Supreme Court of the United States

ANTONIO GUEVARA MENDOZA, individually, as surviving father of CAROLINA GUEVARA RODRIGUEZ, deceased; MARTHA RODRIGUEZ del VALLE, individually, as surviving mother of Carolina Guevara Rodriguez, deceased; et al.,

Petitioners,

v.

BRIDGESTONE FIRESTONE NORTH AMERICAN TIRE, LLC and FORD MOTOR COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

These products liability cases were transferred from the U.S.D.C. for the Western District of Texas to the multidistrict litigation (MDL) proceedings in the U.S.D.C. for the Southern District of Indiana. The MDL judge denied Ford and Bridgestone Firestone's motion to dismiss the cases on *forum non conveniens* grounds and remanded the cases back to the Western District of Texas. On remand, the Western District of Texas denied Ford and Bridgestone Firestone's motion to reconsider the MDL judge's *forum non conveniens* ruling. Ford and Bridgestone Firestone filed a Petition for Writ of Mandamus with the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit concluded that the Western District of Texas erred in not overruling the MDL judge's *forum non conveniens* ruling and ordered the court to enter a judgment of dismissal of the cases.

The question presented is:

> Can a party to a MDL proceeding conducted pursuant to 28 U.S.C. § 1407 seek to overturn an adverse *forum non conveniens* pretrial ruling by the transferee district court through mandamus to the circuit court with appellate authority over the transferor district court rather than the circuit court with such authority over the transferee district court after the cases are returned to the transferor district court for trial?

LIST OF PARTIES

The additional Petitioners not listed on the cover are:

– ROSA VIDRIO CALVO, individually; JAIME VALDES CRODA, individually; EDUARDO VALDES VIDRIO, minor, individually, by and through his father and next friend Jaime Valdes Croda; RAFAEL VALDES VIDRIO, minor, individually, by and through his father and next friend Jaime Valdes Croda; LORENA del CARMEN ARRES VIDRIO, minor, individually, by and through her mother and next friend Rosa Vidrio Calvo; JUAN MIGUEL ARRES NAVARRETE, individually.

– MARISOL GOMEZ LOPEZ, individually; MARIO MANUEL OSORIO GOMEZ, minor, individually, by and through his mother and next friend, Marisol Gomez Lopez; MARIO MANUEL OSORIO CAMPOS.

– ROBERTO ACENCIO VALLE, minor, as surviving child of ROBERTO ACENCIO LOZANO, deceased, by and through his mother and next friend Margarita Valle Chavelas; ISAAC ISRAEL ACENCIO VERGARA, minor, as surviving child of Roberto Acencio Lozano, deceased, by and through his mother and next friend, Rocio Vergara Romano; ROBERTO ACENCIO MARTINEZ, individually, as surviving father of Roberto Acencio Lozano, deceased.

LIST OF PARTIES – Continued

– ESTEBAN QUIJANO BONFIL; CARLOS ORTIZ ANDRAE; YADIRA BALTAZAR ZAMUDIO; IVANA QUIJANO BALTAZAR, minor.

– OLIVER FLORES BARENO, individually; JOSE RAMON GARFIAS HERNANDEZ, individually.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued an Opinion on August 21, 2009, granting a Petition for Writ of Mandamus filed by Ford Motor Company and Bridgestone Firestone North American Tire LLC (formerly Bridgestone Firestone, Inc.) against the above named Petitioners on February 6, 2009. *See In re: Ford Motor Company*, 580 F.3d 308 (5th Cir. 2009) (superseded). On December 16, 2009, the Fifth Circuit Court denied the Petitioners' petition for review *en banc* and issued a revised Opinion to replace the August 21, 2009, panel opinion. *See In re: Ford Motor Company,* 591 F.3d 406 (5th Cir. 2009). A copy of the opinion is attached hereto as Appendix A.[1]

[1] References to the pages of the Appendix shall be made by referring to the particular document "A," "B", or "C" and the page number for that particular document, *e.g.*, "App. A-1 through A-2"; "App. B-15" "App. C-5".

