

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

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**IN RE: TAXOTERE (DOCETAXEL)  
EYE INJURY PRODUCTS LIABILITY  
LITIGATION**  
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**MDL DOCKET NO. 3023**

**RESPONSE OF DEFENDANTS SANOFI-AVENTIS U.S. LLC AND SANOFI US  
SERVICES INC. TO MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28  
U.S.C. SECTION 1407 FOR CENTRALIZED PRETRIAL PROCEEDINGS**

Defendants sanofi-aventis U.S. LLC and Sanofi US Services Inc. (“Sanofi”) oppose Plaintiff Jade Porter’s Motion for Transfer because the small number of pending cases do not warrant centralization. Should the Panel determine that the pending cases would benefit from centralized pretrial proceedings, Sanofi respectfully submits that those benefits would only be fully realized before Judge Jane Triche Milazzo in the Eastern District of Louisiana. As the Panel is aware, Judge Milazzo currently presides over *In re Taxotere (Docetaxel) Products Liability Litigation* (MDL 2740). Transfer of these cases to her court would create significant efficiencies, which would benefit *all litigants* and better serve the orderly administration and resolution of the litigation. If, however, the Panel decides to centralize these cases outside of the Eastern District of Louisiana, Sanofi proposes transfer to the Western District of Texas or the Southern District of Texas because of their nexus to the witnesses, counsel, and the Fifth Circuit. Sanofi opposes transfer to the Northern District of California or the District of Arizona because there is no clear relationship to either other than Plaintiffs’ counsel selecting those districts to file the first cases.

**I. THE TAXOTERE LITIGATIONS.**

Taxotere, or docetaxel, is an FDA-approved, life-saving chemotherapy. For nearly 25 years, oncologists in the United States (and around the world) have prescribed Taxotere to treat serious and potentially fatal cancer types, including breast cancer. Taxotere’s therapeutic benefit

cannot be credibly disputed, and it remains the standard of care for the treatment of many high-risk cancer populations. The World Health Organization included Taxotere in its Model List of Essential Medicines, making it one of “the most efficacious, safe and cost-effective medicines for priority conditions.”<sup>1</sup>

Ms. Porter filed her lawsuit in the Northern District of California on March 17, 2021. She alleges she developed “excessive tearing” as a result of permanent occlusion or blockage of her tear ducts after chemotherapy treatment with Taxotere. Nine months later, on December 1, 2021, Ms. Porter filed a motion with the Panel to transfer her lawsuit and five related lawsuits for centralized pretrial proceedings. (Dkt. No. 1).<sup>2</sup> Like Ms. Porter, Plaintiffs in the related lawsuits claim that they developed “excessive tearing” as a result of permanent injuries to their tear ducts (the lacrimal duct system), including punctal, canalicular, and nasolacrimal duct stenosis after chemotherapy treatment with Taxotere. Each case makes the following common factual allegations: (i) exposure to Taxotere; (ii) damages arising from allegedly permanent injuries to the lacrimal system; and (iii) the same or similar conduct by Sanofi.<sup>3</sup> Plaintiffs claim that the expected tearing (sometimes referred to as “lacrimation”) that may occur during chemotherapy has continued after their treatment with Taxotere.

Since 2002, however, the FDA-approved Taxotere label has included the following warning in the “Post-Marketing Experiences” subsection of the Adverse Reactions section:

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<sup>1</sup> WORLD HEALTH ORG., WHO MODEL LIST OF ESSENTIAL MEDICINES Explanatory Notes, 27 (2021).

<sup>2</sup> After Ms. Porter filed her Motion, two additional related actions were filed—one in the Eastern District of Tennessee (*Leone*) and one in the Northern District of Alabama (*Pettway*). (Dkt. Nos. 5, 6). There are now eight total actions.

<sup>3</sup> Multiple companies (other than Sanofi) manufacture, sell, or distribute various forms of docetaxel, which have either been approved by the FDA under the 505(j) or the 505(b)(2) process. Generic docetaxel products have been on the market since 2011.

“Excessive tearing which may be attributable to lacrimal duct obstruction has been reported.” The potential risk of lacrimal duct obstruction has remained in Taxotere’s FDA-approved label since 2002, and FDA has approved the Taxotere label on at least 17 occasions without change to the warning on lacrimal duct obstruction. Despite the clear language in the label, Plaintiffs assert that Sanofi failed to provide an adequate warning of this alleged risk. If the Panel determines these cases warrant centralization, Ms. Porter requests that the Panel transfer them to the Northern District of California or, alternatively, to the District of Arizona. (Dkt. No. 1 at 1).

