BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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

PLAINTIFF MAHNAZ KHORRAMI'S RESPONSE IN OPPOSITION TO MOVING PLAINTIFF TANASHISKA LUMAS' MOTION FOR CONSOLIDATION AND TRANSFER PURSUANT TO 28 U.S.C. § 1407

The Panel should deny moving Plaintiff Tanashiska Lumas' ("Lumas") Motion because MDL transfer will not serve the convenience of the parties or promote the just and efficient conduct of the litigation. Any pre-trial efficiency that ordinarily would be generated by MDL transfer is negated by the substantial amount of discovery that has been completed and the multiple trials that have taken place. MDL transfer is also unnecessary because there are available alternatives that would allow the parties to achieve the benefits of pre-trial coordination without the need for centralization. Finally, the United States District Courts are not overwhelmed with a large amount of cases to justify consolidation.

I. BACKGROUND OF PLAINTIFF MAHNAZ KHORRAMI

On August 1, 2016, Plaintiff Mahnaz Khorrami filed a civil action in the United States District Court for the Central District of California, Case No. 8:16-cv-01419-CJC-JCG, against the following Defendants: (1) Johnson & Johnson, (2) Johnson & Johnson Consumer Companies, Inc., and (3) Personal Care Products Council f/k/a/ Cosmetic, Toiletry, and Fragrance Association. Plaintiff Khorrami's action arises out of her diagnosis of ovarian cancer, which was caused by her regular and prolonged exposure to the products Johnson & Johnson

Baby Powder and Shower to Shower. For the reasons set forth herein, Plaintiff Khorrami respectfully requests that the Panel deny Lumas' Motion for Consolidation and Transfer.

II. ARGUMENT

A Motion to transfer under 28 U.S.C § 1407 is proper under the following circumstances: (1) the actions involve "one or more common questions of fact"; (2) transfer "will be for the convenience of parties and witnesses" and (3) transfer "will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). All three criteria must be met for transfer to be appropriate. *See In re Highway Acc. Near Rockville, Connecticut, on Dec. 30, 1972*, 388 F. Supp. 574, 575 (J.P.M.L. 1975).

Lumas' Motion identifies five common questions of fact. Even if the Panel were to accept that common issues of fact exist, because MDL transfer will not serve the convenience of the parties or promote the just and efficient conduct of the litigation, the Panel should deny the Motion. *See In re Chiropractic Antitrust Litig.*, 483 F. Supp. 811, 813 (J.P.M.L. 1980) (Denying motion to transfer when "transfer under Section 1407 would not necessarily serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation.").

A. The Substantial Amount of Completed Discovery Precludes the Need for Centralization.

The efficiencies generated by MDL treatment relate primarily to pretrial proceedings and discovery. However, those benefits are inconsequential here because the litigation as a whole has already proceeded efficiently in courts across the country without MDL treatment. This coordination can continue with any newly filed cases through the various procedural tools available to the parties, without the need for centralization.

Upon information and belief, there are approximately more than 1,500 cases pending in the Missouri and New Jersey state courts combined. There are also approximately 200 cases filed in California state court. There is also one case pending in the Washington D.C. Superior Court.

The discovery that has occurred in this litigation is substantial. Plaintiff is aware that approximately 170,000 documents have been produced and seven depositions of Defendants' corporate witnesses have either taken place and/or are scheduled to take place. Two trials occurred in Missouri state court in 2016. *See Fox v. Johnson & Johnson et al.*, Case No. 1422-CC09012, Circuit Court of the City of St. Louis, Missouri; *Ristesund v. Johnson & Johnson et al.*, Case No. 1422-CC09012, Circuit Court of the City of St. Louis, Missouri. Additional trials are currently scheduled to take place in 2016 and 2017 in the Circuit Court of the City of St. Louis, Missouri. In 2013, a trial occurred in the United States District Court for the District of South Dakota. *See Berg v. Johnson & Johnson et al.*, C.A. NO. 4:09-CV-04179-KES (D. S.D.).

Consolidation risks impeding the substantial progress made in the litigation. The Panel has not shied away from denying MDL transfer when litigation is at advanced stages of discovery. For example, in *In re Ambulatory Pain Pump-Chondrolysis Products Liab. Litig.*, 709 F. Supp. 2d 1375 (U.S. Jud. Pan. Mult. Lit. 2010), the Panel denied transfer in a litigation involving over 100 actions and multiple defendant manufacturers. In denying transfer, the Panel noted:

> Finally, the constituent actions are at widely varying procedural stages. In many, fact discovery is either over or nearly over. The record shows that expert discovery is underway or has been completed in a number of actions. Although movants and other plaintiffs favoring centralization argue that defendants have stymied their efforts to streamline discovery, that argument is undercut by the multiple requests to exclude certain actions on the ground that they are too advanced to warrant inclusion in an MDL. Given all these circumstances, we are

> still unconvinced that centralization would serve the convenience of the parties or promote the just and efficient conduct of the litigation, taken as a whole.