JURISDICTION

On December 16, 2009, the Fifth Circuit Panel denied the Petitioners' petition for *en banc* review of its prior opinion and filed its revised decision directing U.S. District Judge Henry Lee Hudspeth to enter a judgment of dismissal of Petitioners' cases in the U.S.D.C. for the Western District of Texas. This Court has jurisdiction to review the circuit court's decision on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 1407 (excerpt), which provides:

Sec. 1407. **Multidistrict litigation**

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the

district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

* * *

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time

by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

* * *

Title 28 U.S.C. § 1294 (excerpt), which provides:

Sec. 1294. **Circuits in which decisions reviewable**

> Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
>
> > (1) From a district court of the United States to the court of appeals for the circuit embracing the district;
> >
> > * * *

STATEMENT OF THE CASE

Petitioners are citizens of Mexico representing themselves and/or deceased or injured family members as a result of traffic accidents in Mexico involving defective Bridgestone Firestone tires on Ford Motor Company vehicles. There were many such accidents involving Bridgestone Firestone tires (manufactured in the United States or Canada) and Ford sport utility vehicles (manufactured in the United States) that resulted in civil litigation in federal and state courts in the United States. Beginning on October 24, 2000, pursuant to Rule 7.4 of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation*, 199 F.R.D. 425, 435-36 (2001), the Judicial Panel has transferred more than 750 of those pending products liability cases to the United States District Court for the Southern District of Indiana (MDL court), in the Seventh Circuit, for coordinated or consolidated pretrial proceedings, pursuant to the

Multidistrict Litigation Statute, 28 U.S.C. § 1407 (MDL statute).

The Judicial Panel assigned United States District Judge Sarah Evans Barker (MDL judge) to manage and conduct pretrial proceedings in the MDL cases.[2] Petitioners' six cases (arising from three separate accidents) were originally filed in 2003 in Texas state courts and removed by the Respondents[3] to the United States District Court for the Western District of Texas, in the Fifth Circuit (based on diversity of citizenship). The cases were then transferred to the Southern District of Indiana in 2004, in the Seventh Circuit, without objection, and assigned to MDL Judge Barker.

Prior to the transfer of Petitioners' cases, Respondents had sought through multiple filings to obtain dismissal of many of the MDL cases on *forum non conveniens* (*FNC*) grounds where plaintiffs were foreign nationals and the accidents had occurred in foreign countries.[4] *See e.g., In re: Ford Motor Company*,

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[2] The cases in this complex product liability multidistrict litigation are consolidated in *In re: Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, MDL No. 1373, United States District Court, Southern District of Indiana, Indianapolis Division, Master File No. IP 00-9373-C-B/S and IP 00-9374-C-B/S.

[3] Ford and Firestone are referred to collectively here as "Respondents" or "Respondent corporations."

[4] This Court has held the federal doctrine of *forum non conveniens* has continuing application only in cases where the

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344 F.3d 648 (7th Cir. 2002) (rejecting mandamus to overturn MDL Judge Barker's denial of *FNC* motions in 121 cases filed by Venezuelan and Colombian nationals arising out of accidents in their home countries). On December 7, 2006, Respondent Firestone filed with the MDL court a "Motion To Adopt and Join All Previous Filings Relating to *Forum Non Conveniens* and Request for Judicial Notice Thereof," in which it sought to have Petitioner's cases (and three others) dismissed on *FNC* grounds. Respondent Ford joined in Firestone's motion on December 28, 2006. Petitioners filed their Response to the motion on January 8, 2007. On July 16, 2007, in a written order, Judge Barker denied Respondents' request to dismiss Petitioners' cases on *FNC* grounds, holding that the Respondents had failed to satisfy their burden of proving that Mexico was an available alternate forum in which to litigate Petitioners' cases.[5]

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alternate forum is available. *American Dredging Co. v. Miller*, 510 U.S. 443, 448, n. 2 (1994). *See* 28 U.S.C. § 1404.

