BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: JOHNSON & JOHNSON TALCUM POWDER PRODUCTS MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 2738**

PLAINTIFFS MONA ESTRADA'S AND BARBARA MIHALICH'S INTERESTED PARTY RESPONSE IN OPPOSITION TO MOTION FOR CONSOLIDATION AND TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. §1407

I. INTRODUCTION

Pursuant to 28 U.S.C. §1407 and Rules 6.2(e) and 7.2(a) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, plaintiffs Mona Estrada and Barbara Mihalich, the named plaintiffs in *Estrada v. Johnson & Johnson*, No. 2:14-cv-01051-TLN-KJN (E.D. Cal., filed April 28, 2014) and *Mihalich v. Johnson & Johnson*, No. 3:14-cv-00600-MJR-SCW (S.D. Ill., filed May 23, 2014), hereby submit this interested party response to the pending motion for consolidation and transfer pursuant to 28 U.S.C. §1407, filed by plaintiff Tanashiska Lumas (*Lumas v. Johnson & Johnson*, No. 3:16-cv-00741-SMY-PMF (S.D. Ill, filed July 1, 2016)) in the above-captioned litigation pending before the Judicial Panel on Multidistrict Litigation ("JPML").[1] Plaintiffs Estrada and Mihalich ("Plaintiffs") allege consumer protection claims based on the purchase of a falsely advertised product on behalf of themselves and all others similarly situated. All other cases proposed to be consolidated allege personal injuries resulting from use of the product.

The *Estrada* and *Mihalich* class actions have been prosecuted by the same counsel since 2014, so those cases are further along and already being well-managed without MDL treatment. Coordination and transfer of the thirteen cases would overwhelm any efficiency gained by consolidation. For example, the allegations and causes of action differ from case to case among

[1] There are currently thirteen related actions included in this pending MDL. Aside from the *Estrada*, *Mihalich*, and *Lumas* actions already cited, the remaining ten actions are as follows: *Chakalos v. Johnson & Johnson*, No. 3:14-cv-07079-FLW-LHG (D.N.J., filed Nov. 11, 2014); *Robb v. Johnson & Johnson*, No. 5:16-cv-00620-D (W.D. Okla., filed June 8, 2016); *Bors v. Johnson & Johnson*, No. 2:16-cv-02866-MAK (E.D. Pa., filed June 9, 2016); *Musgrove v. Johnson & Johnson*, No. 1:16-cv-06847 (N.D. Ill., filed June 29, 2016); *Anderson v. Johnson & Johnson*, No. 3:16-cv-00447-JWD-EWD (M.D. La., filed July 1, 2016); *Rich-Williams v. Johnson & Johnson*, No. 1:16-cv-00121-SA-DAS (N.D. Miss., filed July 1, 2016); *Gould v. Johnson & Johnson*, No. 4:16-cv-03838-DMR (N.D. Cal., filed July 8, 2016); *Kuhn v. Johnson & Johnson*, No. 1:16-cv-00055 (M.D. Tenn., filed July 13, 2016); *Cerrone-Kennedy v. Johnson & Johnson*, No. 5:16-cv-06091-HFS (W.D. Mo., filed July 21, 2016); and *Traylor v. Johnson & Johnson*, No. 4:16-cv-00263-CDL (M.D. Ga., filed July 29, 2016).

the personal injury cases, and Plaintiffs' cases are class actions alleging consumer protection claims, not personal injury or wrongful death actions. Finally, several of the cases were filed in 2014, including *Estrada* and *Mihalich*, so they are at varying stages of litigation. Transfer and consolidation would likely be unworkable and provide little benefit. Therefore, the motion should be denied.[2]

II. ARGUMENT

A. Centralization of All Actions Into One MDL Is Inappropriate

Plaintiffs do not believe it is necessary or appropriate to consolidate the pending actions pursuant to 28 U.S.C. §1407 and transfer them to the Southern District of Illinois. Centralization is proper only where it is "necessary in order to eliminate duplicative discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005). As such, the movant is "under a heavy burden to show that those common questions of fact are sufficiently complex and that the accompanying discovery will be so time-consuming as to justify transfer under Section 1407." *In re 21st Century Prods., Inc. "Thrilsphere" Contract Litig.*, 448 F. Supp. 271, 273 (J.P.M.L. 1978). Coordination of the consumer protection class actions in an MDL is not necessary, would decrease efficiency, and would place unnecessary burdens on the resources of the Panel and the parties.

