BEFORE THE UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

In re NATIONAL PRESCRIPTION OPIATE LITIGATION	MDL No. 2804
	Case No. 1:17-md-2804
THIS DOCUMENT RELATES TO:	Hon. Dan Aaron Polster
City and County of San Francisco v. Purdue Pharma L.P. 3:18-cv-07591	[Electronically Filed]

PLAINTIFF CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO DEFENDANTS' MOTIONS TO VACATE ORDER CONDITIONALLY REMANDING *CITY AND COUNTY OF SAN FRANCISCO V. PURDUE PHARMA L.P.*

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I. INTRODUCTION

On December 12, 2017, this Panel, as authorized by 28 U.S.C. §1407, transferred and centralized pretrial proceedings for *In re National Prescription Opiate Litigation* ("Opioid MDL"). In doing so, the Panel designated Judge Dan Aaron Polster of the Northern District of Ohio as the transferee judge to "steer this litigation on a prudent course."[1] Specifically, the Panel entrusted such matters as remand "to the sound judgment of the transferee judge."[2] *See also* Manual on Complex Litigation (Fourth), §20.133 (2019) ("MCL") ("The Panel looks to the transferee court to suggest when it should order remand . . . .").[3] Exercising his wide discretion, Judge Polster recognized that *City and County of San Francisco v. Purdue Pharma L.P.* is an ideal candidate to be part of the selective remand structure the judge crafted to hasten an end to the Opioid MDL via remand to the transferor court.

Defendants' motions to vacate the order conditionally remanding *San Francisco* should be denied for the following three reasons: (1) the transferee court used its sound judgment to suggest remand; (2) the transferee court has advanced and effectuated the purposes of Section 1407 centralization and provided detailed guidance to the transferor court making remand of *San Francisco* (as a bellwether case) proper for expedited trial to further advance the overall litigation; and (3) *San Francisco* does not present unique issues that prevent it from serving as a valuable bellwether trial case.[4]

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[1] Ex. 1, MDL ECF No. 1 ("Transfer Order"). References to "Ex." are to the Exhibits attached to the Declaration of Aelish M. Baig in Support of Plaintiff City and County of San Francisco's Opposition to Defendants' Motions to Vacate Order Conditionally Remanding *City and County of San Francisco v. Purdue Pharma L.P.*, filed concurrently herewith.

[2] *Id.*

[3] Citations and footnotes omitted and emphasis added unless noted otherwise.

[4] The City and County of San Francisco and the People of the State of California (collectively referred to herein as "Plaintiff") submit this opposition as an omnibus response to JPML ECF No.

II. BACKGROUND

Over the past two years, the Opioid MDL has grown to include over 2,500 cases brought by counties, municipalities, Native American tribes, and numerous other plaintiffs against opioid manufacturers, distributors, pharmacies, and other members of the opioid supply chain for their roles in creating and perpetuating the opioid crisis. In April 2018, upon suggestion of the parties and with the complexities of the ballooning MDL in mind, the transferee court created a "litigation track" of "bellwether" cases to "conserve judicial resources, reduce duplicative service, avoid duplicative discovery, serve the convenience of the parties and witnesses, and promote the just and efficient conduct of this litigation."[5] The first set of bellwether cases, limited to two Ohio counties ("Track One" cases) which consumed copious amounts of time and money, settled against seven of the Track One defendant families on the eve of trial set for October 21, 2019.[6] The second set of bellwether cases, involving plaintiffs located in the Southern District of West Virginia ("Track Two" cases),[7] are currently underway.

Prior to the settlement of the Track One cases, on September 26, 2019, the transferee court held a hearing during which it invited the thoughts and suggestions of all parties on the remand process. A Selective Remand Working Group of plaintiffs and defendants was tasked with

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6483, Defendants' Motion to Vacate Order Conditionally Remanding *City and County of San Francisco v. Purdue Pharma L.P.* ("Mfr. Defs' Mem."); and JPML ECF No. 6477-1, Defendants' Memorandum of Law in Support of Motion to Vacate Conditional Remand Order ("Distr. Defs' Mem."). Plaintiff in *The Cherokee Nation v. McKesson Corp.*, also named in Defendants' memoranda, is filing its response separately. References to "JPML ECF" are to the docket entries in *In re National Prescription Opiate Litigation*, MDL No. 2804 (J.P.M.L.).

