

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE
NEMOURS AND COMPANY C-8
PERSONAL INJURY LITIGATION,

Civil Action 2:13-md-2433
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth Preston Deavers

This document relates to: ALL CASES.

PRETRIAL ORDER NO. 47

Transfer of Venue; Suggestion of Remand

Currently, the parties and the Court are preparing to try 40 of the approximately 3500 non-bellwether cases that make up this MDL. The majority of the 40 cases will be tried between May 2017 and November 2017. Numerous judges have volunteered to assist in trying these cases. To provide the resources necessary for the trials, this Court, as permitted under 28 U.S.C. § 1404(c), ordered some of the cases to be tried in the St. Clairsville seat of court within this division. 28 U.S.C. § 1404(c) (“A district court may order any civil action to be tried at any place within the division in which it is pending.”).¹

In light of the compelling need for additional resources for the 2017 trials, the Court notified the parties that it was contemplating utilizing 28 U.S.C. § 1404(a) to transfer some of the non-bellwether cases to the Western Division of this district (*i.e.*, Dayton and Cincinnati) for trial. Section 1404(a) provides that the Court, “[f]or the convenience of parties and witnesses, in

¹ St. Clairsville, Ohio is a designated seat of court for the Eastern Division of the Southern District of Ohio. 28 U.S.C. § 115(b)(2). While the district court has a contract to use a state-owned courtroom, there is no federal courthouse in St. Clairsville. The parties here agree to select the juries in St. Clairsville and thereafter the case will be tried in the federal courthouse in nearby Wheeling, West Virginia.

the interest of justice, may transfer any civil action to any other district or division where it might have been brought. . . .” The burden on the resources of the Eastern Division seats of court to try the 40 cases is evident, (*e.g.*, the limited number of courtrooms available at the single federal courthouse within the division, the weight of the docket in this division with one of the four judgeships vacant, and the court security personnel necessary to secure numerous trials). The convenience of the parties and the interests of justice thus appear to weigh heavily in favor of transfer. Further, Ohio is not geographically vast; the Western Division seats of court are all within a two hour drive and a 110 mile distance from Columbus. The jury pool in the Western Division is very large, including the cities of Dayton and Cincinnati. The Court is not aware of any prejudice to the parties if the cases are tried in Dayton and/or Cincinnati.

The Court asked the parties to brief the issue of using § 1404(a) to transfer several of the 2017 trial cases in this MDL to the Western Division of this district for trial. (Pretrial Order No. (“PTO”) 46, Notice and Opp. to be Heard on Transfer of Venue, ECF No. 4608) (stating that “[a] transfer of venue pursuant to § 1404(a) may be made by motion of either party or by the court *sua sponte*, so long as the parties are first given the opportunity to present their views on the issue.”) (citations omitted). The parties have completed that briefing. (ECF Nos. 4618, 4619, 4621, 4622.) In their briefs the plaintiffs indicate that they do not oppose the contemplated transfer. In contrast, DuPont opposes any transfer.

In its briefs, DuPont does not provide evidence of, or argument in support of, any perceived prejudice it may suffer from the proposed transfer.² Instead, DuPont contends that

² The Court notes that DuPont’s counsel has an office in Cincinnati with 25 attorneys, adding to the other nearly 200 attorneys at its other Ohio locations.

§ 1404(a) does not provide this Court with the ability to transfer cases to the Western Division. Specifically, DuPont argues that “absent a *Lexecon* waiver from DuPont [which it will not provide] and the applicable Plaintiffs for trials in the Western Division of the Southern District of Ohio, a 28 U.S.C. § 1404 transfer is ‘completely unavailable due to the interplay of § 1404 and § 1407’” (DuPont’s Reply to Pls.’ Response to PTO 46 at 1, ECF No. 4622) (quoting *Mann v. Lincoln Elec. Co.*, No. 1:06-CV-17288, 2011 U.S. Dist. LEXIS 82585, at *7, 9 (N.D. Ohio July 28, 2011)³; see also *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 (1998) (examining MDL transferee court’s use of § 1404 to transfer a case to itself,⁴ thereby avoiding the requirement that each case transferred to an MDL court pursuant to § 1407 for pretrial proceeding be “remanded [for trial] by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred”). DuPont is partially correct.