[5] Judge Barker's Order is attached as Appendix B. Judge Barker found the defense expert's evidence on availability to be both internally inconsistent and inconsistent with the plaintiffs' evidence. App. B-7 through B-15. Although it is the defendants' burden to invoke the doctrine of *forum non conveniens* and prove the availability of an alternate forum, *see e.g., Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 430 (2007), here the plaintiffs presented extensive documentary evidence to Judge Barker on the unavailability of Mexico as an alternate forum due to refusal by Mexican courts to accept jurisdiction in similar cases. *See El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 679 (D.C. Cir. 1996) (satisfaction of defendants'

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On the same day, Judge Barker also entered a "Suggestion of Remand" concluding the pretrial proceedings and asking the judicial panel to return Petitioners' cases to the transferor court, pursuant to 28 U.S.C. § 1407(a). On August 9, 2007, the MDL

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burden on *FNC* challenge depends on alternate forum's acceptance of the case). Conversely, the Fifth Circuit found that the defendant corporations could not fail in their burden of proof if the Mexican plaintiffs did not affirmatively present expert evidence to overcome a presumption of availability established by its prior cases. App. A-16 through A-17. Even if a showing that defendants are willing to submit to the jurisdiction of the alternate forum is deemed to have shifted the *FNC* burden to plaintiffs to prove unavailability, Petitioners' submissions from Mexican courts showing that those courts reject jurisdiction in cases where defendant corporations are not domiciled in Mexico more than met that burden in the MDL court.

The Fifth Circuit did not consider that evidence. Instead, the Court looked to its prior decisions in which the issue of availability of a Mexican forum was not litigated but merely accepted by the Court based upon stipulation or agreement by defendants to submit to Mexican jurisdiction. App. A-12 through A-15. *Cf. Piper Aircraft v. Reyno*, 454 U.S. 235, 255, n. 12 (1983) (finding availability requirement is met when defendant is amenable to the alternate jurisdiction). Amenability is defined as "subject to answer to the law of . . . " *See* Black's Law Dictionary, at 80 (6th ed. West 1990) "Submission to" and "amenability to" a forum are distinct questions – the first asking whether a defendant will agree to submit to an alternate forum, and the second asking whether a defendant is subject to answer to the law of another forum. If Mexican courts deny jurisdiction in these types of cases, the defendants are not subject to answer to Mexican law. Thus, the Respondents' and the Fifth Circuit Court's reliance on *Veba-Chemie A.G. v. M/V GET-AFIX,* 711 F.2d 1243, 1245 (5th Cir. 1983), *citing Piper Aircraft*, is misplaced. 591 F.3d at 412.

Panel issued a conditional order to remand Petitioners' cases to United States District Court for the Western District of Texas, effective August 24, 2007. *See* Rule 7.6(c), *Rules of Procedure of the Judicial Panel on Multidistrict Litigation.* Respondents objected to the remand, and they filed in the MDL court on August 13, 2007, a "Motion to Reconsider Entry Regarding *Forum Non Conveniens* Issues or, in the Alternative, to Certify for Appeal Pursuant to 28 U.S.C. § 1292(B)." The Judicial Panel denied the objection and ordered the cases remanded on December 21, 2007. On February 4, 2008, MDL Judge Barker entered an order denying that motion as moot due to the remand.[6]

When Petitioners' case files were returned for trial to the Texas federal district court in April 2008, they were assigned to Senior United States District Judge Harry Lee Hudspeth.[7] Although Judge Barker

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[6] Reconsideration is not a matter of right but is granted at the discretion of the court. *See e.g., Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). *See also Caissee Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) (motion for reconsideration "is not an appropriate forum for rehashing previously rejected arguments").