Plaintiffs' class actions involve different factual allegations and legal theories from the personal injury actions. The class actions do not allege physical harm or seek damages for personal injuries. Plaintiff Lumas incorrectly states that all plaintiffs have been diagnosed with

[2] In the alternative, should this Panel determine that coordination and transfer is appropriate, plaintiffs Estrada and Mihalich believe transfer should be to the Honorable David R. Herndon in the Southern District of Illinois, before whom *Mihalich* is pending.

cancer as a result of their use of defendants' talcum powder products. *See* ECF No. 1-1 at 2-3. Neither Ms. Estrada nor Ms. Mihalich has been diagnosed with cancer.

Rather, Plaintiffs allege they and all others similarly situated were injured by purchasing a falsely advertised product and seek damages and restitution based on defendants' violations of California and Illinois's consumer protection statutes. This is in sharp contrast to the personal injury cases, none of which are class actions and all of which claim defendants' products caused personal injury or death. In these circumstances, where the cases involve different factual and legal allegations, "informal coordination of any overlapping discovery is preferable to transfer." *In re Mirena IUD Prods. Liab. Litig.*, MDL No. 2434, 2015 U.S. Dist. LEXIS 43807, at *3 (J.P.M.L. Apr. 1, 2015). In fact, informal coordination is already occurring, and counsel for the plaintiffs are already working cooperatively in the *Estrada* and *Mihalich* actions. The two class actions are being coordinated absent an MDL because the same counsel is prosecuting both. Likewise, the *Musgrove* and *Anderson* personal injury actions also have the same plaintiffs' attorneys at the helm who are coordinating those actions. This type of coordination among the different groups of cases will be far more efficient than lumping all the cases with all of their significant differences together.

While the currently filed cases in this litigation allege some similar facts, the questions are not complex. There are also substantial differences among the cases that work against consolidation. For instance, the two class actions do not involve individuals who claim to have suffered personal injuries from defendants' talc powder. Instead, they seek relief on behalf of consumers related to defendants' false advertising. Thus, the class actions need not address individual medical histories or other potential causes of ovarian cancer for particular plaintiffs.

Furthermore, the personal injury actions all present individualized issues regarding liability and causation, such as questions regarding the amount of defendants' talc powder product used, the number of times used, and duration of use. In the personal injury actions, these "individual issues of causation and liability . . . appear to predominate, and [are] likely to overwhelm any efficiencies that might-be-gained by, centralization." *In re Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig.*, 709 F. Supp. 2d 1375, 1377 (J.P.M.L. 2010). *See also In re Qualitest Birth Control Prods. Liab. Litig.*, 38 F. Supp. 3d 1388, 1389 (J.P.M.L. 2014) ("It appears that individualized facts—particularly relating to whether each plaintiff received an improperly packaged Qualitest birth control product and whether she became pregnant as a result of taking the pills in the wrong order—will predominate over the common factual issues alleged by plaintiffs . . ." and "there is little to be gained from centralization at this time."). In the personal injury cases, defendants will have to conduct discovery pertinent to each individual whether or not centralization occurs, so discovery on a case-by-case basis will not be unduly time-consuming. Indeed, the predominance of individual inquiries in the personal injury cases would negate any benefits centralization might provide.

Finally, Plaintiffs' actions and *Chakalos* were filed in 2014, and are thus further along in the litigation process than the other cases. For example, defendants' second rounds of motions to dismiss are pending in *Estrada*[3] and *Mihalich*.[4] And in *Mihalich*, the parties have already exchanged significant written discovery, plaintiff is in the process of reviewing hundreds of thousands of pages of documents produced by defendants and is preparing for the filing of her

[3] *See Estrada*, No. 2:14-cv-01051-TLN-KJN, ECF Nos. 29-32.

[4] *See Mihalich*, No. 3:14-cv-00600-MJR-SCW, ECF Nos. 62-63, 67-68. Plaintiff Lumas incorrectly stated that the only cases not filed in 2016 were "the New Jersey and Eastern District of California cases." ECF No. 1-1 at 4. As is clear from plaintiff Lumas's Schedule of Actions, *Mihalich* was filed in 2014. ECF No. 1-2 at 1.

motion for class certification, and defendants have deposed plaintiff.[5] In *Chakalos*, fact discovery closed in February and expert discovery is to be completed in less than a month.[6] Where, as here, discovery in one action is complete, and dispositive motions are pending, "there is scant need for coordinated or consolidated pretrial proceedings." *In re Qualitest Birth Control Litig.*, 38 F. Supp. 3d at 1389. Additionally, numerous trials are set in state courts around the country, and the formation of an MDL will largely slow down the prosecution of these and other claims, as well as slow down the efforts to address this serious public health concern. Centralizing all of these cases at such "widely varying procedural stages" would not "serve the convenience of the parties or promote the just and efficient conduct of the litigation, taken as a whole." *In re: Pain Pump Litig.*, 709 F. Supp. 2d at 1378.

