

**BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

MDL No. 2179

IN RE: Oil Spill by the Oil Rig
“Deepwater Horizon” in the
Gulf of Mexico, on April 20, 2010

This Filing Relates To The Following Case Only:

Donovan v. Barbier, et al., FLM/8:20-cv-02598

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF’S MOTION TO VACATE
CONDITIONAL TRANSFER ORDER (CTO-140)**

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Dated: December 11, 2020

Pursuant to Rule 7.1(f) of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation (“JPML”), Brian J. Donovan (“Plaintiff”) files this Memorandum of Law in Support of his Motion to Vacate Conditional Transfer Order (CTO-140), as follows.

I.

PRELIMINARY STATEMENT

On November 5, 2020, Brian J. Donovan (“Plaintiff”), on behalf of his business, himself, and those parties who were injured as a result of the tortious conduct of the RICO MDL 2179 Defendants and who are not able to assert their rights because they have been denied access to the courts, brought a civil RICO Complaint against Carl J. Barbier, Stephen J. Herman, James P. Roy, Kenneth R. Feinberg, and Patrick A. Juneau (“Defendants” or “RICO MDL 2179 Defendants”) to prevent future harm and to redress past wrongs. (*See* Exhibit No. 1)

Plaintiff has filed this suit because he believes that our federal justice system is not a sanctuary for Defendants to use for the purpose of carrying out their own massive, nefarious scheme in the name of “judicially-efficient” multidistrict litigation and to hold Defendants responsible for their “Eight-Step” fraudulent scheme which turns MDL 2179 into “the MDL 2179 Enterprise.”

As explained below, CTO-140 is without merit.

Plaintiff respectfully requests that the JPML vacate its conditional transfer of this matter to the Eastern District of Louisiana. Doing so will foster the just, speedy, and inexpensive determination of this action. *See* Fed. R. Civ. P. 1.

II.

PROCEDURAL HISTORY

On November 5, 2020, Plaintiff, on behalf of his business, himself, and those parties who were injured as a result of the tortious conduct of the RICO MDL 2179 Defendants and who are not able to assert their rights because they have been denied access to the courts, files this action against Defendants in the U.S. District Court for the Middle District of Florida.

On November 23, 2020, the JPML files Conditional Transfer Order (CTO-140). On November 30, 2020, Plaintiff files his Notice of Opposition to CTO-140 with the JPML.

III.

SUMMARY OF ARGUMENT

A party seeking transfer - or a non-party involved in the MDL - must make the JPML aware of the existence of the case, and the JPML clerk will conditionally transfer the case. (*See* WRIGHT ET AL., 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (3d ed. 2007), § 3865, at 490-91).

The Clerk of the Panel has not disclosed the identity of the party, if any, who is seeking transfer and made the JPML aware of the existence of *Donovan v. Barbier, et al.* Moreover, the Clerk of the Panel has not provided any rationale for the transfer of *Donovan v. Barbier, et al.* to MDL No. 2179. CTO-140 merely alleges:

“It appears that the action(s) on this conditional transfer order involve questions of fact that are common to the actions previously transferred to the Eastern District of Louisiana and assigned to Judge Barbier....Pursuant to Rule 7.1 of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation, the action(s) on the attached schedule are transferred under 28 U.S.C. § 1407 to the Eastern District of Louisiana for the reasons stated in the order of August 10, 2010, and, with the consent of that court, assigned to the Honorable Carl J. Barbier.”

As demonstrated below, the JPML should grant Plaintiff's motion to vacate. The actions in MDL 2179 have included, *inter alia*, personal injury/wrongful death actions and actions seeking recovery for property damage and other losses arising out of the explosion and fire that destroyed the *Deepwater Horizon* rig and the resulting oil spill. *See In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, 731 F. Supp. 2d 1352, 1353-55 (J.P.M.L. 2010). In contrast, Plaintiff Donovan alleges injury directly stemming from the tortious conduct of the RICO MDL 2179 Defendants, not from property damage and other losses arising out of the explosion and fire that destroyed the *Deepwater Horizon* rig and the resulting oil spill.