[7] The federal district court clerk in Texas received the files on Petitioners' cases from the MDL court on April 28, 2008, and on August 7, 2008, Judge Alia Ludlum reassigned them to Judge Hudspeth for trial. Notably, while the cases had been pending in the American courts all of the fact witnesses in Mexico and all of the Mexican Plaintiffs in the cases set for trial had been deposed.

had denied Respondents' motion in February 2008, on October 20, 2008, the Respondent Ford Motor Company filed a "Defendant's Motion For Ruling on Motion Still Pending After Remand," and Respondent Firestone joined in that motion on October 22, 2008. The motion asked Judge Hudspeth to reconsider and reverse MDL Judge Barker's denial of their *FNC* motions in these cases. In an order filed December 22, 2008, Judge Hudspeth found there were no extraordinary circumstances to justify reconsideration of Judge Barker's order and denied Respondents' motion.[8]

On February 6, 2009, Respondents filed a Petition for Writ of Mandamus in the United States Fifth Circuit Court of Appeals asking the appellate court to issue a writ of mandamus directing Judge Hudspeth to (1) vacate his order denying reconsideration of their *FNC* motion; (2) grant their motion; and (3) order Petitioners' cases dismissed in favor of the available Mexican forum.[9] In its December 16, 2009,

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[8] Judge Hudspeth's order is attached as Appendix C. Judge Hudspeth also denied Respondents' alternative request to certify an interlocutory appeal under 28 U.S.C. § 1292(b). In the order, the judge noted that the parties "had a full and fair opportunity to litigate the issue of *forum non conveniens* before Judge Barker. . . ." *See* App. C-3.

[9] In their *FNC* filings in Petitioners' cases, the Respondents supported their position on the *FNC* issue by equating Petitioners' cases to earlier dismissed cases in the MDL court in which Mexican plaintiffs assumed availability, but argued against the adequacy, of a Mexican court forum. *See In re Bridgestone/Firestone, Inc.*, 305 F.Supp.2d 927 (S.D. Ind. 2004). On appeal of the dismissal order to the Seventh Circuit Court of Appeals in

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revised Order granting Respondents' Petition for Writ of Mandamus, the Circuit Court directed "the district court to render judgment of dismissal without prejudice, because Mexico is an available and appropriate forum." The Court also stated: "Plaintiffs can refile this suit and proceed to trial in the Western District of Texas on a sufficient showing that the Mexican courts are unavailable for this litigation despite

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those cases, a plaintiff attempted to supplement the record and argument with after-acquired documents showing the unavailability of a Mexican forum. [After the MDL court dismissal, the Manez-Reyes family had sued the Respondent corporations in Mexico, but the Mexican court dismissed the case, *ex parte*, holding that it did not have jurisdiction over the companies not domiciled in Mexico.] *In re: Bridgestone/Firestone, Inc.*, 420 F.3d 702, 705 (7th Cir. 2005). The circuit court expressed concern about whether the dismissal in that case was obtained "in good faith." *Id.* at 706. The court remanded the case to Judge Barker to "thoroughly explore the circumstances surrounding the [Mexico court] decisions." *Id.* On remand, Judge Barker found the Mexican court decision in the *Manez* case was obtained in bad faith and not subject to recognition for FNC purposes, and reinstated her previous dismissal on *FNC* grounds. *In re: Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 470 F.Supp.2d 917, 920 (S.D. Ind. 2006).

Conversely, there is no evidence that Petitioners' documentary evidence before Judge Barker in the instant cases was obtained fraudulently or in bad faith. Not only was the *Manez* case and the circuit court's expressed concerns about the *Manez* Mexican court decision not substantively or procedurally relevant to Petitioners' cases, it clearly served to obfuscate the independent *FNC* issues in Petitioners cases. Judge Barker recognized the inapplicability of the *Manez* case or her concerns expressed therein (referred to by Judge Barker as the "Lopez" case) in her order denying *FNC* dismissals in Petitioners cases here. *See* App. B-5 through B-6.