Only one percent of filed cases are pending in federal court, and all of the cases filed across the country are at varying stages of litigation, thus undermining the need for MDL coordination. Further, the allegations and causes of action differ among the personal injury cases, the many individualized issues overwhelm any efficiency gained by consolidation, and many of the cases are being prosecuted by the same lawyers and thus are already being well-managed without MDL treatment. For these reasons, transfer and consolidation would likely be unworkable and provide little benefit.

B. Alternatively, if the Panel Orders Centralization, Plaintiffs Request that the Cases Be Transferred to Either the Southern District of Illinois or the Middle District of Georgia

Should this Panel determine that transfer is both fair and efficient pursuant to Section 1407, the best transferee venue for the MDL is the Southern District of Illinois, before the

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5 *See* Declaration of Timothy G. Blood in Support of Opposition to Motion for Transfer and Consolidation, ¶2.

6 *See Chakalos*, No. 3:14-cv-07079-FLW-LHG, ECF No. 86.

Honorable David R. Herndon. Two of the thirteen cases are pending in the Southern District of Illinois, and it is the most geographically central and convenient location for all parties. Furthermore, both the Southern District of Illinois and Judge Herndon are experienced in and well-suited for multidistrict litigation. Alternatively, if this Panel decides to transfer and coordinate the related actions to a venue other than the Southern District of Illinois, Plaintiffs believe the Middle District of Georgia, and Chief Judge Clay D. Land, are another suitable venue and judge to oversee this litigation.

1. Several Parties to this Litigation Have Significant Contacts with the Southern District of Illinois

Plaintiffs Mihalich and Lumas are residents of Illinois, and their respective actions are already pending in the Southern District of Illinois. All of the other cases are scattered among eleven different district courts from California to New Jersey. Additionally, *Mihalich* is pending before Judge Herndon, the judge to whom plaintiffs Estrada, Mihalich and Lumas seek transfer. Thus, the Southern District of Illinois maintains the most significant contacts with the plaintiffs in this litigation.

2. The Southern District of Illinois Is the Most Geographically Appropriate Venue, Is Centrally Located, and Is Convenient to All Parties

The Southern District of Illinois is the logical geographic center of the litigation. As indicated above, the thirteen related actions have been filed in twelve Districts. Four of those cases were filed in Midwestern states (Illinois and Missouri); five in the South (Mississippi, Tennessee, Louisiana, Oklahoma, and Georgia), two on the East Coast (Pennsylvania and New Jersey), and two on the West Coast (California). The Southern District of Illinois is centrally located and would be more convenient than the other Districts for all of the parties and their counsel, as it is easily accessible via major national air carriers.

Further, Judge Herndon's court in the Southern District of Illinois is located in East St. Louis, less than four miles from St. Louis, Missouri, where there are three related state-court personal injury cases pending against defendants. This makes the location of the Southern District of Illinois ideal for coordination of discovery.

3. The Southern District of Illinois and the Honorable David R. Herndon Are Experienced in Multidistrict Litigation

The JPML has transferred important MDL actions to the Southern District of Illinois, evidencing its faith in this District's ability to manage complex litigation. *See, e.g.*, *In re: MCI Non-Subscriber Telephone Rates Litig.*, MDL No. 1275; *In re: Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig.*, MDL No. 2100; *In re: Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, MDL No. 2385; *In re: Profiler Prods. Liab. Litig.*, MDL No. 1748; and *In re: General Motors Corp. Vehicle Cooling System Prods. Liab. Litig.*, MDL No. 1562. This is likely due to the extreme efficiency of the Southern District of Illinois. As of March 31, 2014, the most recent data available for the Southern District of Illinois, the median time interval from the filing of a case to trial is approximately a year and a half—this is less than almost all of the other eleven Districts in which these cases have been filed in this litigation. *See* http://www.uscourts.gov/statistics/table/c-5/federal-judicial-caseload-statistics/2014/03/31. It is clear that the judges and clerks of this District have extensive MDL experience and will conduct these actions efficiently and effectively.

