M.L. Aug. 3, 2017) ("Unique legal theories and factual allegations in a particular action, though are not significant where all actions arise from a common factual core.").

Coordination is warranted when, as here, central facts, parties and claims overlap. *In re 100% Grated Parmesan*, 201 F. Supp. 3d 1375, 1378 (J.P.M.L. 2016) (coordination was appropriate where there was an "overlap in the central factual issues, parties, and claims"); *In re Epipen*, 2017 WL 3297989 at *3 ("given the factual overlap, the litigation taken as a whole is unlikely to benefit from excluding *Sanifo* from the MDL"). Moreover, to the extent that any case presents "unique factual and legal issues, the transferee judge has the discretion to address those issues through the use of appropriate pretrial devices, such as separate tracks for discovery and motion practice." *In re Epipen*, 2017 WL 2397989 at *3.

Here, the responses in opposition claim that factual or legal differences between the complaints preclude consolidation. For example, distributor Masters Pharmaceutical, Inc. argues that determining whether it filled suspicious orders will involve circumstances unique to each order, and that the cases in which it is named involve distributors, not manufacturers or physicians. (*See* Dkt. 110 at 2-3). However, Distributor Defendants, Manufacturers and physician defendants, disagree. (*See* Dkts. 131, 142, 148, 158, 159, 161, 162.) Contrary to Masters' argument, orders of controlled substances -- whether filled by manufacturers or distributors -- are governed by the same uniform standards, which are based on the Controlled Substances Act ("CSA") and Code of Federal Regulations. The Department of Justice used these standards to prosecute Masters and numerous other manufacturers and distributors. *Masters Pharmaceutical, Inc. v. Drug Enforcement Administration*, 861 F.3d 206, 216 (D.C. Cir. 2017) (upholding the "DEA's 2014 decision to revoke Masters' certificate of registration, without which Masters cannot sell controlled substances" and finding that "the relevant inquiry is more legal than factual"); (*see also* Dkt. 54 at 7-8.)

Similarly, other distributor defendants who are not among the "Big Three" Distributor Defendants, argue that the cases against them are different from the cases against the Manufacturers because they involve different legal theories.[8] For example, TopRX erroneously contends that cases against manufacturers relate solely to marketing, while the claims against distributors allege that they violated their duties based on the CSA. (*See* Dkt. 129 at 2-3). Again, the Manufacturers and Distributor Defendants disagree. But, this argument also fails on its merits because TopRX and other defendants making such arguments ignore the theory of liability asserted against distributors ***and*** manufacturers under the Racketeering Influence and Corrupt Organizations Act ("RICO").[9] They also fail to address the fact that distributors and manufacturers all have a duty to identify, investigate and report suspicious orders of controlled substances and halt shipment of those orders.[10] In short, the Movants allege both manufacturers and distributors are jointly and severally responsible for the volume of prescription opiates unlawfully sold and diverted for illicit purposes throughout the country. Defendants Walgreen Eastern Co, Inc., Kroger Limited Partnership I, Kroger Limited Partnership II, SAJ Distributors, Rite Aid of Maryland, Inc., Walmart Stores East, L.P., CVS Indiana, LLC, Omnicare Distributors, and J M Smith Corporation d/b/a Smith Drug Company (all named as distributors) assert similar arguments and additionally assert that individual facts related to each plaintiff's claim against the various parties, and the corresponding scope of discovery require denial of centralization. (*See* Dkts., 136 at 6; 144 at 2-5; 149 at 7-10; 150 at 2-3; Dkt. 157 at 2.)

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[8] Distributors like CVS Indiana, LLC also argue that their cases are dissimilar from the national litigation because they are not named in the majority of cases. Their inclusion in the West Virginia cases was due, in part, to the ARCOS data that was disclosed regarding West Virginia in prior litigation. Plaintiffs' anticipate that full disclosure of nationwide ARCOS data may result in amended complaints naming other distributors in additional complaints.

[9] *See* First Amended Complaint, *City of Cincinnati v. AmerisourceBergen Drug Corporation, et al.*, S.D. Ohio Case No. 17-cv-00713. Although the Distributor Defendants argue Movants' RICO claims will not survive pleading challenges, they neglect to mention that the authority upon which they rely, *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008), has been rejected by numerous other courts. In any event, Distributor Defendants acknowledge the RICO theory and support consolidation. (*See* Dkt. 148 at 3, 10.)

[10] *See, e.g.*, 21 U.S.C. § 823(a) (manufacturers) and § 823(b) (distributors).