petitioners' submission to jurisdiction there."[10] *See* App. A-24.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit Court of Appeals to exercise mandamus authority over the *forum non conveniens* rulings by the MDL court (transferee court) in these cases after their return to the trial court in Texas (transferor court), under the auspices of reviewing the trial court's refusal to reconsider the MDL court's pretrial ruling, contravenes the purpose of the Multidistrict Litigation Statute, 28 U.S.C. § 1407, and decisions of the Seventh, Fourth, and Second Circuit Courts of Appeals. To permit continuous re-litigation of pretrial issues properly resolved through the MDL process will create procedural and substantive chaos in the MDL system and result in the very non-uniformity the MDL system was designed to prevent.

The Fifth Circuit Court of Appeals determined that the issue of whether it had the authority to

[10] Judge Hudspeth dismissed Petitioners' cases pursuant to the Fifth Circuit order. The original Fifth Circuit Panel (Smith, Stewart, and Southwick, JJ.) opinion was issued August 21, 2009. Judge Hudspeth's minute order dismissing the cases was filed in the district court on September 20, 2009, before the Fifth Circuit denied *en banc* review and filed a revised opinion on December 16, 2009.

"grant mandamus on a district court's refusal to reconsider a pretrial MDL (multidistrict litigation) decision" to be one of first impression in its circuit. App. A-7. The All Writs Act, 28 U.S.C. § 1651(a), permits federal courts to issue writs "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Act does not independently confer jurisdiction; rather, a court must have independent subject matter jurisdiction before it can invoke its writ authority. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31 (2002). The effect of the Circuit Court's exercise of its writ authority was to erroneously extend its appellate jurisdictional reach to overrule a *forum non conveniens* decision rendered by a district court in another federal judicial district. *See* 28 U.S.C. § 1294(1) (limiting jurisdiction of appellate courts to their territorial circuits).[11] The Court's decision thwarts the purpose of multidistrict litigation, it is contrary to decisions in other federal circuit courts, and it warrants review by this Court. *Cf. Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964) (Supreme Court granted certiorari in mandamus case involving

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[11] *See also* 28 U.S.C. § 1631, which permits an appellate court to transfer a case to the appellate court with appropriate jurisdiction. Under this statute, upon proper determination that it did not have jurisdiction over the *FNC* orders of the transferee court, the Fifth Circuit Court could have ordered the case transferred to the Seventh Circuit embracing the MDL district court.

antitrust prosecution in view of importance of question to the prosecution of multi-venue cases).

The statute authorizing multidistrict litigation, 28 U.S.C. § 1407, was enacted in 1968 to provide for consolidated, coordinated pretrial proceedings in federal civil cases. 28 U.S.C. § 1407(a). *See also H.R.Rep. No. 1130, 90th Cong. 2d Sess.*, Reprinted in *U.S. Code Cong. & Admin. News* 1898, 1900. The statute created a seven-judge judicial panel with broad authority to order cases transferred from multiple federal districts (transferor courts) to a single federal district (transferee court) and assign judge(s) within that district to preside over the consolidated proceedings. 28 U.S.C. § 1407(d).

Section 1407(e) provides a singular remedy to challenge orders under the statute, specifically: "Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district." While this provision reaches those orders issued by the judicial panel, it has been held consistently that challenges to pretrial orders issued by an MDL transferee court authorized by the statute must likewise be taken to the court of appeals for that district and not the court of appeals for the transferor court. *FMC Corporation v. Glouster Engineering Co.*, 830 F.2d 770 (7th Cir. 1987), *cert. dismissed sub nom., Reifehauser GmbH & Co. Maschinenfabrik, et al. v. FMC Corporation*, 486 U.S. 1063 (1988).