Ms. Porter’s Motion, if granted, would create the second active MDL alleging that Sanofi failed to warn of an alleged side effect associated with Taxotere. On October 4, 2016, the Panel created *In re Taxotere (Docetaxel) Products Liability Litigation* (MDL 2740), which centralized the plaintiffs’ claims alleging that Sanofi (and other manufacturers of docetaxel)<sup>4</sup> had failed to warn of the risk of “permanent” hair loss associated with Taxotere. *See* 220 F. Supp. 3d 1360, 1361 (J.P.M.L. 2016). The Panel transferred these actions to the Eastern District of Louisiana, where Judge Milazzo has presided over MDL 2740 since 2018.<sup>5</sup>

## II. CENTRALIZATION IS NOT WARRANTED AT THIS STAGE.

Although these actions present common questions of fact, centralization is warranted only if doing so “would serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation.” *In re TD Bank, N.A.*, 703 F. Supp. 2d 1380, 1381 (J.P.M.L.

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<sup>4</sup> In addition to Sanofi, the Panel transferred the plaintiffs’ claims against the following sponsors, manufacturers, and distributors of docetaxel: Sandoz Inc.; Accord Healthcare, Inc.; McKesson Corporation; Hospira Worldwide, LLC; Hospira, Inc.; Sun Pharma Global FZE; Sun Pharmaceutical Industries, Inc.; Actavis LLC; and Actavis Pharma, Inc.

<sup>5</sup> The JPML entered an order reassigning the case from Chief Judge Kurt D. Engelhardt to Judge Milazzo in May 2018. Order Reassigning Litigation, *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, No. 16-md-2740 (E.D. La. May 16, 2018), ECF No. 2599.

2010). Ms. Porter, as the proponent of centralization, bears the burden to show it is appropriate where, as here, only a handful of actions are pending. *In re Bernzomatic & Worthington Branded Handheld Torch Prods. Liab. Litig.*, 293 F. Supp. 3d 1380, 1380 (J.P.M.L. 2018). Ms. Porter has failed to do so.

Specifically, Ms. Porter seeks transfer of six actions pending in four districts, with two potential tag-along actions pending in two additional districts. The Panel, however, has declined to centralize products-liability actions where only a few cases are pending. *Compare In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 959 F. Supp. 2d 1375 (J.P.M.L. 2013) (denying centralization of five products-liability actions and 24 related cases), *with In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II)*, 997 F. Supp. 2d 1354, 1355 (J.P.M.L. 2014) (later granting centralization of 56 products-liability actions and more than 170 related actions), and *In re: TelexFree Sec. Litig.*, 54 F. Supp. 3d 1353 (J.P.M.L. 2014) (transferring 12 actions in complex securities litigation for coordinated pretrial proceedings).

Ms. Porter does allege that she “reasonably anticipates that dozens of other actions with similar allegations are likely to follow.” (Dkt. No. 1-1 at 3). Plaintiffs’ counsel has also previously represented to Sanofi’s counsel that there are hundreds of potential actions, but to date has only filed eight cases in nine months. Mere speculation about the filing of future actions should not affect the Panel’s analysis. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 959 F. Supp. 2d at 1376 (the Panel is “disinclined to take into account the mere possibility of future filings in [its] centralization calculus.”). In *In re Belviq (Lorcaserin HCl) Products Liability Litigation*, for example, the Panel recently denied centralization where there were only, “at most, twenty actions” pending, despite the plaintiffs’ prediction that the litigation would encompass “hundreds or thousands of cases.” 2021 WL 3523427, at \*2 (J.P.M.L. Aug. 10,

2021); *see also In re Gen. Motors LLC Chevrolet Bolt EV Battery Prods. Liab. Litig.*, 532 F. Supp. 3d 1413, 1414 (J.P.M.L. 2021) (denying centralization where there were “only eight actions at issue”). The same result is warranted here.

In addition, informal coordination over centralization is preferable because all actions are in their early stages, and only a few firms are involved. *See In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.*, 38 F. Supp. 3d 1380, 1381 (J.P.M.L. 2014) (denying centralization in favor of informal coordination because of “few involved counsel” in the “limited number of actions” that were “in their infancy”). Centralization of pretrial proceedings is often unnecessary when plaintiffs share common counsel, as is the case here. *See In re OxyElite Pro & Jack3d Prods. Liab. Litig.*, 11 F. Supp. 3d 1340, 1341 (J.P.M.L. 2014) (declining centralization given that two groups of plaintiffs’ counsel were already coordinating most of the personal injury actions). All but one action share common counsel between Plaintiffs’ firms.<sup>6</sup> Lead Plaintiffs’ counsel and Sanofi’s counsel have already established a working relationship, and Sanofi’s counsel is prepared to work with Plaintiffs’ counsel to coordinate discovery and pretrial matters as appropriate.<sup>7</sup> *See In re Cymbalta (Duloxetine) Prods. Liab. Litig.*, 65 F. Supp. 3d 1393, 1394 (J.P.M.L. 2014) (“The

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<sup>6</sup> Hotze Runkle PLLC and Paul LLP represent seven Plaintiffs: Ms. Porter, Ms. Estell, Ms. Hamilton-Moews, Ms. Vega, Ms. Cone, and Ms. Burns. Heninger Garrison Davis represents one Plaintiff, Ms. Pettway.