The cases submitted for centralization unquestionably involve common legal theories and facts. For example, a common core fact is that through the Controlled Substances Act ("CSA"), the federal government created a closed system for the manufacture and distribution of controlled substances, which was designed to prevent diversion of dangerous drugs, like prescription opioids, into the illicit drug market. The complaints allege that manufacturers and distributors engaged in an industry-wide practice of illegally allowing the distribution of prescription opioids into the illicit market by ignoring their duties under the CSA and regulations implemented thereunder. The actions in Movant's petition also allege an industry wide-practice by manufacturers of illegally marketing the prescription opioids that they were manufacturing for distribution. Certain manufacturers and distributors already admitted that they failed to uphold their duties under the CSA, and hundreds of millions of dollars in penalties to the federal government. (Dkt. 1-1 at 7-8.) A decision regarding the responsibilities of the manufacturers and distributors will necessarily involve overlapping legal and factual issues, discovery, and motion practice. (*Id*. at 8-9.) Moreover, to the extent that any responses in opposition argue that the unique state law claims prohibit centralization, they are incorrect. *In re CVS Caremark Corp. Wage and Hour Employment Practices Litig.*, 684 F. Supp. 2d 1377, 1378 (J.P.M.L. 2010) ("it is 'within the very nature of coordinated or consolidated pretrial proceedings in multidistrict litigation for the transferee judge to be called upon to apply the law of more than one state.'") (quoting *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 407 F. Supp. 244 (J.P.M.L. 1976)). Therefore, common question of fact indisputably exist.

B. Centralization Will Facilitate Uniform and Efficient Pretrial Litigation, and Conserve the Resources of the Parties, their Counsel, and the Judiciary

Multidistrict litigation "eliminate[s] the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491-92 (J.P.M.L. 1968). Transfer of related actions "eliminate[s] duplicative discovery; prevent[s] inconsistent pretrial rulings; and conserve[s] the resources of the parties, their counsel, and the judiciary." *In re Ethicon Physimesh Flexible*

Composite Hernia Mesh Products Liab. Litig., __ F. Supp. 3d __, 2017 WL 2402828, at *1 (J.P.M.L. June 2, 2017). Centralization is especially proper where it eliminates "the potential for conflicting, disorderly, chaotic judicial action." *In re Plumbing Fixtures*, 298 F. Supp. at 493.

Notwithstanding the above, in opposing centralization, some plaintiffs and defendants argue that centralization will not increase convenience for the witnesses and parties. In particular, those opposing centralization assert essentially four arguments, including that (1) centralization is not convenient because of pending or already granted motions to remand; (2) costs will increase because of the broader scope of discovery, and the location of documents and witnesses; (3) voluntary coordination would be more convenient; and (4) that transfer will inconvenience Pfizer because it was expecting a dismissal from the Texas plaintiffs.

First, to the extent that any entities believe that their cases require remand, those cases may be remanded prior to the Panel's centralization order or set on a special track by the transferee judge. (*See* Dkt. 164 at 4-5.) Here, the Tennessee action has already been remanded, and it is anticipated that a ruling on the West Virginia Attorney General's motion to remand, having been fully-briefed and argued, is forthcoming. The New Hampshire action similarly involves a fully-briefed motion to remand.

Second, the location of witnesses and cost of coordination do not provide a basis to deny centralization. *In re Tribune Co. Fraudulent Conveyance Litig.*, 831 F. Supp. 2d 1371, 1372 (J.P.M.L. 2011) (a party is not inconvenienced when an MDL is not in its home district because that party's witnesses will be deposed where they are located); *British Marine PLC v. Aavanti Shipping & Chartering Ltd.*, 2014 WL 2475485 (E.D.N.Y. June 3, 2014) ("modern technologies have rendered the physical location of documents less relevant to the forum non conveniens analysis"); *Red Bone Alley Foods, LLC v. Nat'l Food & Bev., Inc.*, 2014 WL. 1090352, *6 (D.S.C. Mar. 14, 2014) (same). To the extent that the City of Everett claims that its witnesses are located in Washington, they may be deposed there, and any documents in the City's possession can be collected there and made available electronically. Moreover, the majority of parties objecting to consolidation, and their counsel, are located in geographic areas that are

reasonably close to the transferee forums advanced by Movants. *In re Air Fare Litig.*, 322 F. Supp. 1013, 1015 (J.P.M.L. 1980 ("[t]he geographical location of the transferee court is especially relevant when counsel must travel from distant parts of the country").

Third, voluntary coordination will not effectively assist the parties in managing this litigation. Movants' counsel admit that their clients represent a majority of the cases filed, and they have cooperated, and continue to be willing to cooperate, with other groups of plaintiffs whose cases are identified for inclusion in this MDL. But, given the volume of cases, which is only expected to grow, voluntary coordination alone cannot resolve the multidistrict character of this litigation. The cases concerning cooperation, which were cited by the parties opposing centralization, concern different circumstances than those present here.[11] For example, the