Transfer under Section 1407 does not require a complete identity or even a majority of common factual issues. *E.g., In re: MLR, LLC Patent Litig.*, 269 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003). Rather, in deciding issues of transfer under Section 1407, the Panel "look[s] to the overall convenience of the parties and witnesses, not just those of a single plaintiff or defendant in isolation." *In re Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351-52 (J.P.M.L. 2012).

Plaintiff's claims against the RICO MDL 2179 Defendants do not involve common questions of fact with actions transferred to MDL 2179, and that transfer of these claims will not serve the overall convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

Vacatur is warranted because this first-of-its-kind type of case does not pose any danger of inconsistent rulings or duplicative proceedings. Plaintiff's claims are sufficiently distinct such that transfer would not serve Section 1407's purposes. In particular, Plaintiff's claims against the RICO MDL 2179 Defendants concern alleged conduct or events that are ongoing.

IV.

THE STANDARD TO BE APPLIED

A conditional transfer order is an administrative act of the Panel Clerk “which can and will be vacated upon the showing of good cause by any party.” *In re: Grain Shipment Litig.*, 319 F. Supp. 533, 534 (J.P.M.L. 1970) (citing *In re: IBM Antitrust Litig.*, 316 F. Supp. 976 (J.P.M.L. 1970)). Good cause exists where consolidation fails to promote the “just and efficient” conduct of the action. *See* 28 U.S.C. § 1407(a); *see also* H.R. Rep. No. 1130, 90th Cong. 2nd Session, 1968 USCCAN 1898, 1900 (explaining that “pretrial consolidation must promote the just and efficient conduct of such actions and be for the convenience of the parties and witnesses”). Congress intended for consolidation to be ordered “only where significant economy and efficiency in judicial administration may be obtained.” *See* H.R. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1900 (emphasis added).

V.

ARGUMENT AND AUTHORITIES

A. This Action Does Not Involve Common Questions of Fact with Actions Previously Transferred to MDL 2179.

In the MDL No. 2179 Transfer Order, dated August 10, 2010, the JPML held that the Eastern District of Louisiana was an appropriate Section 1407 forum for actions which “*indisputably* share factual issues concerning the cause (or causes) of the Deepwater Horizon explosion/fire and the role, if any, that each defendant played in it.” (emphasis added) *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, 1354 (J.P.M.L. 2010).

Donovan v. Barbier, et al. does not “*indisputably* share factual issues concerning the

cause (or causes) of the Deepwater Horizon explosion/fire and the role, if any, that each defendant played in it.” Plaintiff’s damages did not result from the oil spill. Here, the RICO MDL 2179 Defendants’ tortious acts, *not the Deepwater Horizon explosion/fire*, resulted in Plaintiff’s damages. The factual issues in *Donovan v. Barbier, et al.* concern those set forth in the 188-page civil Rico complaint attached hereto.

Plaintiff respectfully points out that if the JPML transfers the instant case to MDL 2179, the Honorable Carl J. Barbier will be assigned the *Donovan v. Barbier, et al.* case for the sole purpose of being able to promptly dismiss the case with prejudice. A review of the pleadings filed with the MDL 2179 Court in the *Donovan v. Herman* case and the three Feinberg cases, which do not involve questions of fact that are common to the actions previously transferred to the Eastern District of Louisiana but were nevertheless transferred by the JPML, would lead a reasonable person to conclude that CTO-140 was filed by the JPML in an attempt to make *Donovan v. Barbier, et al.* disappear as quickly and quietly as possible.

Reason for the JPML to grant Plaintiff’s Motion to Vacate Conditional Transfer Order (CTO-140) applies with particular force here, where the RICO MDL 2179 Defendants use our federal justice system as a sanctuary for the purpose of carrying out their own massive, nefarious scheme in the name of “judicially-efficient” multidistrict litigation

Judicial economy is undoubtedly well-served by MDL consolidation when scores of similar cases are pending in the courts. Nevertheless, the excessive delay and “marginalization of juror fact finding” (i.e., dearth of jury trials) sometimes associated with traditional MDL practice are developments that cannot be defended. *Delavventura v. Columbia Acorn Trust*, 417 F. Supp. 2d at 153 (D. Mass. 2006).