[5] *See* Ex. 2, MDL ECF No. 232, Case Management Order One, at 1. A bellwether, or "test case," "offer[s] federal judges the possibility to determine the outcome of future cases by subjecting a sample representative case to jury trial." *Binding Bellwether Trials in Multidistrict Litig. and the Right to Jury Trial*, 17 T.M. Cooley J. Prac. & Clinical L. 295.

[6] Ex. 3, MDL ECF No. 2868.

[7] Ex. 4, MDL ECF No. 1218.

developing suggestions for a remand structure. During that process, the parties met and conferred on multiple occasions during which MDL Plaintiffs offered several proposals. Defendants, however, declined to propose any cases for remand and the parties did not reach agreement.

On November 6, 2019, Judge Polster held a status conference to address further steps in the litigation.[8] Recognizing the extensive efforts that went into bringing the Track One cases to the brink of trial and the lack of progress in establishing a remand structure, the transferee court explained that "we have to change the paradigm."[9] Judge Polster explained that the existing model was not "sustainable" and quipped he would otherwise have to be "Methuselah" and live a thousand years in order to hear all of the Opioid MDL cases.[10] Using his authority as the transferee judge,[11] Judge Polster announced a new plan of selective remand in which certain cases would be transferred back to their courts of origin for further disposition and, if necessary, trial.[12] The goal – akin to a bellwether process – would be to "inform everyone on the strengths and weaknesses of the plaintiffs' cases and the strengths and weaknesses of the defendants' cases."[13] On November 13, 2019, the parties submitted separate proposals for a remand plan.[14]

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[8] *See* Ex. 5, MDL ECF No. 2913 ("Nov. 6, 2019 Hr'g Tr.").

[9] Nov. 6, 2019 Hr'g Tr. at 3:12.

[10] *Id*. at 3:22-25.

[11] *See* MCL, §20.132 ("[T]he transferee judge exercises not only the judicial powers in the transferee district but also the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings.").

[12] Nov. 6, 2019 Hr'g Tr. at 4:12-13.

[13] *Id*. at 4:16-21. *See also* MCL, §22.315 (explaining the purpose of bellwether cases is to "produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis and what range of values the case may have if resolution is attempted on a group basis"); *In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prod. Liab. Litig.*, MDL No. 2436, 2015 WL 2417411, at *1 n.4 (E.D. Pa. May 20, 2015) ("'Bellwether' trials should produce representative verdicts and settlements. The parties can use these verdicts and settlements to gauge

On November 19, 2019, the transferee court submitted its Suggestions of Remand to the Panel.[15] In crafting his suggested remand plan, Judge Polster "catalogue[d] the entire universe of cases that comprise the MDL and attempt[ed] to divide the cases into several discrete categories based on prominent variables."[16] Specifically, he identified different types of plaintiffs (*e.g.*, Cities, Counties, and Indian Tribes); different categories of defendants (*e.g.*, manufacturers, distributors, dispensers, and third-party administrators); and claims for relief (*e.g.*, RICO, conspiracy, and public nuisance).[17] By way of example, he noted "that there could be a remand of: (1) a case focused on manufacturers; (2) a case focused on distributors; (3) a case focused on pharmacies; (4) a case brought by an Indian Tribe; and so on."[18]

Based on the critical variables contained within the MDL, he selected three cases to remand: (1) *City of Chicago v. Purdue Pharma L.P.*; (2) *Cherokee Nation v. McKesson Corp.*; and (3) *City and County of San Francisco, Cal. v. Purdue Pharma L.P.* The court explained that the *San Francisco* case names defendants, "many of whom have completed or nearly completed global discovery" and "[t]he case is from a different jurisdiction than the Track One and Track Two

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the strength of the common MDL claims to determine if a global resolution of the MDL is possible.").