[11] *In re: Rite Aid Corp. Wage & Hour Employment Practices Litigation*, 655 F. Supp. 2d 1376, 1377 (J.P.M.L. 2009) (denying centralization of six actions because the court would be required to look at individualized issues for each employees' job duties); *In re Table Saw Prods. Liab. Litig.*, 641 F. Supp. 2d 1384, 1384-85 (J.P.M.L. 2009) (no mention of limited number of counsel, but denying centralization because each action "arises from an individual accident that occurred under necessarily unique circumstances."); *In re Dollar Tree Stores, Inc., Fair Labor Standards Act (FLSA) & Wage & Hour*, 829 F. Supp. 2d 1376, 1377 (J.P.M.L. 2011) (moving to centralize four actions that were "not particularly complex" and were subject to a section 1404 motion); *In re Trilegiant Membership Program Mktg. & Sales Practices Litig.*, 828 F. Supp. 2d 1362, 1363 (J.P.M.L. 2011) (denying centralization, ***five*** of only ***six*** plaintiffs being represented by same counsel, because "the movants have not convinced us that any common factual questions are sufficiently complex or numerous"); *In re Boehringer Ingleheim Pharm., Inc.*, 763 F. Supp. 2d 1377, 1378 (J.P.M.L. 2011) (seeking to centralize ***four*** actions); *In re: Gerber Probiotic Prods. Mktg. and Sales Pracs. Litig.*, 899 F. Supp. 2d 1378, 1379-80 (J.P.M.L. 2012) (denying centralization because of a "reasonable prospect that the resolution of the Section 1404 motion could resolve the multidistrict character of the [***ten***] actions before [the Panel]"); *In re Lipitor Marketing, Sales Practices and Products Liability Litigation*, 959 F. Supp. 2d 1375, 1376 (J.P.M.L. 2013) (denying centralization where ***three*** of the ***five*** actions at issue were already coordinated and defendant agreed to coordinate other actions); *In re: Fresh Dairy Products Antitrust Litigation (No. II)*, 959 F. Supp. 2d 1361 (J.P.M.L. 2013) ("This litigation, then, remains one with a limited number of actions and non-overlapping putative classes."); *In re Cymbalta (Duloxetine) Products Liab. Litig. (No. II)*, 138 F. Supp. 3d 1375, 1377 (J.P.M.L. 2015) (procedural posture varied significantly, most if not all common discovery had already taken place).; *In re: DIRECTV, Inc., Fair Labor Standards Act (FLSA) and Wage and Hour Litigation*, 84 F. Supp. 3d 1737, 1375 (J.P.M.L. 2015) (denying centralization because "[t]he issues of whether an individual is an employee or an independent contractor involves . . . individualized inquiry"); *In re Uber Techs., Inc., Wage & Hour Employment Practices*, 158 F. Supp. 3d 1372 (J.P.M.L. 2016) ("plaintiffs in ***six*** of the ***seven*** actions on the motion and two related actions are represented by the same counsel, and all of those actions are in their infancy. The defendants are the same in all actions, and they have represented that, to the extent pretrial proceedings overlap, they are amenable to informal coordination."); *In re Cordarone (Amiodarone Hydrochloride) Mktg., Sales Practices & Prod. Liab. Litig.*, 190 F. Supp. 3d 1346,

subject actions here do not involve a small number of cases with narrow, individualized issues, and no motions under 28 U.S.C. § 1404 are pending that would resolve the multidistrict character of this litigation. Rather, Movants seek to centralize over 80 actions filed to date in at least 15 districts. And, despite some intra-district coordination, a staggering number of cases remain spread across the federal judiciary, with more cases being filed ***every day***, in new non-coordinated jurisdictions. *In re: Foot Locker, Inc.*, 787 F. Supp 2d 1364, 1365 (J.P.M.L. 20110 ("weighing in favor of centralization is that additional related actions alleging similar claims in other states could well be filed"); *In re Proton-Pump Inhibitor Products Liab. Litig. (No. II)*, __ F. Supp. 3d __, 2017 WL 3309647 at *2 (J.P.M.L. Aug. 2, 2017) ("the significantly larger number of involved actions, districts, and counsel, the concomitant increase in burden on party and judicial resources . . . coupled with most defendants' change in position to now support centralization, tip the balance in favor of creating an MDL"). Importantly, no defendant has offered, nor can offer, to coordinate discovery across all actions or any sufficiently meaningful group of coordinated actions. Consequently, the Panel should not consider voluntary coordination to be a relevant factor here.

Finally, Pfizer's arguments for exclusion from MDL proceedings based on convenience similarly must be rejected. First, as a manufacturer of a prescription opioid, Pfizer operates under the same duties as other defendants. Second, centralization of cases concerning Pfizer will benefit all plaintiffs and defendants because to the extent Pfizer asserts defenses which apply to others, or *vice versa*, it will eliminate overlapping motion practice. Pfizer's conduct indisputably is within the scope of the proposed MDL, and, therefore, if it were excluded, rulings in any case

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1348 (J.P.M.L. 2016) (denying centralization of nine actions because the very nature of the allegations appeared to "mandate a unique inquiry" and the defendants willingness to cooperate); *In re Credit Union Checking Account Overdraft Litigation*, 158 F. Supp. 3d 1363 (J.P.M.L. 2016) (each of the ***eleven*** actions was "brought against a different credit union on behalf of a different class"); *In re Sorin 3T Heater-Cooler Sys. Products.*, MDL 2772, 2017 WL 1282908, at *1 (J.P.M.L. Apr. 5, 2017 (denying centralization of ***sixteen*** actions where ten were already pending before a single judge, four were brought by the same plaintiffs' counsel, and the parties to those actions were already working successfully to minimize overlapping pretrial proceedings) (all emphasis added).

against it could give rise to disparate rulings in cases concerning other manufacturers. Third, Pfizer gives no reason why its anticipated early dismissal from the Texas cases merits excluding it from the consolidated cases.