B. Transfer of This Action Will Not Promote the Just Conduct of the Litigation.

In order to determine whether the transfer of this action will promote the just conduct of the litigation, it is instructive to review the pleadings filed with the MDL 2179 Court in the *Donovan v. Herman* case and the three Feinberg cases.

1. *Donovan v. Herman*

On February 12, 2019, Plaintiff Donovan, on behalf of himself, his clients, and all others similarly situated, filed an action against Defendant Stephen J. Herman in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. (*See Exhibit No.2*)

The case was subsequently transferred by the JPML to the MDL 2179 Court on July 31, 2019. The transfer order was issued by Judge Sarah S. Vance. Plaintiff respectfully points out that Judge Vance, who is a U.S. District Judge of the U.S. District Court for the Eastern District of Louisiana, a colleague of Judge Barbier, and an acquaintance of Stephen J. Herman, should have recused herself pursuant to 28 U.S.C. § 455(a). (*See Exhibit No.3*)

Defendant Herman filed a motion to dismiss on February 5, 2020. (*See Exhibit No. 4*)

Plaintiff filed his response in opposition to defendant's motion to dismiss on February 19, 2020 wherein he explains "...when transfer results in a change of venue for purposes of MDL pretrial proceedings, the transferee judge generally must apply the substantive law of the transferor forum, including that forum's choice-of-law rules and appropriate state law. The Supreme Court held in *Van Dusen* and *Ferens* that the policies underlying the holdings of *Erie* and *Klaxon* mandated that the law, including the choice-of-law rules, of the transferor court, rather than those of the transferee court, must be applied to a case that has been transferred pursuant to 28 U.S.C. § 1404(a). *Ferens v. John Deere Co.*, 494 U.S. 516, 532 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964)." (*See Exhibit No. 5*)

On March 27, 2020, the Court grants Herman's motion and dismisses Donovan's complaint with prejudice. Judge Barbier states, "Donovan's lawsuit is untimely. Louisiana Revised Statute 9:5605(a) requires that an action against an attorney be filed within one year of discovery of the allegedly wrongful conduct and, in all events, within three years of the allegedly wrongful conduct. Donovan's complaint centers on acts or omissions that allegedly occurred between 2010 and 2013. As such, La. R.S. 9:5605(a) required Donovan to file his complaint by 2016, if not earlier. Donovan did not file his complaint until 2019....Donovan attempts to avoid this outcome by arguing that the choice of law rules of the transferor district (Florida) apply when a case is transferred under 28 U.S.C. § 1407....the Court's own research reveals that Florida's choice of law regime applies the law of the state that has most this significant relationship to the parties and the occurrence. *See Merkle v. Robinson*, 737 So.2d 540, 542 (Fla. 1999)."

Judge Barbier creatively explains, "Donovan is an attorney in Florida. Herman is an attorney in Louisiana. No contract exists between them. Donovan's claims concern actions Herman allegedly took in his role as a member of the PSC and as Plaintiffs' Co-Liaison Counsel, leadership positions in an MDL that is centralized in Louisiana. Herman's appointments came from this Court, which sits in Louisiana. All attorneys who appear in this MDL, including both Donovan and Herman, are subject to this Court's disciplinary authority and Louisiana's Rules of Professional Conduct....Considering these factors, the Court holds that Louisiana has the most significant relationship to the parties and the events giving rise to this dispute. As a result, Donovan's [**twelve**] claims are untimely under La. R.S. 9:5605(a)....Louisiana law governs this dispute." (*See Exhibit No. 6*)