In *FMC Corporation,* the suit was originally filed in Illinois federal district court in the Seventh Circuit, and the German defendants moved for dismissal. 830 F.2d at 770. Pursuant to Section 1407, the case was transferred for consolidated pretrial proceedings to the federal district court in Massachusetts, a federal district court in the First Circuit. *Id.* When the Massachusetts district court denied the defendants' motion to dismiss, the defendants sought review by the Seventh Circuit Court of Appeals under 28 U.S.C. § 1292(b) permitting interlocutory appeal under limited circumstances. *Id.* Analyzing the issue on first impression, Judge Posner held that the Seventh Circuit Court of Appeals lacked jurisdiction to hear an appeal from a pretrial order of an MDL district court sitting outside the Seventh Circuit, noting:

> Although the multidistrict statute does not say which court of appeals has jurisdiction over appeals from orders by the district court to which a case is transferred, most cases hold that it is the court of appeals covering the transferee court rather than the one covering the transferor court. [citations omitted] Indirect support for this conclusion comes from the statute's provision on venue for review by extraordinary writ of post-transfer orders issued by the multidistrict panel. *See* 28 U.S.C. § 1407(e).

Id. at 771. The Court reasoned that a rule confining appellate jurisdiction over all orders issued by an MDL transferee court to the court of appeals

embracing such transferee court "is simple to administer and free from uncertainty." *Id.* The Respondent corporations in the instant cases argued that, even assuming a general rule against their position, an exception (in the guise of a writ) was necessary due to the nature of the *FNC* rulings and the transferee court's denial of their motion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Seventh Circuit specifically rejected creating an exception in the context of Section 1292(b). *Id.* at 772. *See also Winkler v. Eli Lilly & Co.,* 101 F.3d 1196, 1201-02 & n. 5 (7th Cir. 1996) (A transferee court's statutory power to control multidistrict litigation necessarily includes equitable power, after remand, to interpret scope and protect integrity of orders it issued while in charge of consolidated lawsuits.).

In *In re: Food Lion,* 73 F.3d 528 (4th Cir. 1996), eleven separate federal cases, brought under the Fair Labor Standards Act by employees and former employees of the defendant corporation's grocery stores (ultimately including a thousand such employees), were transferred and consolidated for pretrial proceedings pursuant to the multidistrict litigation statute. *Id.* at 531. After the transferee court granted summary judgment and dismissed about half of the cases and sent others back to their original transferor courts by order of the Judicial Panel, some plaintiffs sought and received certifications for immediate appeal from their original transferor district courts. *Id.* In its analysis and ultimate rejection of the certifications by the transferor courts, the Fourth

Circuit Court relied on the reasoning of the early judicial panel supporting a prohibition against transferor judges modifying orders of transferee judges:

> "[I]t would be improper to permit a transferor judge to overturn orders of a transferee judge even though error in the latter might result in reversal of the final judgment of the transferor court. If transferor judges were permitted to upset rulings of transferee judges, the result would be an undermining of the purposes and usefulness of transfer under Section 1407 for coordinated or consolidated pretrial proceedings because those proceedings would then lack the finality (at the trial court level) requisite to the convenience of witnesses and parties and the efficient conduct of actions." *Weigle, S.A., The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575, 577 (1977).

Id. The Court in *Food Lion* also rejected the possibility of review of transferee court orders by the Courts of Appeals embracing the transferor district courts as frustrating the aims of the Section 1407. *Id.* at 532. Here, Judge Hudspeth properly rejected the Respondent corporations' alternative request to certify the MDL court's decision for appeal to the Fifth Circuit, but the Respondents circumvented proper application of Section 1407 by framing what was essentially an impermissible interlocutory appeal on the *FNC* issue as a request for a writ of mandamus.

Lastly, in *In re: PCH Associates,* 949 F.2d 585 (2d Cir. 1991), involving complex debtor/creditor litigation in bankruptcy, the Second Circuit Court recognized the applicability of the general "law of the case" doctrine to decisions made during the course of ongoing litigation between the same parties. Under that doctrine, a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation. *Id.* at 592, *relying on Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988), and *quoting* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure*, § 4478, at 788 (1981); *to wit*:

> Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead they regulate judicial affairs before final judgment.