C. Inclusion of Competing Defendants Does Not Preclude Centralization

Although some plaintiffs and defendants oppose centralization on the basis that there are claims against competitors, the Panel regularly orders centralization of cases that involve industry-wide claims, or claims against competitors. Moreover, such arguments ignore the fact that Manufacturers and Distributor Defendants support centralization.

There are numerous cases supporting centralization in circumstances concerning competitors. *See, e.g.*, *In re Immunex Corp. Average Wholesale Price Litig.*, 201 F. Supp. 2d 1378, 1380 (J.P.M.L. 2002) (centralization of claims against all defendants, rather than on a company-by-company basis was appropriate where "common questions of fact concerning whether (either singly or as part of a conspiracy) the pharmaceutical defendants engaged in fraudulent marketing, sales and/or billing schemes"); *In re Janus Mutual Funds Investment Litig.*, 310 F. Supp. 2d 1359 (J.P.M.L. 2004) (consolidated market-wide conduct); *In re Pharmacy Ben. Managers Antitrust Litig.*, 452 F. Supp. 2d 1352 (J.P.M.L. 2006) (centralizing claims against competing pharmacy benefits managers all of whom faced similar claims under the federal antitrust laws and conspiracy allegations); *In re: Checking Account Overdraft Fee Litig.*, 626 F. Supp. 2d at 1335 (J.P.M.L. 2009) (centralizing claims that "share sufficient factual questions relating to industry-wide bank posting policies and procedures to warrant centralization"); *In re Incretin Mimetics Prods. Liab. Litig.*, 968 F. Supp. 2d 1345 (J.P.M.L 2013) (centralizing actions against competing defendants which manufacturer four similar diabetes drugs that allegedly caused pancreatic cancer because "Plaintiffs in the cases now before us . . . make highly similar allegations about each of the four drugs"); *In re Androgel Prods. Liab. Litig.*, 24 F. Supp. 3d 1378, 1379 (J.P.M.L. 2014) ("We are typically hesitant to centralize litigation on an industry-wide basis. In these circumstances, however, we think it is the best solution").

Aside from Manufacturers and Distributor Defendants' support for centralization, the nature of subject actions themselves justify industry-wide centralization. The subject actions allege that manufacturers and distributors in the opioid industry formed enterprises for the purpose of increasing profits by illegally marketing, manufacturing, and distributing of prescription opioids, subjecting them to joint and several liability. Furthermore, the subject actions allege claims premised on similar legal and factual theories based on industry-wide practices. In contrast to the cases cited by the parties opposing centralization, differences in the chemical composition and features of the opioids at issue are not relevant here. In short, the cases at issue here concern industry-wide practices which are common to all defendants.

The facts here are more similar to *In re Proton-Pump Inhibitor Liab. Litig. (No. II)*, __ F. Supp. 3d __, 2017 WL 3309647 (J.P.M.L. Aug. 2, 2017). The manufacturers and distributors at issue do not vary significantly from action to action, a significant amount of discovery will overlap, and the number of cases has steadily increased since the filing of Movant's petition. And, as the Panel noted in *Proton-Pump II*, "the significantly larger number of involved actions, districts, and counsel, the concomitant increase in burden on party and judicial resources, and the opportunity for federal-state coordination, coupled with most defendants' change in position to now support centralization, tip the balance in favor of creating an MDL." *Id* at *2. *In re Watson-Fentanyl Patch Prods. Liab. Litig.*, like *Proton Pump No.* I, is inapplicable to the facts of this petition. 883 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012). In *Watson-Fentanyl Patch*, each group of cases involved unique products and defendant-specific issues such as differing designs, manufacturing processes, regulatory histories, and company documents and witnesses. Here, differences in the opioids themselves are not at issue. The subject actions concern fraudulent marketing and failures to maintain effective controls against diversion. And, unlike *In re: Yellow Brass Plumbing Component Products Liability Litigation*, these cases involve the same family of drugs that were manufactured and distributed under identical standards. 844 F. Supp. 2d 1377 (J.P.M.L. 2012).

Finally, the cases before the panel are combination cases that do not involve differing methods of production, advertisement or different putative classes of consumers. *In re: Tropicana Orange Juice Marketing and Sales Pracs. Litig.*, 867 F. Supp. 2d 1341, 1342 (J.P.M.L. 2012); *In re Invokana (Canagliflozin) Prod. Liab. Litig.*, 223 F. Supp. 3d 1345, 1348 (J.P.M.L. 2016). Therefore, they can be joined despite the fact that they involve industry competitors. *Id*.; *see also*, *In re Credit Card Payment Protection Mktg. & Sales Prac.*, 753 F. Supp. 2d 1375 (J.P.M.L. 2010); *In re: Prescription Drug Co-Pay Subsidy Antitrust Litig.*, 883 F. Supp. 2d 1334, 1335 (J.P.M.L. 2012).