[14] Ex. 6, MDL ECF No. 2928 (manufacturers' submission); Ex. 7, MDL ECF No. 2929 (generic manufacturers' submission); Ex. 8, MDL ECF No. 2930 (Seminole Tribe of Florida's submission); Ex. 9, MDL ECF No. 2931 (small distributors' submission); Ex. 10, MDL ECF No. 2933 (pharmacies' submission); Ex. 11, MDL ECF No. 2934 (distributors' submission); Ex. 12, MDL ECF No. 2935 (revised plaintiffs' submission); Ex. 13, MDL ECF No. 2936 (Express Scripts' submission).

[15] *See* Ex. 14, MDL ECF No. 2941 ("Suggestions of Remand").

[16] *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2325-26 (2008); Suggestions of Remand at 2-3 (identifying the categories of plaintiffs, defendants, and causes of action).

[17] Suggestions of Remand at 2-3.

[18] *Id.* at 5.

cases."[19] Beyond geographic diversity, the predominate variable that sets *San Francisco* apart from the other two remand cases is the Civil RICO claim. Neither the City of Chicago nor Cherokee Nation asserts RICO claims.[20] Likewise, no other currently selected bellwether case is set to try a RICO claim. Yet, based on a random sampling, the make-up of the MDL shows approximately 98% of MDL Plaintiffs assert a RICO claim against manufacturers and 98% assert the claim against distributors.[21] In other words, Judge Polster's selection of *San Francisco* as a bellwether case to be remanded for trial was designed to inform the transferee court and the parties of a commonly asserted claim within the MDL, which he believed would help speed up and aid resolution of substantial portions of the Opioid MDL.[22]

On December 16, 2019, two groups of *San Francisco* defendants, consisting of manufacturers and distributors, filed motions to vacate the transferee court's suggestions for remand. In their motions, they assert a parade of horribles in an attempt to stymie the course of this litigation,

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[19] *Id*. at 6. Although Judge Polster mistakenly asserted that the current *San Francisco* complaint includes pharmacy defendants, his selection of this case for remand was no accident. *San Francisco* squarely fits into his case management plan and the fact that the pharmacy defendants are the subject of the Track One trial means their presence or absence in the *San Francisco* case likely would not alter that analysis.

[20] *City of Chicago* focuses on manufacturer defendants, and *Cherokee Nation* provides insight as an Indian Tribe case.

[21] *See* Ex. 15, MDL ECF No. 1820-1, Plaintiffs' Memorandum in Support of Renewal and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, at 81; Ex. 16, MDL ECF No. 2591, Order Certifying Negotiation Class, at 2 ("questions of law and fact common to class members predominate over any questions affecting only individual members with respect to a RICO ***claim*** arising out of the alleged Opioid Marketing Enterprise").

[22] Suggestions of Remand at 5. It is further noted that the Track One-B case involving the remaining defendants in the Ohio bellwether case is set for trial in October 2020 against pharmacy defendants. The JPML's November 20, 2019 Order conditionally remanding the *Chicago* case went into effect on November 27, 2019 and involves only manufacturing defendants. And discussions are ongoing regarding the remand of three distributor defendants for trial in the Track Two cases. Consequently, the *San Francisco* case, which includes both manufacturer and distributor defendants and asserts a federal Civil RICO claim, will provide the new geographical frontier Judge Polster envisioned as part of his selective remand plan. *Id*. at 6-7.

but their professed fears are unfounded. In short, and as explained in detail below, *San Francisco* would not require duplicative statewide discovery in California and would not impose a unique undue burden on Defendants. Disregarding the transferee court's sound reasoning for remand, Defendants go on to envision worst-case scenarios that ignore the basic realities of this litigation. In actuality, *San Francisco* is uniquely poised to drive potential resolution of the Opioid MDL. Thus, the Panel should honor the transferee court's suggestion, deny Defendants' motions to vacate the conditional remand order, and transfer *San Francisco* to the Northern District of California for further disposition.