Furthermore, it is no small coincidence that three of the MDLs listed above—*MCI*, *Yasmin and Yaz*, and *Pradaxa*—were assigned to the Honorable David R. Herndon. Judge Herndon served as the Chief Judge for the Southern District of Illinois from 2007 until 2014, and has been handling complex MDLs for nearly two decades. This Panel has recognized Judge Herndon's expertise in complex litigation matters, stating that he is "a jurist with the willingness

and ability to handle" this type of litigation because he is "an experienced MDL judge" who "deftly presided over" the *Yasmin and Yaz* MDL. *In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, 883 F. Supp. 2d 1355, 1356 (J.P.M.L. 2012). In *In re: Yasmin and Yaz* and *In re: Pradaxa*, both of which were massive pharmaceutical products liability litigations, Judge Herndon demonstrated his effectiveness and his deep understanding of complex litigation by facilitating settlements within approximately two years from the time the cases were transferred to him. As mentioned above, Judge Herndon is already presiding over the *Mihalich* action and has heard two rounds of motions to dismiss in that case, so he is familiar with this litigation and the claims involved, making transfer to his Court the most sensible option.

If this Panel decides to transfer and coordinate the related actions, plaintiffs Estrada and Mihalich believe the Southern District of Illinois in general, and Judge Herndon in particular, are the best-suited venue and judge to oversee this litigation.

4. A Suitable Alternative to the Southern District of Illinois Is the Middle District of Georgia Before Chief Judge Clay D. Land

If this Panel decides to transfer and coordinate the related actions to a venue other than the Southern District of Illinois, Plaintiffs believe the Middle District of Georgia before Chief Judge Clay D. Land provides another suitable venue and judge to oversee the litigation.

The Middle District of Georgia is geographically appropriate and is convenient to all parties. Five of the thirteen related actions have been filed in the South: Mississippi, Tennessee, Louisiana, Oklahoma, and Georgia. There are currently two talcum powder cases pending in the Middle District of Georgia, both before Chief Judge Land. Chief Judge Land is stationed in Columbus, Georgia, and is easily accessible from domestic and international airports, including the Hartsfield-Jackson Atlanta International Airport.

Additionally, the Middle District of Georgia in general, and the Honorable Clay D. Land in particular, are experienced in litigating important MDL actions. *See In re: Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, MDL No. 2004; and *In re Tyson Foods, Inc., Fair Labor Standards Act Litig.*, MDL No. 1854. Chief Judge Land's experience in handling *In re: Mentor Corp. ObTape* is especially relevant in the current matter as the defendant there is a Johnson & Johnson subsidiary. Thus, Chief Judge Land is familiar with Johnson & Johnson and its counsel, as well as the many claims, defenses, and legal issues likely to arise in this litigation. Chief Judge Land has sat on the Middle District of Georgia bench since 2001, and has managed MDL proceedings and other cases from all over the country. The Middle District of Georgia and Chief Judge Land have the experience and the ability to manage complex litigation and will conduct these actions efficiently and effectively.

III. CONCLUSION

For the reasons set forth above, plaintiffs Estrada and Mihalich respectfully request that the JPML enter an Order denying the motion to transfer and consolidate. Alternatively, if this Panel grants the motion, Plaintiffs request that the cases be transferred to either the Southern District of Illinois before the Honorable David R. Herndon, or the Middle District of Georgia before the Honorable Clay D. Land.

Respectfully submitted,

Dated: August 5, 2016

BLOOD HURST & O'REARDON, LLP
TIMOTHY G. BLOOD
PAULA R. BROWN

By: *s/ Timothy G. Blood*
TIMOTHY G. BLOOD

701 B Street, Suite 1700
San Diego, CA 92101
Tel: 619/338-1100
619/338-1101 (fax)

tblood@bholaw.com
pbrown@bholaw.com

Counsel for **Plaintiff *Barbara Mihalich***

Mihalich v. Johnson & Johnson; Johnson & Johnson Consumer Companies, Inc.
No. 3:14-cv-00600-DRH-SCW (S.D. Ill.)

and

Counsel for **Plaintiff *Mona Estrada***

Estrada v. Johnson & Johnson; Johnson & Johnson Consumer Companies, Inc.
No. 2:14-cv-01051-TLN-KJN (E.D. Cal.)