<sup>7</sup> For example, “notices for a particular deposition could be filed in all actions, thereby making the deposition applicable in each action.” *In re Sears, Roebuck & Co. Emp’t Pracs. Litig.*, 487 F. Supp. 1362, 1364 (J.P.M.L. 1980) (denying motion to transfer five actions because suitable alternatives were available). Or “the parties could seek to agree upon a stipulation that any discovery relevant to more than one action may be used in all actions.” *Id.* Further, the parties could request that the court order “the parties to coordinate their pretrial efforts” and “discovery completed in any action . . . be made applicable to [similar] actions.” *Id.*; *see also In re Gen. Mills, Inc. Yoplus Yogurt Prods. Mktg. & Sales Pracs. Litig.*, 716 F. Supp. 2d 1371, 1372 (J.P.M.L. 2010) (finding transfer unnecessary where the parties had “every ability to cooperate and minimize the possibilities of duplicative discovery and/or inconsistent pretrial rulings.”).

presence of common counsel here should facilitate informal coordination of this relatively small number of actions.”); Manual for Complex Litigation, Fourth, § 20.14 (2004).

At this stage, Ms. Porter has not made a compelling case that centralization would promote Section 1407’s goals of enhancing efficiency and convenience. Premature centralization, as is requested here, would instead impose “added inconvenience, confusion, and cost” on the parties. *In re Uponor, Inc. F1960 Plumbing Fittings Prods. Liab. Litig.*, 895 F. Supp. 2d 1346, 1348 (J.P.M.L. 2012).<sup>8</sup> Centralization should therefore be “the last solution” after considered review of all other options. *In re: Gerber Probiotic Prods. Mktg. & Sales Pracs. Litig.*, 899 F. Supp. 2d 1378, 1379 (J.P.M.L. 2012). Because the small number of actions and law firms allow for informal cooperation, the Panel should deny Ms. Porter’s motion at this time.<sup>9</sup> See *In re Adderall XR Mktg., Sales Pracs. & Antitrust Litig.*, 968 F. Supp. 2d at 1345 (“Where there are few cases” and “informal cooperation among the involved attorneys and coordination between the involved courts” may be possible, this approach is “preferable.”).

### **III. IF CENTRALIZATION IS WARRANTED, THE EASTERN DISTRICT OF LOUISIANA IS THE MOST APPROPRIATE VENUE FOR PRETRIAL PROCEEDINGS.**

That said, because of the significant overlap between the present actions before the Panel and the actions in *In re Taxotere (Docetaxel) Products Liability Litigation* (MDL 2740),

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<sup>8</sup> Moreover, courts have previously recognized that centralization of “products liability actions [also has] the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.” See also *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, MDL 2004, 2016 WL 4705827, at \*2 (M.D. Ga. Sept. 7, 2016).

<sup>9</sup> Although centralization is currently premature, it may become appropriate should the number of cases filed against Sanofi increase or informal cooperation otherwise become impractical. See, e.g., *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II)*, 997 F. Supp. 2d at 1355 (granting plaintiffs’ second request for centralization because over 190 additional actions were filed since the Panel first denied centralization, making informal coordination impractical).

centralizing the present actions may promote efficiency if they are transferred to the Eastern District of Louisiana. Judge Milazzo, who currently presides over MDL 2740, is uniquely positioned to manage the pretrial proceedings because of her familiarity with the issues in these cases. The Eastern District also remains an easily accessible and central district for all parties.

**A. The Panel Should Transfer These Actions to The Eastern District of Louisiana Where Judge Milazzo Currently Presides Over MDL 2740.**

