

**UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION**

**IN RE: PHILIPS RECALLED CPAP, BI-LEVEL PAP,
AND MECHANICAL VENTILATOR PRODUCTS
LIABILITY LITIGATION**

MDL No. 3014

TRANSFER ORDER

Before the Panel: Plaintiffs in the three actions listed on Schedule A move under Panel Rule 7.1 to vacate our orders that conditionally transferred these actions to the Western District of Pennsylvania for inclusion in MDL No. 3014. Defendant Philips RS North America LLC opposes all three motions. Defendants Respironics, Inc.; Gould’s Discount Medical, Inc.; and Gould’s Discount Medical, LLC, oppose the motion to vacate in the Western District of Kentucky *Graham* action. Defendants Philips North America LLC and Philips Holding USA, Inc., oppose the motions to vacate in the two District of Massachusetts actions.

In support of their motions to vacate, plaintiffs in all three actions argue that federal subject matter jurisdiction over their respective actions is lacking, and that their pending motions for remand to state court should be decided before transfer. We are not persuaded by these arguments. The Panel has held that such jurisdictional objections generally do not present an impediment to transfer.¹ *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347–48 (J.P.M.L. 2001) (“[R]emand motions can be presented to and decided by the transferee judge.”). “This is so even where, as here, plaintiffs assert that the removals were patently improper.” *In re Ford Motor Co. DPS6 PowerShift Transmission Prods. Liab. Litig.*, 289 F. Supp. 3d 1350, 1352 (J.P.M.L. 2018).

¹ Panel Rule 2.1(d) expressly provides that the pendency of a conditional transfer order does not limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court generally has adequate time to rule on a remand motion if it chooses to do so. Here, the transferor courts have stayed all three actions pending our decision to transfer.

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Plaintiffs also contend that transfer will not enhance the convenience of the parties and witnesses or the efficient conduct of the litigation. To the extent these arguments are based on plaintiffs' predictions that resolution of their remand motions will be delayed, they are not well taken, as they assume that the only action the transferee court may take is to remand the actions to state court. "Section 1407 does not empower the MDL Panel to decide questions going to the jurisdiction or the merits of a case, including issues relating to a motion to remand." *In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990). Moreover, transfer of an action is appropriate if it furthers the expeditious resolution of the litigation taken as a whole, even if some parties to the action might experience inconvenience or delay. *See In re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351–52 (J.P.M.L. 2012) ("[W]e look to the overall convenience of the parties and witnesses, not just those of a single plaintiff or defendant in isolation.").

Plaintiffs in *Graham* additionally argue that they assert claims against unique defendants (medical device providers) that will require unique discovery. This argument also fails. "Section 1407 does not require a complete identity of common factual issues or parties as a prerequisite to transfer, and the presence of additional facts is not significant where the actions arise from a common factual core." *In re Am. Med. Collection Agency, Inc., Customer Data Sec. Breach Litig.*, 410 F. Supp. 3d 1350, 1353–54 (J.P.M.L. 2019).²

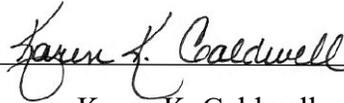
Therefore, after considering the parties' arguments, we find that the actions listed on Schedule A involve common questions of fact with the actions transferred to MDL No. 3014, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. In our order centralizing this litigation, we held that the Western District of Pennsylvania was an appropriate Section 1407 forum for actions sharing factual questions arising from Philips' recall of certain Continuous Positive Airway Pressure, Bi-Level Positive Airway Pressure, and mechanical ventilator devices on June 14, 2021. The recalled devices allegedly contain polyester-based polyurethane (PE-PUR) sound abatement foam that may degrade into particles or off-gas volatile organic compounds that may then be ingested or inhaled by the user, causing injury. *See In re Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Prods. Liab. Litig.*, MDL No. 3014, ___ F. Supp. 3d ___, 2021 WL 4704801, at *1 (J.P.M.L. Oct. 8, 2021). As in many of the cases already in the MDL, plaintiffs here allege that they suffered physical injury caused by the alleged problems with the PE-PUR foam in defendants' devices.

² Because we deny these motions on their merits, we need not reach defendants' alternative argument that plaintiffs in *Graham* did not timely file their Notice of Opposition to transfer.

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IT IS THEREFORE ORDERED that the actions listed on Schedule A are transferred to the Western District of Pennsylvania and, with the consent of that court, assigned to the Honorable Joy Flowers Conti for coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION

A handwritten signature in cursive script, reading "Karen K. Caldwell", is positioned above a horizontal line.

Karen K. Caldwell
Chair

Nathaniel M. Gorton
David C. Norton
Dale A. Kimball

Matthew F. Kennelly
Roger T. Benitez
Madeline Cox Arleo

**IN RE: PHILIPS RECALLED CPAP, BI-LEVEL PAP,
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SCHEDULE A

Western District of Kentucky

GRAHAM, ET AL. v. RESPIRONICS, INC., ET AL., C.A. No. 3:21-00485

District of Massachusetts

WALKER v. PHILIPS NORTH AMERICA LLC, ET AL., C.A. No. 1:21-11669

MACK, ET AL. v. PHILIPS NORTH AMERICA LLC, ET AL., C.A. No. 1:21-11670