D. Concerns of State Sovereignty Do Not Prohibit MDL Treatment

The counties of Upshur and Bowie argue that state sovereignty prohibits the Panel from ordering the transfer of all related cases to a multi-district litigation. (*See Dkt*. 151 at 7-10.) But, consolidation of the related actions into an MDL for ***pretrial*** proceedings does not prejudice the Texas' counties right to choose counsel of their choice because the Texas actions will be remanded back to their home jurisdiction for trial by counsel of the Counties' choosing.

III. THE PROPOSED MDL SHOULD BE TRANSFERRED TO THE EPICENTER OF THE OPIOID EPIDEMIC.

Recent news articles and evidence submitted by Movants pinpoints the epicenter of the opioids epidemic squarely in the Southern District of Ohio[12] and the neighboring states of Kentucky and West Virginia.[13] The Southern District of Ohio, bears a unique nexus to the

[12] The Distributor Defendants argue against transfer to the Southern District of Ohio by prematurely arguing that federal jurisdiction in Ohio will fail because Plaintiffs cannot maintain a RICO claim for damages. *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008). Defendants' ignore persuasive rulings to the contrary. *See Illinois Dep't of Revenue v. Phillips*, 771 F. 2d 312, 314-16 (7th Cir. 1985) ("the plain language of the [18 U.S.C.§ 1964(c)] dictates that the injury requirement be construed broadly" and declining to limit governmental RICO claims to competitive or commercial injuries).

[13] (*See* Dkt. 1-1 at 12); *see also*, Haeyoun Park and Matthew Bloch, How the Epidemic of Drug Overdoses Deaths Rippled Across America, The New York Times, (January 19, 2016) (available at https://www.nytimes.com/interactive/2016/01/07/us/drug-overdose-deaths-in-the-us.html). Notably, the opioids drug overdose epidemic began in 1999 near the juncture of Southern Ohio, West Virginia and Kentucky, and continues to decimate those communities as the epidemic ripples across the country.

opioids epidemic because its death rate due to unintentional drug poisoning has increased 642 percent, driven largely by opioid-related overdoses. (Dkt. 1-1. at 12.) The cost of this epidemic to Ohioans is staggering, costing $2.0 billion in medical and work loss costs in 2012, an average of $5.4 million *per day*. (*Id*. at 12-13.)

The Southern District of Ohio also is the location of relevant documents and witnesses because each of the Distributor Defendants and at least one manufacturer maintain either a corporate headquarters or distribution facilities there.[14] For example, Cardinal Health maintains its corporate headquarters and distribution facilities in the Southern District of Ohio. (*Id.* at 13-14.) Similarly, AmerisourceBergen, McKesson, and Teva all have distribution facilities in the Southern District of Ohio. (*Id.* at 14-15.) Key pieces of discovery are also underway in the Southern District of Ohio. Specifically, the Southern District of Ohio recently ordered the issuance of a subpoena to the Drug Enforcement Administration ("DEA") for the Automated Reports and Consolidated Ordering System ("ARCOS") data that each of the Manufacturers and Distributors must submit to the DEA regarding their sales of controlled substances.[15] The disclosure of this national database is a crucial procedural step which will serve as the evidentiary centerpiece for litigation across the country.

Furthermore, the Southern District of Ohio is convenient because of its geographically central location in the United States as well as its location between the Defendants' principal places of business. *See In re Nat'l Century Fin. Enterprises, Inc.*, 293 F. Supp. 2d 1375, 1377 (J.P.M.L. 2003); *In re Library Editions of Children's Books*, 297 F. Supp. 385, 387 (J.P.M.L. 1968). The Southern District of Ohio is readily accessible to the parties and counsel (*see*, Dkt. 1-1 at 16), and centrally located between the Manufacturers and Distributor Defendants' places of

[14] *In re Foundry Resins Antitrust Litig.*, 342 F. Supp. 2d 1346, 1347 (J.P.M.L. 2004) ("the Southern District of Ohio is a preferable transferee forum for this litigation. Two defendants maintain headquarters within the district, which implies that relevant documents and witnesses will likely be found there.")

[15] *See City of Cincinnati v. AmerisourceBergen Drug Corporation, et al.*, S.D. Ohio Case No. 17-cv-00713, at Dkt. No. 67 at 14:21-15:14.

business, including California, Ohio, Connecticut, Pennsylvania, and New Jersey. (*See* Dkt. 158 12-13.) Finally, the Southern District of Ohio is well-equipped to efficiently manage this multi-district litigation and Judge Sargus is amply qualified to preside. (Dkt. 1-1 at 16-17.); *In re E.I. du Pont de Nemours and Co. C-8 Personal Injury Litigation*, 939 F. Supp. 2d 1374, 1375 (J.P.M.L. 2013).