2. The Three Feinberg Cases

On February 25, 2011, Plaintiffs Pinellas Marine Salvage Inc., et al. filed their action against Defendants Kenneth R. Feinberg and Feinberg Rozen, LLP, d/b/a GCCF, in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida. The case was subsequently transferred by the JPML to the MDL 2179 Court on August 9, 2011. On June 15, 2011, Plaintiff Salvesen filed his action against Defendants Kenneth R. Feinberg, Feinberg Rozen, LLP, d/b/a GCCF, and William G. Green, Jr. in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida. The case was subsequently transferred by the JPML to the MDL 2179 Court on October 6, 2011. On June 12, 2013, Plaintiff Ditch filed his action against Defendants Kenneth R. Feinberg, Feinberg Rozen, LLP, d/b/a GCCF, and William G. Green, Jr. in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida. The case was subsequently transferred by the JPML to the MDL 2179 Court on October 2, 2013.

Each of the three Feinberg cases asserts claims for gross negligence, negligence, negligence per se, fraud, fraudulent inducement, promissory estoppel, and unjust enrichment under Florida state law.

On March 30, 2020, Defendants filed motions to dismiss their cases. (*See* Exhibit No. 7)

On April 6, 2020, Plaintiffs filed their response in opposition to defendants' motions to dismiss. (*See* Exhibit No.8)

On July 2, 2020, the Court grants Defendants' motions and dismisses Donovan's complaints with prejudice. Judge Barbier incomprehensibly states, "Notably, the Donovan Plaintiffs urge that OPA imposed on the GCCF a duty to settle the Donovan Plaintiffs' claims. OPA contains no such duty. OPA is intended to promote settlement and avoid litigation. How

does it do this? As mentioned, OPA's presentment procedure requires a claimant to give the responsible party the opportunity (90 days) to settle her claim before she may sue in court. 33 U.S.C. § 2713. OPA also provides that interest typically begins to accrue following the 30th day after the claim is presented, which incentivizes early settlement. But there is a wide chasm between a process that "promotes" settlement (what Congress enacted) and one that "requires" settlements (what the Donovan Plaintiffs apparently wish Congress enacted)." (*See* Exhibit No. 9)

3. Motions for Clarification of the Issue of Choice-of-Law and the Issue of Remand Were Denied By the MDL 2179 Court.

On February 26, 2020, Plaintiff filed a motion for clarification wherein he moved the MDL 2179 Court to enter an order clarifying whether the MDL 2179 Court applies the choice-of-law rules of the state in which the transferor court sits. In his memorandum of law in support of his motion for clarification, Plaintiff points out that courts have unanimously held that a case filed in a proper venue and transferred to the MDL carries with it the choice-of-law rules of the transferor court. (*See* Exhibit No. 11)

On March 2, 2020, the MDL 2179 Court denies Plaintiff's motion for clarification of whether the MDL 2179 Court applies the choice-of-law rules of the state in which the transferor court sits. (*See* Exhibit No. 12)

On March 17, 2020 and again on April 20, 2020, Plaintiff files a motion for clarification of the issue of remand. (*See* Exhibits 13 and 14)

On July 6, 2020, after the Court had already dismissed the cases, the MDL 2179 Court denies Plaintiff's motions for clarification of the issue of remand. The Order states, "The instant motions seek "an order clarifying whether the Honorable MDL 2179 Court shall ensure each

action transferred to it under 28 U.S.C. § 1407 is remanded by the JPML at or before the conclusion of pretrial proceedings to the district from which it was transferred...the Court has dismissed these cases under FED. R. CIV. P. 12(b)(6); see JPML Rule 10.1 (“Where the transferee district court terminates an action by valid order...[t]he terminated action shall not be remanded to the transferor court”).” (See Exhibit No. 15)

4. Motions to Recuse the Honorable Carl J. Barbier Were Denied and a Disciplinary Complaint Was Filed Against Donovan by Judge Barbier
On August 7, 2019, Plaintiff filed a second motion to recuse the Honorable Carl J.

Barbier. (See Exhibit No. 16)

On November 8, 2019, the Court issued an order denying the two motions to recuse and instructing the Clerk of Court to commence a disciplinary proceeding against attorney Brian Donovan. This disciplinary complaint is unique in that Judge Barbier filed it as part of the order denying the two motions to recuse and then publicly posted the order/disciplinary complaint on the EDLA’s website. (See Exhibit No. 17)

On November 14, 2019, Donovan filed his response to disciplinary complaint No. 19-13531. (See Exhibit No. 18)

On August 6, 2020, a Zoom interview was held between Donovan and the E.D. La.’s Lawyer’s Disciplinary Committee attorney in regard to disciplinary complaint No. 19-13531. At the conclusion of the interview, Donovan was informed that a recommendation would be made to dismiss the disciplinary complaint filed against Donovan by the Honorable Carl J. Barbier.

5. The Primary Purpose of the Appointment of Lead Counsel in MDL 2179 Is to Further the Interests of Judicial Efficiency and Economy.

RICO MDL 2179 Defendant Herman explains in a Loyola Law Review article (64 Loy. L. Rev. 1) which he authored in 2018: (1) the primary purpose of the appointment of

Liaison Counsel and PSC members in MDL 2179 is to further the interests of judicial efficiency and economy [while maximizing their compensation]; and (2) their primary fiduciary duty is to Defendant Barbier. Herman states “the notion that some ‘fiduciary duty’ extends to individually retained counsel, in my view, *goes too far.*” (Emphasis added). (See Exhibit No. 18, Document 2-5; *see also*, Complaint, at ¶¶ 182 - 188)

C. The JPML’s Application of a Broad “But-For” Test to Determine Whether a Case Should Be Transferred to MDL 2179, Although Judicially Efficient, Is Flawed.

1. The Opinion of the Honorable Joseph C. Wilkinson, Jr.

The opinion of the Honorable Joseph C. Wilkinson, Jr. is instructive in this matter. *See Coastal Services Group, LLC v. BP Company North America, Inc. et al.*, Case No. 2:11-cv-02891-JCW (E.D. La. 2012).

Coastal Services Group, LLC filed its Complaint on September 29, 2011, in the Chancery Court of Jackson County, Mississippi, against Patriot Environmental Services, Inc. and the BP defendants. On November 7, 2011, BP removed the case from the state Chancery Court to the United States District Court for the Southern District of Mississippi. On November 18, 2011, pursuant to Rule 7.1 of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation, the case was transferred as a “tag-along” under 28 U.S.C. § 1407 to MDL 2179, the “Deepwater Horizon” Oil Spill litigation.

Plaintiff alleges in its Complaint that in August 2010, after the explosion of the *Deepwater Horizon* offshore drilling platform, BP entered into a six-month contract with plaintiff “for oil clean up and decontamination services.” Plaintiff asserts that the “discounted prices Plaintiff provided Defendant BP for Plaintiff’s services were based on obtaining work

from Defendant BP for at least six months.” Plaintiff alleges that BP breached this contract by improperly terminating the contract “after only two months.”

In granting Plaintiff’s Motion to Remand, Judge Wilkinson, Jr. succinctly points out:

“Since transfer by the Judicial Panel on Multidistrict Litigation to this court of the cases now constituting *In Re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010*, the presiding district judge and magistrate judge have issued several case management orders and conducted substantial pretrial activities geared primarily toward the issues of fault, causation and damages arising from the subject explosion and resulting oil spill. The vast majority of parties involved in most of the individual member cases have vital common interests in these primary issues. The referenced member case is based on a separate and distinct contractual relationship. It does not fit the consolidated case management, settlement and trial preparation activities with which the MDL proceeding as a whole has been concerned. It appears that the member case can be resolved more efficiently, with less cost and less delay, if it is severed from the MDL proceeding and provided with individualized attention appropriate to its distinct nature, all with no risk of any ruling that might be inconsistent with anything that occurs in the MDL action.

In short, retaining the case in this district does not serve the purposes contemplated by the MDL transfer statute, while transfer of the case back to the Southern District of Mississippi, where it was pending before transfer to this court, serves the convenience of the parties and the witnesses and the interest of justice and all parties in the ‘just, speedy and inexpensive determination’ of this action. Fed. R. Civ. P. 1.”

