UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: OIL SPILL BY THE OIL RIG "DEEPWATER HORIZON" IN THE GULF OF MEXICO, ON APRIL 20, 2010 MDL No. 2179

TRANSFER ORDER

Before the Panel: Plaintiff in the Middle District of Florida action listed on Schedule A (*Donovan*) moves under Panel Rule 7.1 to vacate our order that conditionally transferred *Donovan* to the Eastern District of Louisiana for inclusion in MDL No. 2179. Defendants Stephen J. Herman, James P. Roy, Kenneth R. Feinberg, and Patrick A. Juneau oppose the motion.

In addition to the motion to vacate, plaintiff—who is proceeding *pro se*—filed what he called a "motion for clarification" on January 25, 2021. This motion was directed to six "procedural issues" relating to the conditional transfer order listing the *Donovan* action and which is subject to plaintiff's motion to vacate. These procedural issues were raised in plaintiff's briefing on his motion to vacate. As the motion for clarification was filed pursuant to Panel Rule 6.3—which allows the Panel Clerk to act on the motion without waiting for a response—the Panel Clerk construed the motion for clarification to be a sur-reply brief and denied it. *See* Minute Order, MDL No. 2179 (J.P.M.L. Jan. 26, 2021), ECF No. 2036. The next day, plaintiff—via an *ex parte* email to the Panel Chair—sought reconsideration of the Panel Clerk's order.[1]

Turning first to plaintiff's motion to vacate, plaintiff argues that his action focuses on specific alleged misconduct on the part of defendants, which falls outside the MDL's ambit. Plaintiff's complaint, which spans more than 180 pages, contains very similar, often identical, allegations of misconduct as a previous action filed by plaintiff that we transferred to MDL No. 2179. *See* Transfer Order at 1, MDL No. 2179 (J.P.M.L. July 31, 2019), ECF No. 2005. These wide-ranging allegations go to the core of the MDL itself, including the prosecution and settlement of tens of thousands of claims in the litigation. As the Panel previously has noted, a transferee judge has an undeniable interest in policing the conduct of attorneys involved in an MDL. *See, e.g.*, Transfer Order at 1–2, *In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2187 (J.P.M.L. Oct. 4, 2017), ECF No. 2315 (ordering transfer of action in which plaintiff alleged that "some of the principal attorneys involved in the MDL" had made misrepresentations inducing her to accept a proposed settlement). Here, in addition to allegations concerning defendants Herman's and Roy's role as two of the principal attorneys in the MDL, plaintiff asserts multiple challenges to the conduct of the litigation generally.

[1] Plaintiff's email and letter to the Panel Chair will be filed on the Panel docket contemporaneously with this Order. Email addresses have been redacted.

Plaintiff in his complaint also challenges various decisions of the transferee court, including the dismissal of plaintiff's prior action and the dismissal of three actions (on behalf of plaintiff's clients) against defendant Feinberg relating to the pre-MDL Gulf Coast Claims Facility. *Donovan* thus constitutes a collateral challenge to the rulings of the transferee court. Allowing the transferee court to consider this challenge to the pretrial proceedings in MDL No. 2179 will enhance efficiency, as otherwise the transferor court would be required to spend time and energy getting up to speed on a complex and years-long litigation.

Additionally, plaintiff raises various procedural objections to transfer (both in his briefing on the motion to vacate and in the subsequent motion for clarification). These uniformly lack merit. For instance, plaintiff argues that transfer is inappropriate because he has not yet served the summons and complaint on defendants. Panel Rule 7.2(b), though, speaks directly to this issue:

> Failure to Serve. Failure to serve one or more defendants in a potential tag-along action with the complaint and summons as required by Rule 4 of the Federal Rules of Civil Procedure does not preclude transfer of such action under Section 1407. Such failure, however, may constitute grounds for denying the proposed transfer where prejudice can be shown.

Plaintiff has not shown any prejudice to transfer. Nor could he, as any prejudice would stem from plaintiff's own failure to serve defendants. In his motion for clarification, plaintiff suggests that transfer is not appropriate because the transferor court lacks personal jurisdiction over the defendants until they are properly served. Any objection to the transferor court's jurisdiction, however, can be raised in the transferee court. *See In re Delta Dental Antitrust Litig.*, MDL No. 2931, __ F. Supp. 3d __, 2020 WL 7382602, at *1 (J.P.M.L. Dec. 16, 2020) ("Following a transfer, the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer.") (quoting *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976)).

Plaintiff's other procedural objections appear to stem from a misunderstanding of the conditional transfer process. A conditional transfer order is the means whereby the Panel transfers an action upon its own initiative under 28 U.S.C. § 1407(c)(i). Parties who seek transfer of an action must file a motion to transfer under 28 U.S.C. § 1407(c)(ii).[2] Plaintiffs' argument that the Panel Clerk has not disclosed the identity of the party seeking transfer thus makes no sense—the conditional transfer order issued upon the Panel's own initiative. There is no requirement in the Panel Rules that the Panel inform the parties of how it learned of the pendency of the action. Similarly, plaintiff's contentions that the conditional transfer order runs afoul of Panel Rules

[2] Panel Rule 7.1(a) requires parties or counsel in actions previously transferred under Section 1407 to notify the Panel Clerk of potential tag-along actions. When notice of a potential tag-along action is filed, the Panel may file a conditional transfer order, issue an order directing the parties to show cause why the action should not be transferred, or decline to act on the notice. Accordingly, even when actions noticed by a party are listed on a conditional transfer order, that order issues upon the Panel's own initiative.

4.1(b)—which requires that a copy of a motion for transfer be transmitted to the clerk of the transferor court—and 6.1(b)—which requires that motions set forth the background of the litigation and movant's factual and legal contentions—misapply rules directed to motions filed by parties to a conditional transfer order.

Plaintiff does raise one argument against transfer with some substance. The *Donovan* complaint asserts a claim that defendants engaged in a RICO conspiracy designed to maximize the compensation of counsel in MDL leadership in exchange for limiting the liability of BP. Among the defendants named in the complaint is the transferee judge, the Honorable Carl J. Barbier. Plaintiff asserts that, if we transfer *Donovan* to MDL No. 2179, Judge Barbier will not recuse himself and will dismiss his case. This concern, however, is readily addressed. When recusal issues have arisen in other MDLs, we have reassigned the actions presenting those issues to another judge in the transferee court. *See, e.g.*, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2327 (J.P.M.L. July 10, 2017), ECF No. 2898 (assigning actions from which the transferee judge was recused to another judge in the transferee district). If Judge Barbier determines that he must recuse from this action—a question about which the Panel expresses no opinion—the Panel, in consultation with the Chief Judge of the Eastern District of Louisiana, will assign *Donovan* to another judge in the district. If Judge Barbier declines to recuse from this matter, plaintiff can seek whatever appellate relief is appropriate. Proceeding in this manner will allow this action, which challenges, *inter alia*, the court-supervised settlement program, to be adjudicated by the court with jurisdiction over the settlement. It also will ensure that any appeals from pretrial rulings in this matter are made to the U.S. Court of Appeals for the Fifth Circuit, which has decided numerous appeals arising from MDL No. 2179, including appeals relating to some of the pretrial proceedings that are the subject of plaintiff's current complaint.

After considering the argument of counsel, we find that *Donovan* involves common questions of fact with actions transferred to MDL No. 2179, and that transfer will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The actions in the MDL share factual questions arising from the explosion and fire that destroyed the Deepwater Horizon offshore drilling rig, and the resulting oil spill. *See In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 731 F. Supp. 2d 1352 (J.P.M.L. 2010). A review of the *Donovan* complaint leaves no doubt that the action implicates those same questions. *See, e.g.*, *Donovan* Compl. ¶ 7 (listing "facts" that allegedly are "illustrative of how the defendants limited BP's liability for the purposes of maximizing judicial efficiency and/or maximizing their compensation").

With respect to plaintiff's *ex parte* request for reconsideration of the Panel Clerk's denial of his motion for clarification, we admonish plaintiff—who is an attorney and thus already should be aware—that such *ex parte* communications with a court generally are inappropriate. *See, e.g.*, *Dragash v. Saucier*, No. 17-12031, 2017 WL 5202252, at *2 (11th Cir. Sept. 26, 2017) (stating that *ex parte* communications between counsel and the court are generally prohibited). It was clearly not needed here. Panel Rule 6.3(b) specifically states that "[a]ny party aggrieved by the Clerk of the Panel's action may file objections for consideration." While the Clerk's minute order on plaintiff's motion for clarification stated that "[l]eave will not be granted to file additional

briefing relating to the pending motion to vacate CTO-140," it did not prohibit plaintiff from filing a *motion* seeking reconsideration of that order.

Setting aside the inappropriate *ex parte* nature of plaintiff's communication, plaintiff has not shown that he is entitled to reconsideration. He admits that the procedural issues for which he sought clarification were the same procedural issues raised in his prior briefing. As we have explained, these procedural objections to the conditional transfer order lack merit and are based on misapplication of the Panel Rules. Accordingly, plaintiff's request for reconsideration is denied.

IT IS THEREFORE ORDERED that the action listed on Schedule A is transferred to the Eastern District of Louisiana and, with the consent of that court, assigned to the Honorable Carl J. Barbier for coordinated or consolidated pretrial proceedings.

IT IS FURTHER ORDERED that plaintiff's *ex parte* request for reconsideration of the Panel Clerk's minute order denying his motion for clarification is denied.

PANEL ON MULTIDISTRICT LITIGATION

Karen K. Caldwell
Chair

Catherine D. Perry
Matthew F. Kennelly
Roger T. Benitez
Nathaniel M. Gorton
David C. Norton
Dale A. Kimball

IN RE: OIL SPILL BY THE OIL RIG "DEEPWATER HORIZON"
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SCHEDULE A

Middle District of Florida

DONOVAN v. BARBIER, ET AL., C.A. No. 8:20-02598