This justification for deference is as applicable, if not more so, in the context of multidistrict litigation, which invariably necessitates consistent, on-going resolution of complex legal issues involving large numbers of litigants at different stages of the litigation. *See also In re: Multi Piece Rim Prods. Liab. Litig.*, 653 F.2d 671, 678 (D.C. Cir. 1981) ("The doctrine of the law of the case has its application in multidistrict litigation as well as traditional litigation. [citations omitted]. . . . Proper coordination

of complex litigation may be frustrated if other courts do not follow the lead of the transferee court.")

In its opinion, the Fifth Circuit recognized both the validity and applicability of authority from other circuit courts in the context of Section 1407 multi-district litigation, as well as the manuals on multi-district and complex litigation. App. A-8 through A-10. ("[W]e note that authorities are unanimous that some deference must be given to the transferee court's decisions." App. A-8.).[12] Yet, the Fifth Circuit chose to parse the concept of deference in an attempt to overcome such unanimity. The Fifth Circuit created multiple declining levels of deference; *i.e.*, "bright-line rule that a transferor court cannot overrule a transferee court," "substantial deference, "general deference," and "law-of-the-case" deference, levels heretofore unknown and unsupported in this context, and ultimately held that transferor courts need only use a law-of-the-case approach, the lowest level of deference under its rationale, to determine whether

[12] The Court acknowledged but ultimately rejected language in the *Manual For Complex Litigation,* § 20.133, as well as the language in the *Weigle* treatise (quoted above), which was also included in the *Manual For Complex Litigation*, § 20.133. *See* App. A-7 through A-10. The language in *Weigle* was cited for the obvious purpose to demonstrate under what circumstances the "law of the case" doctrine could *not* be relied upon by a transferor judge to vacate or modify a ruling of an MDL transferee court. Rather than supporting the Fifth Circuit's position, the language from *Weigle* clearly shows that under the circumstances of these cases, the transferor court could not reconsider the MDL court's decision.

to revisit a transferee court's decision. App. A-8 through A-10. Applying that approach, the Fifth Circuit held the MDL court's *FNC* decision was a "manifest injustice" to the Respondents; and, as such, relieved the transferor court of the necessity of giving such deference to transferee court's decision. *Id.*

Although it is unclear how requiring these American corporations to litigate these cases involving their American-made products in American courts creates a "manifest injustice," Petitioners submit that the distinctions created by the Fifth Circuit in order to overcome "unanimous authority" to the contrary are false distinctions in the context of multidistrict litigation. The authorities cited in the Fifth Circuit's opinion discuss the necessity of prohibiting modification of rulings by transferee courts, as stated succinctly in the *Manual For Complex Litigation*, § 20.133, "in the absence of a significant change of circumstances." This is the measure of the deference defined and applied by the case law and the treatises to decisions by transferee courts and to MDL courts specifically. As Judge Hudspeth held, there was no such "significant change in circumstances" in these cases, and the Fifth Circuit erred in granting the writ in order to accomplish indirectly what it was jurisdictionally prohibited from doing directly.

CONCLUSION

The Multidistrict Litigation statute has permitted the orderly management and resolution of cases involving common issues and multiple parties in multiple venues. To permit the parties to re-litigate decisions by the MDL judges in individual transferor district and appellate courts will vitiate the legal efficacy and binding force of the statute and defeat the procedural and substantive consistency needed to satisfy due process in these complex cases. As Judge Hudspeth noted in his order denying reconsideration of MDL Judge Barker's decision in these cases, to do otherwise would mean that "the four years [the parties] spent in the MDL process would have accomplished nothing except to delay the rights of these Plaintiffs to have their day in court." App. C-3. Petitioners submit that this Court should grant certiorari in these cases to preserve the integrity of the statute and to rectify what has, in fact, become a manifest injustice to the Petitioners by denying them the right to have their "day in court" in their chosen forum.

Respectfully submitted,

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