A transferee judge overseeing one pharmaceutical MDL is in a “unique position to guide” a second pharmaceutical MDL when the claims or parties in the two MDLs overlap. *In re: Effexor (Venlafaxine Hydrochloride) Prods. Liab. Litig.*, 959 F. Supp. 2d 1359, 1360 (J.P.M.L. 2013) (“The claims regarding Effexor in this litigation parallel the claims as to the drug Zoloft in MDL No. 2342—which is already before Judge Rufe and also involves Pfizer as common defendant—and there may be some overlap between these litigations in pretrial proceedings.”); *see also In re: Natrol, Inc. Glucosamine/Chondroitin Mktg. & Sales Pracs. Litig.*, 26 F. Supp. 3d 1392, 1394 (J.P.M.L. 2014). The Panel, for example, has transferred an MDL, which alleged a drug caused irreversible neuropathy, to the same district court judge overseeing another MDL, which alleged the same drug caused tendon-rupture injuries. *See In re: Fluoroquinolone Prods. Liab. Litig.*, 122 F. Supp. 3d 1378, 1378–81 (J.P.M.L. 2015). In doing so, the Panel recognized that the transferee judge’s familiarity “with the scientific and regulatory background of [a prescription drug]” would “benefit the parties and facilitate the just and efficient conduct of [the] litigation.” *Id.* at 1381.<sup>10</sup>

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<sup>10</sup> The Panel has also regularly transferred non-pharmaceutical cases for centralized pretrial proceedings before the same transferee judge to facilitate the just and efficient conduct of the litigation. *See, e.g., In re Google Play Store Simulated Casino-Style Games Litig.*, No. MDL 3001, 2021 WL 2369247, at \*1–2 (J.P.M.L. June 3, 2021) (centralizing second MDL that alleged defendant Google’s online store facilitated access to casino-style games in violation of state laws before district court judge overseeing first MDL that alleged Apple’s online store facilitated access to casino-style games in violation of state laws); *In re Lumber Liquidators Chinese-Manufactured Flooring Durability Mktg. & Sales Pracs. Litig.*, 232 F. Supp. 3d 1344, 1345 (J.P.M.L. 2016) (transferring second MDL concerning sales and marketing of laminate flooring to district court judge overseeing first MDL concerning inappropriate emissions of

The same is true here. Significant procedural and substantive overlap exists between the present actions and the actions centralized in *In re Taxotere (Docetaxel) Products Liability Litigation* (MDL 2740) in the Eastern District of Louisiana. 220 F. Supp. 3d 1360 (J.P.M.L. 2016). Plaintiffs in MDL 2740 assert that Sanofi was aware of and failed to warn that Taxotere could cause permanent hair loss. *Id.* at 1361. Plaintiffs here assert that Sanofi was aware of and failed to warn that Taxotere could cause permanent eye damage.<sup>11</sup> Both sets of plaintiffs assert products-liability claims against Sanofi for these alleged failures to warn.<sup>12</sup> Sanofi is currently the only named defendant in the present actions, although MDL 2740 suggests that if additional lawsuits are filed, future plaintiffs may also assert claims against other docetaxel manufacturers.

Given this overlap, Judge Milazzo is the jurist best equipped to preside over a second Taxotere MDL. She is intimately familiar with Taxotere, including its scientific development, the regulatory approval process, and the interplay of this history with the plaintiffs' claims. To that end, Judge Milazzo has previously addressed MDL-wide issues of preemption, foreseeability of the risk, and label adequacy. She is also well-versed in MDL trial pool work-up; dispositive motion practice; and bellwether trials. The present actions before the JPML involve the same drug (Taxotere), the same defendant (Sanofi), and the same legal claims (products liability / failure-to warn). *See In re: Effexor*, 959 F. Supp. 2d at 1360; *In re: Fluoroquinolone*, 122 F. Supp. 3d at

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formaldehyde from same laminate flooring); *In re: London Silver Fixing, Ltd., Antitrust Litig.*, 52 F. Supp. 3d 1381, 1382 (J.P.M.L. 2014) (transferring second MDL that alleged defendants manipulated the price of silver before district court judge overseeing first MDL that alleged some overlapping defendants manipulated the price of gold).

<sup>11</sup> (Dkt. No. 1-1 at 2) (“Movant alleges that Sanofi manufactured and sold the chemotherapy drug Taxotere (docetaxel) without adequate warning concerning the risk of permanent eye injuries, specifically punctal and canalicular stenosis.”).

<sup>12</sup> *Cf. Ex. A*, Amended Complaint, *Estell v. Sanofi US Services, Inc.*, No. 3:21-cv-02749 (N.D. Cal. July 28, 2021), with *Ex. B*, Short Form Complaint, *Estell v. Sanofi US Services, Inc.*, No. 2:19-cv-13003 (E.D. La. Oct. 7, 2019).



1381. As a result, Judge Milazzo is in a “unique position” to guide the pretrial proceedings for these actions. *In re: Effexor*, 959 F. Supp. 2d at 1360.