Section 1407 of Title 28 of the United States Code is the MDL venue provision. 28 U.S.C. § 1407. Pursuant to § 1407, after pretrial proceedings in the MDL court are complete, the parties may insist upon remand to the transferor court under § 1407(a), or they may waive their right and agree to trial in the MDL transferee court. *Mann*, 2011 U.S. Dist. LEXIS 82585, at *6 (citing *Manual for Complex Litig. Fourth* §21.132 at 224). The *Mann* court explained the interplay between § 1407 and any transfer for convenience under § 1404(a), stating: “The *Lexecon* court found that ‘the statutory language of §1407 precludes a transferee court from

³ Plaintiff David Mann, who is a resident of South Dakota, filed his case in the United States District Court for the District of Minnesota. Pursuant to 28 U.S.C. § 1407, Mr. Mann’s case was transferred to the Northern District of Ohio, as a member case in the multidistrict litigation known as *In re: Welding Fumes Prods. Liab. Litig.*, MDL No. 1535, No. 03-CV-17000.

⁴ The *Mann* court found unpersuasive the argument that *Lexecon* applied only to transferee court’s seeking to transfer a case to itself, based on the plain language of § 1407.

granting any §1404(a) motion.” *Id.* (citing *Lexecon*, 523 U.S. at 41 n.4). Consequently, DuPont is correct that, absent waivers, § 1404(a) transfers are unavailable for use by this Court on the cases before it pursuant to a § 1407 transfer. What DuPont has ignored is the fact that fewer than half of the 3500 cases that make up this MDL are before this Court on a § 1407 transfer.

A distinctive feature of this MDL is that all the alleged injuries of all of the plaintiffs occurred from DuPont’s release of ammonium perfluorooctanoate (C-8) from its West Virginia Washington Works plant, causing contamination of six water districts that are located in either the Southern District of Ohio or the Southern District of West Virginia. All of the cases that make up this MDL are, therefore, properly venued in the Southern District of Ohio or the Southern District of West Virginia, with the majority of the plaintiffs residing in Ohio. 28 U.S.C. § 1391(b) (“A civil action may be brought in--(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.”)

Thus, this MDL is unlike the traditional MDL that centralizes cases for pretrial proceedings and bellwether trials and then remands to numerous home jurisdictions around the country for individual trials. Rather, in this MDL, remand would result in the majority of the cases remaining in this district and the remainder transferring to the Southern District of West Virginia. And, because of this Court’s Local Rules on related cases, the cases that would remain in this district are on the docket of the undersigned. Consequently, § 1404(a) is available to

transfer the cases in this MDL brought by Ohio plaintiffs, and it is not available to transfer any of the cases filed by West Virginia plaintiffs absent *Lexecon* waivers.

With regard to the cases that are set in 2017 for trial, 18 were brought by West Virginia plaintiffs and 22 by Ohio plaintiffs. The parties have already proposed, and this Court adopted, a trial schedule for these plaintiffs, including deadlines for discovery, dispositive and evidentiary motions, and trial dates. (Case Management Order No. 17, Initial Pretrial Schedule for the 40 Cancer Trials to Begin in May 2017, ECF No. 4459.) The work on these cases has begun in earnest by both sides. With regard to these cases, the Court will schedule the West Virginia plaintiffs for trial in the Eastern Division, and at least some of the Ohio plaintiffs will have their cases tried in the Western Division, depending upon the number of judges from that division who are available to be assigned to those cases.

The Court, however, has two options from that point forward: (1) continue to try the West Virginia plaintiffs' cases in the Eastern Division and transfer some of the Ohio plaintiffs to the Western Division for trial, or (2) file a suggestion of remand with the Judicial Panel on Multidistrict Litigation that will result in the West Virginia plaintiffs' cases being sent to the Southern District of West Virginia. The second option may provide the ability to double the number of trials that could follow the 2017 trials. The Court directs the parties to present it with their positions on this issue in simultaneous briefs to be filed on or before 12:00 p.m. on September 19, 2016. The parties may file a response to their opposing counsels' brief by 12:00 p.m. on September 26, 2016.

IT IS SO ORDERED.

9-8-2016
DATE



EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE