

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1121
(2:18-mn-02873-RMG)
(2:20-cv-02115-RMG)

In re: STATE OF NEW MEXICO; NEW MEXICO
ENVIRONMENT DEPARTMENT

Petitioners

**PLAINTIFFS' EXECUTIVE COMMITTEE'S
RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

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Respondents, the MDL 2873 Plaintiffs' Executive Committee (PEC), pursuant to this Court's orders of February 8, 2021 and March 2, 2021, submit this response to the Petition for Writ of Mandamus filed by the State of New Mexico (New Mexico).

I. INTRODUCTION

New Mexico petitioned this Court for a writ of mandamus to vacate the Judicial Panel on Multidistrict Litigation's (JPML) June 2, 2020 Transfer Order (A001-004) that transferred its case from the transferor United States District Court for the District of New Mexico to the District of South Carolina, where Judge Gergel sits as the transferee Judge for MDL 2873. New Mexico seeks to vacate the JPML's transfer order and have its case remanded back to the District of New Mexico. On its face, the Mandamus Petition is seeking relief only from the JPML Transfer Order, not from any of Judge Gergel's orders. New Mexico's Petition explicitly states, "the State is not challenging the MDL court's broad discretion in case management, but rather the JPML's order" Pet. at 12, fn. 11. As well it should, the Petition does not overtly challenge the MDL's orders appointing Lead counsel, creating a process for motions practice, or imposing guidelines for time and expense submissions and a fee holdback¹ (referencing Case Management

¹ See generally, MANUAL FOR COMPLEX LITIGATION (Fourth), *Compensation for Designated Counsel* §14.215 at 202 (Fed. Jud. Cntr. 2004) ("Early in the litigation, the court should define designated counsel's functions, determine the method of

Order Nos. 2, 2A, and 3 (A367, A387, A413), which upon inspection are standard-fare and typical of initial and/or foundational case management orders in multidistrict litigations.²

Nevertheless, as the court-appointed leadership for all plaintiffs in the MDL proceedings, Case Management Order No. 2 (A367), the PEC is obliged to respond to New Mexico's Petition because of the State's stochastic references which appear to impugn the orders of the MDL court. In particular, New Mexico highlights efforts it made to obtain injunctive relief in the MDL Court and its contention that its efforts "have been rebuffed." Pet. at 4; *see also* 16, 18, 23. While the PEC is

compensation, specify the records to be kept, and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions. Guidelines should cover staffing, hourly rates, and estimated charges for services and expenses.") ["MCL"].

² *See generally*, Herr, *Annotated Manual for Complex Litigation* (Fourth) §22.62 at 515-16 (2020) ("Early organization of the counsel who have filed the various cases transferred or consolidated for pretrial purposes is a critical case-management task . . . Lead counsel and committees of counsel for the plaintiffs in mass tort litigation perform a host of functions. They develop proof of liability and anticipate defenses; gather the expertise necessary to prove causation and other elements of plaintiffs' cases; trace patterns of exposure; manage discovery; coordinate the various filings; and communicate with counsel for plaintiffs, counsel for defendants, and the court. *** During the selection process, judges should explicitly articulate their expectations about attorney compensation."); *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges* (Second Edition) at 2-3 (Fed. Jud. Cntr. 2014) (describing the importance of appointing counsel who are capable stewards able to prosecute complex litigation and entering a well-sequenced case management order) available at <https://www.fjc.gov/sites/default/files/2014/Ten-Steps-MDL-Judges-2D.pdf>.

appointed to develop and prosecute the overall litigation on behalf of all plaintiffs, the PEC owes its fidelity to the MDL Court and the MDL proceedings writ large. Therefore, out of an abundance of caution, the PEC addresses the propriety of the MDL Court's orders referenced in the Petition, particularly the order denying the State's motion for leave to move for a preliminary injunction. (A860-862). This order was appropriate under the relevant standards in the Federal Rules of Civil Procedure, the MDL Court's own case management orders, and the JPML Transfer Order.