III. ARGUMENT

A. The Transferee Court Properly Used Its Sound Judgment to Suggest Remand of *San Francisco*

Great deference is given to the transferee judge's suggestion of remand. *See* MCL, §20.133 n.673.[23] This is because the extent to which remand is appropriate wholly "depend[s] on the circumstances of the litigation." *Id*., §20.133.[24] Although the transferee court does not have statutory authority to unilaterally remand a case, the Panel looks to the transferee court to determine "when remand will best serve the expeditious disposition of the litigation." *Id*. At that time, Section

[23] *See also In re Asbestos Prod. Liab. Litig. (No. VI)*, 545 F. Supp. 2d 1362, 1363 (J.P.M.L. 2008) ("In considering the question of remand, the Panel has consistently given great weight to the transferee judge's determination that remand of a particular action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings."); *In re Brand-Name Prescription Drugs Antitrust Litig.*, 264 F. Supp. 2d 1372, 1376 (J.P.M.L. 2003) ("[I]t is not surprising that the Panel consistently has given great weight to the transferee judge's informed determination that remand at a given point in time is appropriate."); Robert H. Klonoff, *Federal Multidistrict Litigation: in a Nutshell* 331 (West Academic Publishing 2020) ("[I]f the transferee judge ***has*** suggested remand, the party opposing remand will have a hard time persuading the Panel not to do so.").

[24] *See also In re Light Cigarettes Mktg. & Sales Practices Litig.*, 856 F. Supp. 2d 1330, 1331, 1332 n.2 (J.P.M.L. 2012) (declining to "second-guess" the transferee court's determination to remand because "[e]ach multidistrict litigation is unique, and transferee judges have broad discretion to determine the course and scope of pretrial proceedings"); *In re Managed Care Litig.*, 416 F. Supp. 2d 1347, 1348 (J.P.M.L. 2006) ("Whether Section 1407 remand is appropriate for an action in any particular multidistrict docket is based upon the totality of circumstances involved in that docket.").

1407(a) "imposes a mandatory obligation on the Panel to remand transferred cases to the transferor court." *In re Roberts*, 178 F.3d 181, 184 (3d Cir. 1999) (citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32-33 (1998)).[25]

Judge Polster "carefully considered and rejected" the same arguments Defendants have asserted here in suggesting remand of the *San Francisco* case; that determination should not be second guessed. *See Light Cigarettes*, 856 F. Supp. 2d at 1331. Judge Polster, who has personally devoted an extraordinary amount of time to this litigation and is acutely aware of its day-to-day proceedings, is in the best position to determine how to resolve it efficiently (*i.e.*, in a just, speedy, and inexpensive manner). *See* Fed. R. Civ. P. 1. He made this suggestion based on his determination that this "is the best way to advance resolution of various aspects of the Opioid MDL."[26]

Although the transferee court initially described four types of cases to be remanded, the court implied that this list was not meant to be exhaustive, but by way of example.[27] The court's language suggests that the initial remand strategy was not a paradigm set in stone, but instead, one that was missing a piece. And as Judge Polster plainly recognized as compatible with his goal of creating a parallel process for bellwether trials, *San Francisco* is a piece that will drive potential global settlement.

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[25] *See also In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. (No. II) MDL 2502*, 892 F.3d 624, 648 (4th Cir. 2018) (noting the "MDL court may recommend that cases in an MDL be returned to their transferor courts") (citing *Roberts*, 178 F.3d at 184); MCL, §20.133 ("Section 1407 directs the Panel to remand, after appropriate pretrial proceedings, actions not filed or terminated in the transferee court to the respective transferor courts for further proceedings and trial.").

[26] Suggestions of Remand at 7.

[27] *Id*. at 5.

Judge Polster's deliberately developed and considered remand plan results in geographically diverse bellwether trials of the important recurring claims and issues before different juries. Bellwether trials have an increasingly important role in contemporary MDLs. Transferee courts continue to evolve the bellwether process to meet the challenge of conducting a meaningful number of bellwether trials in a cost-effective and time-efficient manner. This promotes the dual bellwether function of: (1) providing merits and value information to facilitate global settlement; and (2) providing trial packages for subsequent trials. *See* Klonoff, *supra*, n.23, at 223-42. Remand of *San Francisco* advances both goals in an MDL in which the need for intensive and expeditious development and resolution of the litigation has been a dominant theme and is a societal imperative. *San Francisco* presents both a recurring claim unique among the cases to be remanded – Civil RICO – and state-specific claims shared by various other cases filed by government entities in the most populous state in the country. It is hence a key component of the transferee court's state-of-the-art bellwether approach of remanding a set of cases designed to provide geographic and demographic diversity, speed multiple cases to trial, and test recurring claims and issues before diverse fact-finders. *See* Klonoff, *supra*, n.23, at 224-25, 235.

The transferee court acted well within its discretion and was correct to suggest remand.

B. Remand of *San Francisco* Satisfies the Purposes of Section 1407 and Will Further the Goal of a Potential Global Settlement, as Recognized by the Transferee Court

The transferee judge properly suggested remand of certain cases in this uniquely complex litigation "to advance the MDL strategically using 'parallel processing.'"[28] His selection of *San Francisco* as one of three remands will support global resolution of the litigation, which would help to address the nation's ongoing opioid crisis.

[28] *Id*. at 3.

First, Judge Polster reasoned that remand is proper for *San Francisco* because it asserts claims against manufacturer and distributor defendants, "many of whom have completed or nearly completed global discovery."[29] It is axiomatic that "the global discovery, pretrial rulings, and other litigation matters over which the [transferee court] has already presided provide a good base upon which the [Northern District of California] can build" on a parallel process with the MDL as the "hub."[30] The litigation and trial preparation efforts undertaken by the parties and the transferee court in Track One will not be lost by remand. *See* Klonoff, *supra*, n.23, at 333 (noting at remand the "transferor court receives the cases with all of the rulings by the transferee court" (*i.e.*, "law of the case")).[31] Instead, as with most mass tort litigations, that work created the foundation for future bellwether trials, such as *San Francisco*.[32] Here, Judge Polster has already provided a robust set of rulings that would substantially advance resolution of this action. By way of example, Judge Polster ruled on 13 *Daubert* motions and 24 summary judgment motions. Additionally, he issued numerous evidentiary rulings that have shaped the scope of the litigation, including an omnibus evidentiary order memorializing rulings on over 100 motions *in limine* asserted in the Track One bellwether trial and ordered that they will not only "apply to all future cases in this MDL that are tried by this Court" but also "to the remanded cases tried by transferor courts."[33] In sum, a *San Francisco* remand will

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[29] *Id*. at 6.

[30] *Id*. at 5-7.

[31] *See also McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 705 (5th Cir. 2014) ("The law of the case doctrine requires attention to the special authority granted to the multidistrict transferee judge and ensures that transferor courts respect the transferee court's decisions.").

[32] *See* Fallon, *supra*, n.16, at 2325-26, 2338, 2343 (explaining the twin goals of bellwether trials (*i.e.*, informative indicators of future trends and catalysts for an ultimate resolution) are accomplished in two key respects: (1) the development of "trial packages"; and (2) the precipitation of global settlement negotiations).

[33] Ex. 17, MDL ECF No. 3052, Evidentiary Order, at 1 (citing David F. Herr, *Multidistrict Litigation Manual* §10:5 (May 2019 update) ("The transferor court (court to which the actions are

provide valuable information to a broad, diverse range of plaintiffs and defendants, utilizing the work previously done in the Track One cases and without requiring massive and unnecessary expenditures of time, money, and judicial resources.

Second, and relatedly, *San Francisco* asserts a unique claim apart from other cases that have been remanded (or are being considered for remand) from the MDL and actions pending in California state court, such as Orange County and the three actions pending in the Judicial Council Coordinated Proceeding ("JCCP") in Los Angeles County Superior Court: a federal Civil RICO claim. As mentioned above, a Civil RICO claim is asserted by the vast majority of MDL Plaintiffs. Indeed, it was one of the remaining claims that was to be tried in Track One, which "was designed to inform the Court and the parties regarding a central cross-section of the evidence, the parties, and the claims."[34] Thus, *San Francisco* will provide valuable nationwide insight on a RICO claim that has yet to be tested and that will not be tested in the California state court proceedings or any of the other current federal bellwether cases.

Third, the transferee court explained that remand of *San Francisco* is important because it encompasses the West Coast and a different geographic area from the prior bellwether trial tracks. Even certain Defendants agree that "[w]e know nothing about what a case looks like if it's brought by a large coastal city."[35] *San Francisco* is also a fitting bellwether because, as a case brought by a

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remanded) receives the cases in the condition they are in at the time of remand. Decisions that have been made in the case continue to apply unless circumstances change warranting their modification. The decisions made by the transferee court are considered 'law of the case.'"); citing also MCL, §20.132 (before remand of cases to transferor courts, the transferee court should enter "a pretrial order that fully chronicles the proceedings, summarizes the rulings that will affect further proceedings, outlines the issues remaining for discovery and trial, and indicates the nature and expected duration of further pretrial proceedings").

[34] Suggestion of Remand at 4. Because a RICO claim has not been asserted against the Track One Defendants that have not yet settled, that claim will not be included when those claims are tried in October 2020 against the remaining Defendants.

[35] Nov. 6, 2019 Hr'g Tr. at 23:21-23.

large city and county on the West Coast, information gleaned from this case will help inform other coastal and western cities, driving a potential global settlement. *See* Fallon, *supra*, n.16, at 2335 (noting wider geographic sampling of jury verdicts beneficial to the bellwether process).

In sum, the Panel should remand *San Francisco* to further a broader geographic understanding for the federal claims asserted and a speedier and more efficient resolution of the Opioid MDL.

C. Defendants' Attempts to Undermine *San Francisco*'s Bellwether Value Fold Under Scrutiny

Defendants haul out a laundry list of *San Francisco*'s "procedural peculiarities"[36] that they insist weigh against remand. But when examined closely, their concerns are revealed as overblown at best, and, at worst, as an attempt to obstruct and delay this litigation.

1. Plaintiff's Public Nuisance, Unfair Competition Law, and False Advertising Law Claims Do Not Necessitate Statewide Discovery

Plaintiff's public nuisance, Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Civil RICO claims would not necessitate statewide plaintiff discovery or undermine the efforts already underway in other California cases.[37]

San Francisco's public nuisance claim is limited to San Francisco and thus does not entail statewide discovery. *See* C.C.P. §731, which authorizes city attorneys from cities "in which the nuisance exists" to bring an abatement action on behalf of the People.[38] By contrast, although UCL and FAL claims are not similarly geographically limited, the San Francisco City Attorney here has

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[36] Distr. Defs' Mem. at 14.

[37] *See, e.g.*, Distr. Defs' Mem. at 14; Mfr. Defs' Mem. at 11.

[38] *See also People v. Los Angeles*, 160 Cal. App. 2d 494, 500 (1958) (holding "[t]he only authority given [a city attorney] by Code Civ. Proc., §731 is to bring an action to abate a public nuisance existing within the city").

elected to seek remedies solely for violations occurring within the City and County of San Francisco. In this action, the San Francisco City Attorney asserts claims in a sovereign capacity seeking monetary relief related to violations occurring within San Francisco and remedial measures as needed to abate the epidemic in San Francisco.[39] Thus, Defendants will not need to take discovery related to the damages or abatement needs of all California cities and counties as part of this remand.

At bottom, the monetary relief and abatement sought by San Francisco is dictated by statute and pleading. None of the state law claims asserted require Defendants to take discovery specific to the impact of the epidemic in other California cities and counties. And as certain Defendants rightfully point out, "[t]he principal focus of the discovery that remains . . . is jurisdiction-specific."[40] Here, that jurisdiction is San Francisco. In any event, even if there is the potential for duplicating efforts, Plaintiff is confident that the Northern District of California is more than capable of coordinating efforts with the California state courts, as well as with the MDL.

2. A *San Francisco* Remand Will Promote Coordination, Not Conflict, with Other California Proceedings

For the same reasons that Plaintiff's claims do not require statewide discovery, they likewise pose little risk of double recovery or conflict with other state court proceedings or the MDL. As discussed above, the monetary relief sought in this case on behalf of "the People" is limited to San

[39] It is well established that a city attorney is authorized to bring claims on behalf of "the People of the State of California" that concern violations and relief limited solely to his or her city. And San Francisco's current city attorney, who also brought the action here, has previously brought several such claims himself. For example, *City & County of San Francisco v. Patel*, No. CGC 09 493-770, 2010 Cal. Sup. LEXIS 10088 (S.F. Super. Ct. Mar. 12, 2010), concerned a San Francisco property that constituted a public nuisance and violated, among other laws, the UCL; and there the only relief sought was within the city proper. Similarly, in *City & County of San Francisco v. Dick Lee Pastry*, No. CGC-11-512391, 2013 Cal. Sup. LEXIS 10859 (S.F. Super. Ct. Jan. 9, 2013), San Francisco brought a UCL claim on behalf of the people seeking relief only within the city proper.

[40] Ex. 6, MDL ECF No. 2928, Manufacturer Defendants' Submission Regarding Selection of a Manufacturer Case for Remand, at 5; *see also* Nov. 6, 2019 Hr'g Tr. at 18:14-21.

Francisco.[41] And, the added federal Civil RICO claim is wholly distinct from the state court cases. In addition to the Civil RICO claim, there are other nuances between *San Francisco* and the state court proceedings. For example, Defendants here are distinct from those in the Santa Clara case pending in California state court; whereas plaintiffs in that case have only sued manufacturers, San Francisco also asserts claims against the big three distributors: AmerisourceBergen, Cardinal Health, and McKesson (which notably was headquartered in San Francisco for much of the relevant period). Parallel federal and state proceedings are par for the course in a case as complex as the Opioid MDL. *See* Fallon, *supra*, n.16, at 2335 (noting six bellwether trials in the MDL and an additional 13 state court trials aided in the resolution of the *Vioxx* MDL).[42] There is nothing unique about *San Francisco* and the California state court proceedings that would prevent a parallel process here.

Defendants also fret over the possibility that the California Attorney General might "assert[] control over all California opioid litigation," which "would potentially require a stay of the *San Francisco* case."[43] But the Attorney General has only filed and sought to take charge of claims against Purdue Pharma L.P. and members of the Sackler family, against whom all claims are stayed due to bankruptcy proceedings.[44] Claims against the movants here, who do not include Purdue Pharma or the Sacklers, are unaffected. Moreover, the Attorney General only sought to take charge of "public nuisance, unfair competition law, and false advertising law claims brought on behalf of

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[41] *See* Distr. Defs' Mem. at 15; Mfr. Defs' Mem. at 13.

[42] In addition to *San Francisco* and the California state court proceedings, the transferee court will likewise move forward with trying claims against pharmacy Defendants that were not resolved as part of Track One (*i.e.*, *Cuyahoga County (II)*), even while cases are still pending in Ohio state court. *See State ex rel. Yost v. Purdue Pharma* L.P. No. 17 CI 000261 (Ross Cty. Ct. C.P.); *State ex rel. Yost v. McKesson Corp.*, No. CVH 2018055 (Madison Cty. Ct. C.P.).

[43] *See* Distr. Defs' Mem. at 16; Mfr. Defs' Mem. at 13-14.

[44] Ex. 19, Attorney General's First Amended Complaint (Redacted).

the People."[45] Under what legal authority he may do so remains unclear. Thus far his effort to assert control over the Santa Clara case has been declined by the JCCP.[46] In any event, these claims make up only a small fraction of those brought in *San Francisco*; most of the case would be unaffected. For example, the Attorney General did not assert control over the Civil RICO claim. Regardless, the Panel need not concern itself with issues of coordination with the California Attorney General, which are irrelevant to remand. The transferor court is well-equipped to address any issues with coordination arising in this action.

For these reasons, the pending California state court actions pose little threat of interference with the *San Francisco* proceedings, and any potential conflict can be resolved through proper coordination or fashioned remedies. Additionally, any involvement by the California Attorney General is hypothetical and unrelated to the issue of remand presently before the Panel.