Transfer of the present actions to the Eastern District of Louisiana would result in significant, tangible efficiencies to the parties, counsel, and the courts. Judge Milazzo’s management of MDL 2740 is yet another example of the Eastern District’s successful administration of pharmaceutical MDLs.<sup>13</sup> And as is the Panel’s longstanding practice, the transferee court would determine in its sound discretion the level of coordination between MDL 2740 and the present actions to ensure that both proceed in a just and efficient manner. *In re Google Play Store Simulated Casino-Style Games Litig.*, 2021 WL 2369247, at \*2. Based on the present structure of MDL 2740, centralizing both litigations in the Eastern District of Louisiana provides opportunities for efficiencies that are far more difficult (if not impossible) to realize outside the district.

***Overlap in Plaintiffs:*** Two of the eight Plaintiffs before the Panel—Ms. Estell and Ms. Pettway—have lawsuits already pending in MDL 2740.<sup>14</sup> Both Ms. Estell and Ms. Pettway have previously submitted MDL Plaintiff Fact Sheets and produced accompanying medical records to Sanofi. If dozens more cases will be filed as Plaintiffs’ counsel suggests (and centralization is granted), then it is likely that there will be more plaintiffs with claims in both Taxotere MDLs. In such cases, transfer of these actions to the Eastern District of Louisiana would minimize the risk

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<sup>13</sup> See *In re Propulsid Prods. Liab. Litig.* (MDL 1355); *In re Vioxx Prods. Liab. Litig.* (MDL 1657); *In re: Xarelto (Rivaroxaban) Prods. Liab. Litig.* (MDL 2592). The Eastern District has also managed complicated mass-tort cases outside of the pharmaceutical context. See *In re Chinese Manufactured Drywall Products Liability Litigation* (MDL 2047); *In re: FEMA Trailer Formaldehyde Prods. Liab. Litig.* (MDL 1873).

<sup>14</sup> **Ex. B**, Short Form Complaint, *Estell v. Sanofi US Services, Inc.*, No. 2:19-cv-13003 (E.D. La. Oct. 7, 2019); **Ex. C**, Short Form Complaint, *Pettway v. Sanofi S.A.*, No. 2:17-cv-10127 (E.D. La. Oct. 4, 2017).

of duplicative discovery and streamline case management because both sets of claims would rely on overlapping medical records, prescriber depositions, and fact witness discovery. In MDL 2740, for example, the parties have utilized a case management platform, MDL Centrality, which could be used for the present actions if centralized. Many dispositive issues also would apply to both claims and promote judicial efficiencies through motion practice.

***Overlap of Counsel:*** Ms. Porter’s counsel currently has filed 18 cases in MDL 2740, and one of their attorneys serves on the court-appointed Taxotere Plaintiffs’ Settlement Committee.<sup>15</sup> As a result, Plaintiffs’ counsel is familiar with, and subject to, the preexisting legal architecture that governs MDL 2740, including protocols for common benefit funds, electronically stored information, protective orders, and depositions. If the same or similar protocols are implemented, both Plaintiffs’ and Sanofi’s counsel are familiar with them.<sup>16</sup> This could further reduce the need for protracted negotiations and briefing to address these MDL-management procedures.

***Overlap of Issues:*** Plaintiffs in both the present actions and MDL 2740 claim that Sanofi failed to warn of permanent side effects associated with Taxotere. As discussed, both litigations present similar MDL-wide issues, such as preemption and label adequacy, and plaintiff-specific issues, such as warnings causation and statutes of limitation. The Court has addressed all of these in MDL 2740, some in favor of plaintiffs and some in favor of defendants—decisions the Fifth Circuit has consistently affirmed. The Court is also familiar with the experts on both sides of MDL 2740 after multiple rounds of *Daubert* briefing. So any overlap in experts between MDL 2740

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<sup>15</sup> Hotze Runkle PLLC has 17 active cases and Paul LLP has one active case in MDL 2740. Ashlea Schwarz of Paul LLP serves on the MDL 2740 Settlement Committee. *See Ex. D*, Pretrial Order No. 89 (Re-Appointing Plaintiffs’ Settlement Committee Members), *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, MDL No. 16-2740 (E.D. La. Nov. 27, 2018).

<sup>16</sup> This familiarity would extend to other counsel as well. Ms. Pettway, for example, is represented by the Heninger Garrison Davis in her potential tag-along case. The Heninger Garrison Davis firm currently has six active cases in MDL 2740.

and the present actions would also favor transfer to the Eastern District of Louisiana. Finally, Chief Magistrate Judge Michael B. North has overseen discovery and adjudicated discovery disputes in MDL 2740 since its inception. MDL 2740 has an established protocol for producing electronically stored information and has numerous case management orders governing discovery. Under those procedures, millions of documents have been produced in MDL 2740. Such procedures could be implemented and tailored for this litigation if these claims are centralized in the Eastern District of Louisiana. While there would be new issues, new counsel, and new leadership, the lessons learned in MDL 2740 would be invaluable if centralization occurs.