Conversely, the Northern District of Ohio, advocated by the Cities of Parma, Lorain and Dayton, does not warrant consideration as the transferee district. Although the Northern District of Ohio is readily accessible through the Cleveland-Hopkins International Airport, and Judge Polster is qualified to manage this MDL, the relatively small number of cases filed there suggests that the Southern District of Ohio is a better forum for these cases.

Alternatively, Movants submit that Judge Yandle in the Southern District of Illinois would also be an excellent choice to preside over this multi-district litigation and that the Southern District of Illinois would be a very appropriate forum for the consolidated actions. (*Id*. at 19). The Southern District of Illinois has a growing nexus to the opioid epidemic as the number of cases filed in that jurisdiction is continuing to increase and the Southern District of Illinois has the support of the plaintiffs in the State of Illinois and St. Clair County.[16]

Finally, the Distributors Defendants, argue that the Southern District of West Virginia is the most appropriate transferee forum. Movants do not oppose transfer to Judge Faber in the Southern District of West Virginia.

IV. ALTERNATIVE PROPOSED FORUMS DO NOT MERIT CONSIDERATION

A. *City of Chicago* Should Not be Consolidated and the Northern District of Illinois Is Not an Appropriate Forum

The Manufacturer Defendants argue that Movants blatantly ignored the *City of Chicago* case. (*See* Dkt. 158 at 1-2, 8.) Not so. Movants identified *City of Chicago* to the Panel, explained why consolidation of that case was not warranted under the law, and alternatively,

[16] (*See* Dkt. 140). Since the filing of Movants' petition, the number of cases pending in the Southern District of Illinois has increased to eleven. Movants will provide the Panel with a current register of action prior to the hearing on the motion to transfer.

proposed a resolution for that case if the Panel elected to include it in an MDL transfer order. (*See* Dkt. 1 at 2-3, n.2.) Not surprisingly, the Distributor Defendants also argue for exclusion of the *City of Chicago* case. (Dkt. 148 at 7, n.12.)

The Manufacturers' arguments and authority weigh against including the *City of Chicago* case in this MDL and counsel against centralization in the Northern District of Illinois. Specifically, this Panel has previously ordered that a case pending three years longer than any of the fourteen actions subject to the Panel's potential decision was "at a sufficiently advanced stage to warrant its exclusion from Section 1407 proceedings." *In re Dow Chemical Co. Sarabond Products Liability Litig.*, 650 F. Supp. 187, 188-89 (J.P.M.L. 1986). In opposition, Manufacturers argue that over 80 cases should be consolidated with the *City of Chicago* -- a case pending three years longer than any action before the Panel that has proceeded through multiple rounds of motions to dismiss and is currently engaged in discovery -- because the Panel previously consolidated three actions with one case that had been pending for only months longer than the others. *In re Ocean Financial Corp. Prescreening Litigation*, 435 F. Supp. 2d 1350 ("the action in the Northern District of Illinois, which is proceeding apace, has been pending months longer than those filed outside this district"). The factually dissimilarity of the Manufacturers' authority, along with the procedural dissimilarity of *City of* Chicago to the proposed MDL cases weigh against its inclusion and against centralization in the Northern District of Illinois.

The remainder of the Manufacturers' authority is similarly inapplicable to this petition because the cited decisions were not based on the first-filed case, or because the number of cases and time pending between the first-filed and related cases differ from cases in this petition. *See In re Light Cigarettes Marketing and Sales Practices Litigation*, 652 F. Supp. 2d 1379, 1381 (declining centralization where "[a]ll three actions are at a relatively advanced stage, and differ in significant ways from the eight listed in Schedule A."); *In re Epipen*, 2017 WL 3297989, at *3 (the transferee district was appropriate because it "presents a geographically central forum for this nationwide litigation" and was already a "de facto consolidation" of eight plaintiffs' claims);

In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Prods. Liab. Litig., 220 F. Supp. 3d 1356, 1359 (J.P.M.L. 2016) (the actions were not too procedurally disparate because "[a]ll but three of the actions were filed within the past six months and are in their infancy," and "[t]he two putative class actions have been pending since 2014, but have not advanced significantly past the pleading stage").

Here, contrary to the Manufacturers' position, *City of Chicago* was filed significantly earlier than any other case at issue and "proceeded significantly past the pleading stage." In fact, the Manufacturers admit that *City of Chicago* progressed well beyond the initial pleading stage, through multiples rounds of motions to dismiss, and that written discovery, document production, and rulings on discovery motions are already underway. (Dkt. 158 at 8). Consolidation of the *City of Chicago* would not convenience any parties because it is one action, significantly more advanced than any other case in the country,[17] and consolidation will significantly hamper the progress of *City of Chicago* and any recently-filed case consolidated with it. Moreover, *City of Chicago* only presents one theory of liability -- a false marketing theory against manufacturers.