3. Defendants Vastly and Unfairly Overstate the Burden of Discovery Imposed by a Remand of the *San Francisco* Case

Defendants further complain that remand of the *San Francisco* case will "impose significant burdens on Movants."[47] But this argument ignores *San Francisco*'s procedural posture, the reality of other California cases, and basic fairness, making clear that Defendants' real complaint is not with *San Francisco* but with being required to litigate multiple cases simultaneously at all.

Defendants assert that it is wrong to force them to undertake additional discovery when discovery is already underway in the MDL and state cases.[48] But contrary to Defendants' claims, discovery in *San Francisco* would be relatively modest. As discussed above, the vast majority of

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[45] *See id*.

[46] Ex. 18, Order on Petition for Coordination, *Prescription Opioid Cases*, JCCP No. 5029 (Cal. Super. Ct. L.A. Cty. Sept. 6, 2019).

[47] Distr. Defs' Mem. at 9.

[48] *See id*.

discovery is complete and the primary focus of the discovery that remains is jurisdiction-specific to *San Francisco*. *See* Klonoff, *supra*, n.23, at 333 (recognizing it is not uncommon for the MDL court to not rule on individual plaintiff issues, and "[a]s such, if the case is ultimately remanded to the transferor court for trial, it may not be ready for trial because there are case-specific issues to address"). Indeed, this would be no different than if *San Francisco* was remanded at the dissolution of the MDL.

Furthermore, Defendants insist discovery needed in *San Francisco* will be redundant of discovery already conducted in the JCCP and Orange County. Defendants themselves, thus, suggest the discovery burden will be minimal, as, according to them, San Francisco will not require any discovery other than what Defendants have already provided. While San Francisco does not agree wholly with that implication, it agrees that, between the first MDL bellwether action and the California state proceedings, the majority of discovery against Defendants required for San Francisco's case has been completed. The parties and courts can certainly coordinate to avoid any potential duplicative discovery or inconsistent rulings. *See* MCL, §20.31 (noting state and federal judges "have undertaken innovative efforts to coordinate parallel or related litigation so as to reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation"). Indeed, Judge Polster has already ordered discovery procured in state court actions to be shared with the MDL, and vice versa.

Finally, Defendants contend they should not be subject to discovery in *San Francisco* because there is already litigation underway in numerous other jurisdictions.[49] This argument gets to the heart of Defendants' objection to the conditional remand order and is transparently self-serving. The fact that there are many other state cases in progress only serves to highlight the gravity and scope of Defendants' violations – they cannot now use that fact to escape the consequences in *San*

[49] *See* Mfr. Defs' Mem. at 9-10.

Francisco. To be sure, the burden of litigation on all parties is a key driver of global settlement, which the conditional remand order seeks to promote.

In short, Defendants fail to show that they will encounter a burden that offsets the benefits of remanding the *San Francisco* case.

IV. CONCLUSION

When the Panel first assigned Judge Polster to oversee the Opioid MDL, it expressed its faith in "the sound judgment of the transferee judge."[50] Defendants now describe that court's decisions as "irrational," "arbitrary," and "confounding."[51] But the transferee court more than justified its decision to remand the *San Francisco* case: as a bellwether, this case has novel jurisdictional value; it will inform all parties about litigation involving diverse defendants and bring focus on the federal Civil RICO claim which is not set to be tried in any other opioid bellwether case; and it will speed up potential resolution of the Opioid MDL, saving copious amounts of time, money, and judicial resources. The opioid litigation is among the most complex ever undertaken; if the Panel refused to remand every case that could potentially be hindered by Defendants' worst case scenarios, no case would ever make it back to its transferor court. But *San Francisco* is an important bellwether, and one that the transferee court chose for multiple well-considered reasons. The Panel has previously expressed its faith in Judge Polster; it should now trust his judgment and allow San Francisco to pursue justice for itself and, by virtue of its role as bellwether, for the rest of the Plaintiffs in the Opioid MDL.

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[50] Transfer Order at 4.

[51] Distr. Defs' Mem. at 1, 8; *see* Mfr. Defs' Mem. at 8.

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Respectfully submitted,

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