GOLDENBERG HELLER & ANTOGNOLI, P.C.
Mark C. Goldenberg
Thomas P. Rosenfeld
Ann E. Callis
Kevin P. Green
2227 South State Route 157
Edwardsville, IL 62025
Tel: 618/656-5150
618/656-6230 (fax)
mark@ghalaw.com
tom@ghalaw.com
acallis@ghalaw.com
kevin@ghalaw.com

Additional Counsel for **Plaintiff *Barbara Mihalich***

Mihalich v. Johnson & Johnson; Johnson & Johnson Consumer Companies, Inc.
No. 3:14-cv-00600-DRH-SCW (S.D. Ill.)

BEASLEY, ALLEN, CROW, METHVIN,
PORTS, & MILES, P.C.
Alison Douillard Hawthorne
Charles L. Gould
W. Daniel Miles, III
272 Commerce Street
P.O. Box 4160
Montgomery, AL 36104
Tel: 334/269-2343
334-954-7555 (fax)
alison.hawthorne@beasleyallen.com
lance.gould@beasleyallen.com
dee.miles@beasleyallen.com

Additional Counsel for **Plaintiff *Mona Estrada***

Estrada v. Johnson & Johnson; Johnson & Johnson Consumer Companies, Inc.
No. 2:14-cv-01051-TLN-KJN (E.D. Cal.)

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: JOHNSON & JOHNSON TALCUM POWDER PRODUCTS MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 2738**

DECLARATION OF TIMOTHY G. BLOOD IN SUPPORT OF PLAINTIFFS MONA ESTRADA AND BARBARA MIHALICH'S INTERESTED PARTY RESPONSE IN OPPOSITION TO MOTION FOR CONSOLIDATION AND TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. §1407

I, TIMOTHY G. BLOOD, declare as follows:

1. I am an attorney duly licensed to practice before all courts of the State of California. I am the managing partner of the law firm of Blood Hurst & O'Reardon LLP, one of the counsel of record for plaintiffs in *Mihalich v. Johnson & Johnson, et al.*, No. 3:14-cv-00600-MJR-SCW (S.D. Ill., filed May 23, 2014) and *Estrada v. Johnson & Johnson, et al.*, No. 2:14-cv-01051-TLN-KJN (E.D. Cal., filed April 28, 2014), related cases in the above-entitled MDL action. I submit this declaration in support of plaintiff Mona Estrada and Barbara Mihalich's response in opposition to motion for consolidation and transfer of actions pursuant to 28 U.S.C. §1407.

2. In both *Mihalich* and *Estrada*, defendants' second motions to dismiss are pending. Additionally, the parties in *Mihalich* have exchanged and responded to significant written discovery, including defendants' production of over 470,000 pages of documents. Plaintiff Mihalich has been reviewing these documents in preparation for the filing of her motion for class certification and other potential motion practice. Defendants have also deposed plaintiff Mihalich.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 5, 2016, at San Diego, California.

s/ Timothy G. Blood
TIMOTHY G. BLOOD

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: JOHNSON & JOHNSON TALCUM POWDER PRODUCTS MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 2738**

CERTIFICATE OF SERVICE

On August 5, 2016., I filed **Plaintiffs Mona Estrada and Barbara Milhalich's Interested Party Response in Opposition to Motion for Consolidation and Transfer of Actions Pursuant to 28 U.S.C. §1470**; and **Declaration of Timothy G. Blood in Support of Plaintiffs Mona Estrada and Barbara Milhalich's Interested Party Response in Opposition to Motion for Consolidation and Transfer of Actions Pursuant to 28 U.S.C. §1470** through the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing documents via first class mail through the United States Postal Service to any non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 5, 2016.

Dated: August 5, 2016

Respectfully submitted,

s/ Timothy G. Blood

Timothy G. Blood
701 B Street, Suite 1700
San Diego, CA 92101
Tel: 619/338-1100
619/338-1101 (fax)
tblood@bholaw.com

Counsel for **Plaintiff *Barbara Mihalich***
Mihalich v. Johnson & Johnson; Johnson & Johnson Consumer Companies, Inc.
No. 3:14-cv-00600-DRH-SCW (S.D. Ill.)

and

Counsel for **Plaintiff *Mona Estrada***
Estrada v. Johnson & Johnson; Johnson & Johnson Consumer Companies, Inc.
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