Furthermore, *City of Chicago*, and the Northern District of Illinois are not representative of the overall trend in national opioid litigation across the country. The Northern District of Illinois is not geographically central to the opioid epidemic or the location of the opioid litigation. And, given the theory of liability at issue there, the Northern District of Illinois is not acting as a "*de facto* consolidation" for any cases at issue in this petition. Therefore, the authority relied on by the Manufacturers for consolidation of the *City of Chicago* is inapplicable to the facts of this petition. *See In re Ortho Evra Prod. Liab. Litig.*, 422 F. Supp. 2d 1379, 1380-81 (transferring thirteen cases to the Northern District of Ohio, despite the largest group of cases residing in New Jersey, because "the Northern District of Ohio . . . enjoys the support of the

[17] *People of the State of California v. Purdue Pharma, et al.*. Orange County Superior Court, Case No. 30-2014-0072587 has been pending in California Superior Court, County of Orange since May 22, 2015. Notably, the Manufacturers do not allege that centralization in the Central Districts of California in order to coordinate the with oldest state-court litigation.

common defendants and several plaintiffs" and "provides a relatively central situs in regard to the geographic dispersal of the constituent and potential tag-along actions"); *In re: Franck's Lab, Inc., Prod. Liab. Litig.*, 959 F. Supp. 2d 1367, 1368 (J.P.M.L. 2013) (transferring twenty actions to the Eastern District of Tennessee where, in addition to being the most advanced, the "four actions pending in [that] district . . . [were] more conveniently located to Florida, the locus of events and witnesses."); *In re: JP Morgan Chase Mortg. Modification Litig.*, 818 F. Supp. 2d 1378, 1379 (J.P.M.L. 2011) (consolidating eleven actions in nine districts where the Massachusetts case was the first-filed and "defendants and some plaintiffs support centralization").

B. The Eastern District of Pennsylvania and Southern District of New York are Not Appropriate Forums

Various defendants argue, in the alternative, that either the Eastern District of Pennsylvania or the Southern District of New York would be appropriate forums because they are centrally located to certain defendants' principal places of business. Despite the admirable qualifications of the proposed Judges in those jurisdictions, those forums are not ideal locations for centralization. *See In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Prods. Liab. Litig.*, 406 F. Supp. 540, 542-43 (J.P.M.L. 1975) ("We are reluctant to transfer this litigation to the Eastern District of Virginia because no actions are pending there."); *see also In re Celotex Corp. "Technifoam" Prods. Liab. Litig.*, 68 F.R.D. 502, 505 (J.P.M.L. 1975) ("Inasmuch as no actions are pending in the Middle District of Florida, we are reluctant to transfer this litigation there."). Moreover, the location of Defendants' documents and witnesses does not warrant centralization. *In re Tribune Co.*, 831 F. Supp. 2d at 1372; *British Marine PLC*, 2014 WL 2475485 at *4; *Red Bone Alley Foods, LLC v. Nat'l Food & Bev., Inc.*, 2014 WL. 1090352, *6.

C. The Western District of Washington and Eastern District of Texas Are Not Appropriate Forums

The Cities of Everett and Tacoma and the Counties of Upshur and Bowie advocate for the Western District of Washington or Eastern District of Texas as transferee districts. For the reasons discussed below, neither are proper forums for consideration.

First, the Western District of Washington, is not a convenient forum for any of the parties, or their counsel, except for the Cities of Everett and Tacoma. The Eastern District of Texas is similarly inconvenient. While the presence of documents or witnesses in the chosen forum is not, by itself, grounds for approving or denying transfer to a specific forum, none of the defendants in this litigation has a significant presence in Washington or Texas, and the majority of counsel for interested parties live significantly far from both states. Moreover, The Texarkana division of the Eastern District of Texas is located at least three hours, by car, from the Dallas/Ft. Worth International Airport. Therefore, it is not a readily accessible location for the parties or counsel.

Second, Washington and Texas are not centrally located in the center of the opioid epidemic or the related litigation. *In re Air Fare Litig.*, 322 F. Supp. 1013, 1015 (J.P.M.L. 1980) ("[t]he geographical location of the transferee court is especially relevant when counsel must travel from distant parts of the country"). No argument is put forward justifying transfer to jurisdictions at the extreme edges of the county, especially when districts central to the epidemic and litigation contain more cases and are more procedurally advanced than others.

Finally, the complaints in Washington and Texas do not reflect the overall trend and current theories of liability. As the City of Everett recognizes, its complaint asserts state court claims regarding one specific example of defendants' industry-wide conduct that occurred on a national scale. Similarly, the Counties of Upshur and Bowie assert claims that do not reflect the overall growing trend of holding manufacturers and distributors liable for a RICO claim related to their mutual obligations to prevent diversion and report suspicious orders of controlled substances. In any event, Movants are willing to cooperate with counsel for the Cities and Counties, and maintain that their cases are suitable for inclusion in an MDL proceeding.