2. The Opinion of the Honorable Carlton W. Reeves

The opinion of the Honorable Carlton W. Reeves is also instructive in this matter.

See State of Mississippi v. Gulf Coast Claims Facility, et al., Case No. 3:11-cv-00509-CWR-LRA (S.D. Miss. 2011).

On July 12, 2011, Attorney General Jim Hood filed suit on behalf of the State of Mississippi against the Gulf Coast Claims Facility and Kenneth Feinberg (“GCCF”) in Hinds County Chancery Court. On August 11, 2011, GCCF removed the case to federal court. Specifically, GCCF claims that original jurisdiction lies with the United States District Court for the Southern District of Mississippi by virtue of the Outer Continental Shelf Lands Act. Hood moved to remand the case to state court on September 12, 2011.

In his Order of Remand, Judge Reeves points out, “GCCF’s argument that Hood has unwittingly stated a claim under OCSLA is not compelling. According to OCSLA, federal courts enjoy subject-matter jurisdiction “of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf” The Fifth Circuit has written that it “appl[ies] a broad ‘but-for’ test to determine whether a cause of action arises under OCSLA.” And in GCCF’s view, because it would not exist but for the Deepwater Horizon’s explosion, this case (and, presumably, any other case to which it could ever be a party) necessarily implicates OCSLA.

GCCF is correct that the Fifth Circuit views “[t]he jurisdictional grant[] contained in 43 U.S.C. § 1349(b)(1) [a]s very broad.” “But to view OCSLA’s scope so far-reaching as does GCCF would render GCCF’s every potentially actionable decision a federal case, be it related to the claims process at hand or a GCCF employee’s car wreck en route to the office.”

Neither OCSLA's plain language nor the Fifth Circuit's decisions interpreting it contain any indication that matters so far removed as these - occurring not on the outer Continental Shelf but doing business in Dublin, Ohio, and aimed not at the "exploration, development, or product of . . . minerals" but rather at "developing and publishing standards for recoverable claims" related to the Deepwater Horizon spill - fall within the purview of Section 1349(b)(1), which addresses "any operation conducted *on* the outer Continental Shelf . . ." Plainly, although GCCF's activities amount [to] an operation, that operation is not conducted "on the outer Continental Shelf." Therefore, OCSLA does not apply and is not a proper basis for federal jurisdiction."

The common sense, thoughtful opinions of Judge Wilkinson and Judge Reeves are applicable to the three Feinberg cases, the *Donovan v. Herman* case, and the instant *Donovan v. Barbier, et al.* case.

The JPML appears to be applying a broad "but-for" test to determine whether a case should be transferred to MDL No. 2179. In the JPML's view, because the three Feinberg cases, the *Donovan v. Herman* case, and the instant *Donovan v. Barbier, et al.* case would not exist but for the Deepwater Horizon's explosion, these cases and every other potentially actionable decision is rendered transferable, be it related to the tortious conduct of Feinberg, Herman, the RICO MDL 2179 Defendants or a GCCF employee's car wreck en route to the office. Plaintiff respectfully points out that this "but for" analysis, although judicially efficient, is flawed.

D. The Damages Resulting From the RICO MDL 2179 Defendants' Tortious and Unlawful Conduct Extend Far Beyond the Four Corners of the *Donovan v. Barbier, et al.* Complaint

The RICO MDL 2179 Defendants' fraudulent scheme proved to be so successful that, since 2010, it has served as a template for subsequent MDLs. For example, on December 5, 2017, the JPML created MDL 2804 and transferred to the Northern District of Ohio, allegedly for coordinated or consolidated pretrial proceedings, the lawsuits relating to the national opioid epidemic. The MDL 2804 leadership structure is composed of attorneys who previously served on, or provided significant support to, the MDL 2179 PSC. In sum, the mass tort victims in MDL 2804 are different but the deal making players and MDL game are the same as MDL 2179.