**B. The Factors the Panel Found Warranted Transfer to the Eastern District of Louisiana in MDL 2740 Apply Equally to These Actions.**

Along with the Eastern District of Louisiana's experience in these matters, the reasons the Panel centralized MDL 2740 in the Eastern District of Louisiana are just as applicable here. *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 220 F. Supp. 3d at 1361. In MDL 2740, the Panel recognized that no clear focal point existed “[g]iven the geographic dispersal of the pending actions and the widespread nature of this litigation[.]” *Id.* Because the Eastern District of Louisiana was “an easily accessible and reasonably central district” and several actions were pending there, the Panel found that it was the most appropriate district for transfer. *Id.*

As in MDL 2740, the pending actions are geographically dispersed, and the nature of the litigation is widespread. Currently, there are six pending cases and two tag-along cases in six jurisdictions, including the Northern, Eastern, and Central Districts of California; the District of Arizona; the Eastern District of Tennessee; and the Middle District of Alabama.<sup>17</sup> It is anticipated

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<sup>17</sup> Though none of the eight actions are pending in the Eastern District of Louisiana, this is not a bar to centralization in the district. *In re Nine W. LBO Sec. Litig.*, 464 F. Supp. 3d 1383, 1386 (J.P.M.L. 2020) (“That a related action is not pending in the [proposed transferee district] is not a bar to centralization there.” (citing *In re: Bard IVC Filters Prods. Liab. Litig.*, 122 F.

that, should more cases get filed as Plaintiffs' counsel predicts, the geographic scope of the litigation will only grow wider. Counsel is also similarly dispersed. Plaintiffs' counsel is in Kansas City, Missouri; West Lake Hills, Texas; and Birmingham, Alabama. Sanofi's counsel is in Kansas City, Missouri. Because there is no clear focal point, these actions should be centralized in the Eastern District of Louisiana, which remains an easily accessible and central district. *Id.*; *see also In re: Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 65 F. Supp. 3d 1402, 1405 (J.P.M.L. 2014) (finding Eastern District of Louisiana was geographically central forum for nationwide litigation).

**IV. IN THE ALTERNATIVE, THE WESTERN DISTRICT OF TEXAS OR THE SOUTHERN DISTRICT OF TEXAS ARE APPROPRIATE VENUES FOR PRETRIAL PROCEEDINGS.**

Although the efficiencies of centralized pretrial proceedings would be fully realized in the Eastern District of Louisiana, the Western District of Texas and the Southern District of Texas are also equipped to marshal this litigation. These districts are experienced in managing multidistrict litigations, *see, e.g., In re: Whole Foods Mkt., Inc. Greek Yogurt Mktg. & Sales Pracs. Litig.*, 65 F. Supp. 3d 1395 (J.P.M.L. 2014) (centralized in the Western District); *In re Silica Prods. Liab. Litig.*, 280 F. Supp. 2d 1381 (J.P.M.L. 2003) (centralized in the Southern District), but they are far from overburdened. The Western District of Texas currently has one active MDL, and it is only the 40th busiest district in the country by civil filing per judge.<sup>18</sup> The Southern District of Texas has no active MDLs, and it is only the 46th busiest district in the country by civil filing per judge.<sup>19</sup>

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Supp. 3d 1375, 1377 (J.P.M.L. 2015)); *see also In re: Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, 896 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012).

<sup>18</sup> *See Federal Court Management Statistics, June 2021*, UNITED STATES COURTS, [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0630.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2021.pdf) (last visited Dec. 20, 2021).

<sup>19</sup> *Id.*

Both districts are also within the Fifth Circuit, which is familiar with and has resolved both procedural and substantive appeals in MDL 2740. *See, e.g., In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 966 F.3d 351, 354 (5th Cir. 2020) (affirming dismissal with prejudice of MDL 2740 plaintiff where plaintiff failed to submit a complete plaintiff fact sheet under case-management orders). These decisions would provide guiding precedent to a transferee judge in either district.

Moreover, both districts are convenient to the parties and counsel. *See, e.g., In re: Wells Fargo Wage & Hour Emp. Pracs. Litig. (No. III)*, 804 F. Supp. 2d 1382, 1384–85 (J.P.M.L. 2011) (finding Southern District of Texas was “geographically centrally located and accessible for parties and witnesses located throughout the United States”). Counsel for seven Plaintiffs are located in West Lake Hills, Texas, which is less than 10 miles from the Austin United States Courthouse, and in Kansas City, Missouri, which is a two-hour flight from Austin. Similarly, Houston is a short drive from Plaintiffs’ counsel in West Lake Hills, Texas, and also features access to several large airports. Sanofi’s counsel, located in Kansas City, Missouri, would likewise benefit from travel to a central location. Because Plaintiffs have filed suits across the country, including in Alabama, Arizona, California, and Tennessee, either District provides a geographically convenient forum for this nationwide litigation. Further, Dr. Bitá Esmaeli, the leading expert in canalicular stenosis, and whom all eight Plaintiffs cite numerous times in their complaints, is located in Houston, Texas. As a result, the Western District of Texas or the Southern District of Texas are appropriate if the Panel grants centralization.