V. CONCLUSION

For the foregoing reasons, Movants respectfully request that the Panel centralize these cases, and any subsequently-filed cases, in the Southern District of Ohio, and assign them to Judge Edmund A. Sargus, Jr., or in the alternative, in the Southern District of Illinois, and assign them to Judge Staci M. Yandle. Finally, Movants do not oppose transfer to the Southern District of West Virginia, and assignment to Judge David A. Faber.

Dated: October 27, 2017

BARON & BUDD, P.C.

/s/ Roland Tellis

By: Roland Tellis

Roland K. Tellis
Mark P. Pifko
Sterling L. Cluff
BARON & BUDD, P.C.
15910 Ventura Boulevard, Suite 1600
Los Angeles, CA 91436
Tel.: 818-839-2333
Fax: 818-986-9698
rtellis@baronbudd.com
mpifko@baronbudd.com
scluff@baronbudd.com

Russell W. Budd
J. Burton LeBlanc, IV
Laura J. Baughman
S. Ann Saucer
BARON & BUDD, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219
Tel.: 214-521-3605
Fax: 214-520-1181
rbudd@baronbudd.com
bleblanc@baronbudd.com
lbaughman@baronbudd.com
asaucer@baronbudd.com

(*Signatures continued on next page*.)

James M. "Mike" Papantonio
Peter J. Mougey
Page A. Poerschke
Laura S. Dunning
Archie C. Lamb, Jr.
Jeffrey Gaddy
Neil E. "Ned" McWilliams, Jr.
LEVIN, PAPANTONIO, THOMAS, MITCHELL, RAFFERTY & PROCTOR, P.A.
316 S. Baylen Street, Suite 600
Pensacola, FL 32502-5996
850.435.7068 (office)
850.436.6068 (fax)
mpapantonio@levinlaw.com
pmougey@levinlaw.com
ppoerschke@levinlaw.com
ldunning@levinlaw.com
alamb@levinlaw.com
jgaddy@levinlaw.com
nmcwilliams@levinlaw.com

James C. Peterson (Ohio Bar No. 0032465)
R. Edison Hill
HILL, PETERSON, CARPER, BEE & DEITZLER, PLLC
NorthGate Business Park
500 Tracy Way
Charleston, WV 25311
304-345-5667
304-345-1519 fax
jcpeterson@hpcbd.com
rehill@hpcbd.com

Michael J. Fuller, Jr., OH Bar No. 90250
Amy Quezon, OH Bar No. 0091798
MCHUGH FULLER LAW GROUP, PLLC
97 Elias Whiddon Rd.
Hattiesburg, MS 39402
Telephone: 601-261-2220
Facsimile: 601-261-2481
mike@mchughfuller.com
amy@mchughfuller.com

Paul T. Farrell, Jr. (Ohio Bar No. 0070257)
GREENE, KETCHUM, FARRELL, BAILEY & TWEEL, LLP
419 - 11th Street (25701)/ P.O. Box 2389
Huntington, West Virginia 25724-2389
Phone: 800.479.0053 or 304.525.9115
Fax: 304.529.3284
Email: paul@greeneketchum.com

Anthony J. Majestro
WV Bar 5165
POWELL & MAJESTRO, PLLC
405 Capitol Street, Suite P-1200
Charleston, WV 25301
Phone: 304.346.3889
Fax: 304-346-2895
Email: amajestro@powellmajestro.com

Counsel for: Birmingham, AL; County of Jersey, IL; County of Alexander, Illinois; Boone County, KY; Pendleton County, KY; Campbell County, KY; Anderson County, KY; Franklin County, KY; Shelby County, KY; Henry County, KY; Boyle County, KY; Fleming County, KY; Garrard County, KY; Lincoln County, KY; Madison County, KY; Nicholas County, KY; Bell County, KY; Harlan County, KY; Knox County, KY; Leslie County, KY; Whitley County, KY; Clay County, KY; Louisville/Jefferson County Metro Government, KY; Cumberland County, KY; Spencer County, KY; Union County, KY; Carlisle County, KY; Clermont County Board of County Comm., OH; Belmont County Board of County Comm., OH; Brown County Board of County Comm., OH; Jackson County Board of County Comm., OH; Scioto County Board of County Comm., OH; Vinton County Board of County Comm., OH; Pike County Board of County Comm., OH; Ross County Board of County Comm., OH; City of Cincinnati, Ohio; City

of Portsmouth, OH; Gallia County Board of County Comm., OH; Hocking County Board of Comm., OH; Lawrence County Board of County Comm., OH; Kanawha County Comm., West Virginia; Fayette County Comm., West Virginia; Boone County Comm., West Virginia; Logan County Comm., West Virginia; Cabell County Comm., West Virginia; Wayne County Comm., West Virginia.

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, I electronically filed the attached document using the CM/ECF system which will send notification of such filing to the email addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants and to the Clerk of the United States Judicial Panel on Multidistrict Litigation, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Room G-255, North Lobby, Washington, DC 20544-0005.

/s/Roland Tellis