MDLs accounted for 51.9 percent of all pending federal civil cases at the end of 2018. This percentage increases every year. In addition to the mass tort victims, U.S. taxpayers are also MDL victims when transferee judges, PSC members, and fund administrators conspire to exploit our judicial system to benefit themselves. MDL 2179 is a case in point. MDL 2804 should not be merely another "case in point." In short, MDL 2804 must not be allowed to become "the MDL 2804 Enterprise." The manner in which MDL has been allowed to devolve makes virtually every MDL a potential "MDL Enterprise." It's time for our federal courts to focus on justice for the plaintiffs rather than judicial efficiency and excessive compensation for the PSC members.

E. Each Member of the JPML Has a Fiduciary Duty Not to Transfer the *Donovan v. Barbier, et al.* Civil RICO Case to MDL 2179

Once a case is transferred, the control of the case is out of the JPML's hands and in the control of the transferee judge. The JPML "has neither the power nor the inclination to dictate in any way the manner in which the coordinated or consolidated pretrial proceedings are to be conducted by the transferee judge." *In re Sundstrand Data Control, Inc. Patent Litig.*, 443 F.

Supp. 1019, 1021 (J.P.M.L. 1978). Nor does the JPML review the actions of an MDL judge. *See In re Data Gen. Corp. Antitrust Litig.*, 510 F. Supp. 1220, 1226-27 (J.P.M.L. 1979).

Nevertheless, when federal judges assume the bench, all take an oath to administer justice in a fair and impartial manner to all parties equally. *See* 28 U.S.C. § 453. That oath applies as much to a multidistrict litigation involving hundreds (or thousands) of actions and scores of parties as it does to a single civil action between one plaintiff and one defendant. *See*, Transfer Order, at 4, *In Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (J.P.M.L. Aug. 10, 2010). Plaintiff respectfully points out that oath also applies to each member of the JPML. The JPML members cannot abdicate their “oath to administer justice in a fair and impartial manner to all parties equally” to the MDL judge.

If transferred to MDL 2179, the *Donovan v. Barbier, et al.* civil RICO case will be assigned to the Honorable Carl J. Barbier. As explained *supra*, Judge Barbier will refuse to recuse himself and dismiss the case with prejudice as expeditiously as possible by erroneously holding that “Louisiana law governs this dispute.”

F. The JPML Has a Fiduciary Duty Not Transfer *Donovan v. Barbier, et al.* to MDL 2179 for the Purpose of Allowing It to Be Swept Under the Proverbial MDL Rug. In addition to the foregoing, the JPML should not transfer the *Donovan v. Barbier, et al.*

civil RICO case to MDL 2179 for the purpose of allowing it to be swept under the proverbial MDL rug for the following reasons.

(a) The potential harm to the public’s perception of the judicial process is especially acute in MDL 2179 because of the large number of plaintiffs.

(b) The total compensation paid to the 19 PSC attorneys and their law firms is guesstimated to be *\$3.035 billion*. It is beyond cavil that a reasonable, objective observer would not conclude that this amount is out of all proportion to the value of the professional services rendered.

(c) A narrow focus on judicial efficiency cannot allow the circumvention of the core democratic premises of representation, transparency, and accountability.

(d) Our democratic society favors court transparency to encourage public confidence in our judicial system and avoid the perception that our courts are “star chambers.” *See* Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1129 (5th Cir. 1991) (The term “star chambers” is the theoretical description of court orders and rulings that cannot be questioned and lack accountability.).

(e) “Judges are not politicians, even when they come to the bench by way of the ballot,” Chief Justice John Roberts Jr. observed in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). As he noted, “politicians are expected to be appropriately responsive to the preferences of their supporters,” whereas this “is not true of judges.” To the contrary, “a judge instead must ‘observe the utmost fairness,’ striving to be ‘perfectly and completely independent.’” *Id.* (quoting Address of John Marshall (Dec. 11, 1829), *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, 615, 616 (1830)).

(f) Judge Frank Easterbrook has noted: “The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.” *See* *Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006).

VI.

REQUEST FOR RELIEF

For the foregoing reasons, Plaintiff respectfully requests that the Panel grant his Motion and enter an order vacating the conditional transfer order (CTO-140).

DATED: December 11, 2020

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