**V. THE TRANSFER FACTORS SUPPORT SANOFI’S PROPOSED VENUES OVER MS. PORTER’S PROPOSED VENUES.**

**A. The Northern District of California.**

Although the Northern District of California is an experienced venue for MDLs, Sanofi’s proposed forums would be more appropriate because of current constraints within the Northern

District. The Panel considers a district’s “capacity to efficiently manage [the] litigation” in its transfer analysis. *See In re: T-Mobile Customer Data Security Breach Litig.*, No. 3019, 2021 WL 5872977 (J.P.M.L. Dec. 3, 2021). The Northern District of California currently has four judicial vacancies.<sup>20</sup> The United States Judicial Conference has categorized all four vacancies as “judicial emergencies.”<sup>21</sup> Moreover, Judge Edward M. Chen previously demurred when Ms. Porter’s counsel asked about his interest in taking this potential MDL.<sup>22</sup> The Eastern District of Louisiana and Southern District of Texas, in contrast, have no current judicial vacancies, and the Western District of Texas has one.<sup>23</sup>

The Northern District’s current docket likewise does not invite transfer of this MDL.

<sup>20</sup> *Current Judicial Vacancies*, UNITED STATES COURTS (Dec. 16, 2021), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies>.

<sup>21</sup> *Judicial Emergencies*, UNITED STATES COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last visited Dec. 23, 2021). Whether a vacancy qualifies as a “judicial emergency” is the result of specific definitions and calculations by the U.S. Judicial Conference. *Judicial Emergency Definition, United States Courts*, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition> (last visited Dec. 13, 2021). The U.S. Judicial Conference uses weighted filing, meaning that cases are weighted by their complexity—*e.g.*, a case involving a defaulted student loan is counted as 0.16 for each case and a case involving antitrust issues is counted as 3.72 for each case. *Id.* The total for “weighted filings per judgeship” is the sum of all weights assigned to civil and criminal cases, divided by the number of authorized judgeships. *Id.* Each of the vacancies in the Northern District of California have a weighted filing per judgeship score of 662, qualifying as a “judicial emergency.” *Id.*

<sup>22</sup> MR. PAUL: . . . . I think it is yet to be determined -- certainly on behalf of the Plaintiffs, we have not decided yet whether to pursue an MDL; and I guess might inquire of Your Honor if that were something that you were interested in handling if we were to make that request to the JPML, is that something you would have time for on your docket or –

THE COURT: Well, it depends. If we are talking about four or five, that’s one thing. If we are talking about 400, that may be another matter. So I don’t know.

**Ex. E**, Aug. 31, 2021 Case Management Conf. Tr. 4:22–5:9.

<sup>23</sup> *Current Judicial Vacancies*, UNITED STATES COURTS (DEC. 16, 2021), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies>.

Districts with overtaxed MDL dockets are not appropriate transfer forums. *Cf. In re Baycol Prods. Liab. Litig.*, 180 F. Supp. 2d 1378, 1380 (J.P.M.L. 2001) (transfer district “not currently overtaxed with other multidistrict dockets”). Despite its current vacancies, the Northern District of California manages 19 active MDLs, the most of any district in the country.<sup>24</sup> On the other hand, the Eastern District of Louisiana has only four active MDLs, including MDL 2740.<sup>25</sup> The Western District of Texas has just one active MDL. And the Southern District of Texas has no MDLs. Further, the Northern District of California is the sixth busiest district in the country by civil filings per judge, while the Eastern District of Louisiana is the 77th busiest; the Western District of Texas is the 40th busiest; and the Southern District of Texas is the 46th busiest.<sup>26</sup> The vacancies and current docket conditions are not conducive to the just and efficient resolution of these actions in the Northern District of California.<sup>27</sup>

Nor does the litigation share any nexus with the Northern District of California, beyond

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<sup>24</sup> U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, PENDING MDLS BY DISTRICT AS OF DECEMBER 15, 2021 (2021), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-November-15-2021.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-November-15-2021.pdf).

<sup>25</sup> The *Xarelto* MDL has nearly concluded. *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 2021 WL 493069, at \*1 (E.D. La. Feb. 10, 2021) (noting that 99 percent of plaintiffs have chosen to opt into settlement).