II. ARGUMENT

New Mexico first raised its concern about injunctive relief to the JPML, which explicitly considered this motion in the June 2, 2020 Transfer Order. (A002-003). In the Transfer Order, the JPML left issues related to injunctive relief to the discretion of the transferee court:

The pending motions for preliminary injunction and dismissal are not an impediment to transfer. These motions may well require resolution of factual and legal questions present in other actions pending in the MDL....to the extent the State seeks unique or time-sensitive injunctive relief pertaining to its water supplies, [it] can and should raise such concerns with the transferee court.

Id.

After its transfer to the District of South Carolina, on August 4, 2020, New Mexico sought to present this motion to the MDL court, which long-before had in place a sequencing process for motion practice memorialized in Case Management

Order No. 2A. (A413). After considering the motion presented by New Mexico and briefing by all other interested parties including the USAF, the PEC, and the Defense Coordinating Committee (DCC), (A860-861), the MDL Court exercised its discretion in managing the order of pretrial proceedings to deny leave to bring that motion “at this stage.” (A861). Judge Gergel reasoned that while the extensive and complex discovery proceedings were ongoing, conducted under the auspices of Plaintiffs’ Co-Lead Counsel, allowing New Mexico’s motion would “derail centralized proceeding” and undermine that key responsibility of a transferee court. *Id.* The MDL Judge further explained that the “efficient and consistent” conduct of ordered discovery would benefit all parties in the MDL. *Id.*

As suggested by the JPML, all parties in the MDL, including sovereigns and other parties pursuing RCRA claims as New Mexico has, benefit from pretrial discovery and motion practice on issues common to all cases. This includes an issue especially pertinent to the concerns New Mexico raises in its Petition—the “substances’ chemical properties and propensity to migrate in groundwater supplies.” (A003) (citation omitted). Likewise, the PEC noted the likelihood of New Mexico successfully proving its claims against the United States “involve testing many of the same core facts and legal theories applicable to the many cases

in the MDL.” (A729). The MDL Court accepted this reasoning when it denied the State’s motion to advance its preliminary injunction efforts. (A860).³

Thus, it is abundantly clear that those orders of the MDL Court referenced in the Petition were appropriate under the Federal Rules, the case management orders, and the JPML Transfer Order.

While the New Mexico Petition explicitly states that it is not challenging the orders of the MDL Court, the PEC endorses the propriety of those orders to the extent they are referenced and relied upon in the Petition. This Court can be assured of the integrity of the MDL Court’s efforts to treat all parties dispassionately and fairly, including New Mexico.

³ Equally misplaced is New Mexico’s over-reaction to Judge Gergel’s holdback order against any recovery by a plaintiff in the MDL. CMO No. 3 (A387). New Mexico portrays this Order as “improperly commandeering the resources of the State without its consent.” Petition at 27. New Mexico’s hyperbole is easily disposed of by Paragraph 11 of the same Order, which explicitly states that “[r]eimbursement for costs and/or fees for services of all plaintiffs’ counsel performing functions in accordance with this Order will be set at a time and in a manner established by the Court after due notice to all counsel and after a hearing.” (A391). Thus, despite any holdback that may be imposed, no actual award of any fee would take place without ample due process through notice, briefing and a hearing. New Mexico’s resources are not commandeered by a standard Case Management Order that is recommended by the Manual for Complex Litigation. *See* MCL §14.215, *supra*.

III. CONCLUSION

For the reasons set forth above, the PEC submits that none of the proceedings occurring in the transferee Court have prejudiced the Petitioner.

Respectfully submitted,

Dated: April 9, 2021

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CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and
Type-Style Requirements

1. This principle brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,298 words, excluding the parts of the document exempted by Fed. R. App P. 32(f).

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/s/ Fred Thompson, III
FRED THOMPSON, III

CERTIFICATE OF SERVICE

I, Fred Thompson, III, hereby certify that the foregoing was served on this 9th day of April, 2021 upon all counsel of record via the Court's electronic notification system.

/s/ Fred Thompson, III
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