<sup>26</sup> *See Federal Court Management Statistics, June 2021*, UNITED STATES COURTS, [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0630.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2021.pdf) (last visited Dec. 20, 2021).

<sup>27</sup> The Panel has transferred several actions to the Northern District of California in the last year where the defendant corporations were headquartered in the district. *In re Google Play Store Simulated Casino-Style Games Litig.*, 2021 WL 2369247, at \*2 (“Defendant Google has its headquarters in this district[.]”); *In re Apple Inc. App Store Simulated Casino-Style Games Litig.*, 532 F. Supp. 3d 1409, 1411 (J.P.M.L. 2021) (“Defendant Apple has its headquarters in this district[.]”); *In re Google Antitrust Litig.*, 521 F. Supp. 3d 1358, 1360 (J.P.M.L. 2021) (“Google has its headquarters in this district[.]”). Sanofi, however, is not headquartered in the Northern District of California.

the fact that two cases were filed there. Counsel's strategic decision to file these two cases first in the Northern District of California, however, does not establish any *collective* nexus supporting transfer of the entire MDL to the district for two reasons.

*First*, although Ms. Porter and Ms. Estell have filed their cases in the district, the Panel gives little weight to cases in the early stages of litigation in its transfer analysis. See *In re Onglyza (Saxagliptin) & Kombiglyze XR (Saxagliptin & Metformin) Prods. Liab. Litig.*, 289 F. Supp. 3d 1357, 1359 (J.P.M.L. 2018) ("Given that the drugs at issue here were marketed nationwide, and no action or group of actions is significantly advanced, any number of potential transferee districts would be appropriate."); *In re: Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 780 F. Supp. 2d 1379, 1381–82 (J.P.M.L. 2011) ("Since all the actions in this docket are at an early stage, transfer to another district should not be disruptive."). Ms. Porter and Ms. Estell filed their lawsuits nine months ago, and both cases remain at the pleading stage. The parties have not begun discovery, nor has Judge Chen entered any orders establishing discovery protocols in these cases. Instead, the parties have appeared before Judge Chen for one, 15-minute case management conference where he declined to enter an initial scheduling order. And Judge Chen stayed both cases after Ms. Porter filed her motion for transfer, pending the Panel's decision. As a result, Ms. Porter and Ms. Estell's actions do not establish any collective nexus to the Northern District of California for this potential MDL.

*Second*, Plaintiff's citation to *In re Delphi Corp. Securities, Derivative & "ERISA" Litigation* in support of her nexus argument actually favors the Eastern District of Louisiana as the most appropriate forum. 403 F. Supp. 2d 1358 (J.P.M.L. 2005). In *In re Delphi*, the Panel considered potential forums after centralizing the plaintiff's claims against the defendant corporation. *Id.* at 1359–60. The Panel selected the Eastern District of Michigan because it had a



significant nexus to the litigation, including that the defendant corporation's principal place of business was located within the district, so relevant documents and witnesses would likely be there. *Id.* at 1360. The Panel also recognized that a related shareholder derivative action was proceeding in Michigan state court, so "centralization in the Eastern District of Michigan carrie[d] the added benefit of easily coordinating discovery between the federal and state proceedings, should such a need arise." *Id.*

*In re Delphi* points away from the Northern District of California and toward the Eastern District of Louisiana. First, Sanofi's headquarters are not in the Northern District of California, so relevant documents and defendant witnesses are not in the district. Second, *In re Delphi* reaffirms that the Panel considers the existence and location of related actions when choosing an appropriate venue. MDL 2740, which addresses Sanofi's alleged failure to warn of the risk of permanent hair loss with Taxotere (as compared to Sanofi's alleged failure to warn of the risk of permanent eye injuries), is a related action in the Eastern District of Louisiana. As a result, the Eastern District of Louisiana carries the added benefit of coordination between the two litigations if selected.<sup>28</sup>

### **CONCLUSION**

For all of these reasons, Sanofi requests that the Panel deny Ms. Porter's Motion for Transfer for Transfer of Related Actions Pursuant to 28 U.S.C. § 1407 for Coordinated Pretrial Proceedings. If centralization is granted, however, Sanofi requests that the Panel transfer the pending actions to the Eastern District of Louisiana or, in the alternative, the Western District of

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<sup>28</sup> The Eastern District of Louisiana also offers additional benefits for the just and efficient resolution of these actions over the District of Arizona. While both jurisdictions are convenient to the parties and have few MDLs, the Eastern District of Louisiana currently presides over MDL 2740, which will provide significant efficiencies if the present actions are centralized.

Texas or the Southern District of Texas.

Dated: December 23, 2021

Respectfully Submitted,

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