Id. at 1378. *See also In re Cymbalta (Duloxetine) Products Liab. Litig. (No. II)*, 138 F. Supp. 3d 1375, 1376 (U.S. Jud. Pan. Mult. Lit. 2015) (denying motion for transfer in a litigation where four cases had gone to trial, defendant had produced "nearly three million pages of documents" and multiple fact and 30(b)(6) depositions of defendant's witnesses had been taken); *In re Reglan/Metoclopramide Products Liab. Litig.*, 622 F. Supp. 2d 1380, 1381 (U.S. Jud. Pan. Mult. Lit. 2009) (denying centralization of 11 actions where several of the actions were "substantially advanced" and "a significant amount of the common discovery has already taken place").

The significant work conducted prior to the filing of Lumas' Motion negates the need for transfer. Lumas has failed to explain why the completed discovery cannot transfer easily to other cases. Because the litigation as a whole has progressed in an effective manner, the Panel should not disrupt that progress. *See In re Gasoline Lessee Dealers Antitrust Litig.*, 479 F. Supp. 578, 581 (J.P.M.L. 1979) (denying motion to transfer where inclusion would "disrupt the orderly progress that is presently being made in the actions in each respective district and would result in no significant benefits to the parties, the witnesses or the judiciary"); *In re Dow Chem. Co. "Polystyrene Foam" Products Liab. Litig.*, 429 F. Supp. 1035, 1036 (J.P.M.L. 1977) ("Discovery on the common questions of fact involved here, however, apparently has been completed . . . any need for transfer under Section 1407 has been obviated.").

B. There are Available Alternatives to Transfer that Will Preclude Duplicate Discovery or Conflicting Rulings.

Alternatives to consolidation exist that would allow for efficiencies in terms of coordinating any remaining discovery that needs to occur and coordinating the use of completed discovery in other cases. *See In re Quaker Oats Maple & Brown Sugar Instant Oatmeal Mktg. &*

Sales Practices Litig., No. MDL 2718, 2016 WL 3101830, at *2 (U.S. Jud. Pan. Mult. Lit. June 2, 2016) ("We note that alternatives to centralization, such as voluntary cooperation and coordination among the parties and the three involved courts, are available to minimize any potential duplication in discovery or judicial efforts.")

For example, the parties can cross-notice depositions. *See In re: California Wine Inorganic Arsenic Levels Products Liab. Litig.*, 109 F. Supp. 3d 1362, 1363 (U.S. Jud. Pan. Mult. Lit. 2015); *In re Gasoline Lessee Dealers Antitrust Litig.*, 479 F. Supp. at 581; *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. 242, 244 (J.P.M.L. 1978).

The parties can also reach an agreement or make a request to the other courts that all prior and future discovery completed in any action and relevant to the other actions may be used in those actions. *See e.g. In re: California Wine Inorganic Arsenic Levels Products Liab. Litig.*, 109 F. Supp. 3d at 1363; *In re Cymbalta (Duloxetine) Products Liab. Litig. (No. II)*, 138 F. Supp. 3d at 1376; *In re Chiropractic Antitrust Litig.*, 483 F. Supp. at 813; *In re Gasoline Lessee Dealers Antitrust Litig.*, 479 F. Supp. at 581; *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F. Supp. at 244.

Lumas' concerns about the potential for conflicting rulings or different pretrial schedules amongst the various courts and judges do not mandate transfer. Courts and judges where actions are pending can engage in voluntary coordination without the need for MDL treatment. *See In re: Yellow Brass Plumbing Component Products Liab. Litig.*, 844 F. Supp. 2d 1377, 1379 (U.S. Jud. Pan. Mult. Lit. 2012) ("We consider voluntary coordination among the parties . . . and the involved judges . . . to be a preferable alternative."); *In re: Highway Accident in Fulton Cty., Ohio, on Aug. 2, 2009*, 829 F. Supp. 2d 1374 (U.S. Jud. Pan. Mult. Lit. 2011) ("Here, the Panel is convinced that cooperation among the parties and deference among the courts can easily

minimize the possibilities of duplicative discovery or inconsistent pretrial rulings in these two relatively straight-forward cases."); *In re Gasoline Lessee Dealers Antitrust Litig.*, 479 F. Supp. at 581 ("We emphasize that the parties can easily take steps to coordinate whatever common discovery remains to be accomplished in these actions. For example . . . any party could seek orders from the two district courts directing the parties to coordinate their remaining common pretrial efforts."). *See also Manual for Complex Litigation* (4th), § 20.14 (2004) ("Even when related cases pending in different districts cannot be transferred to a single district, judges can coordinate proceedings in their respective courts to avoid or minimize duplicative activity and conflicts.")

Further, Lumas' concerns regarding coordination of pretrial discovery are a fallacy. *See In re Highway Acc. Near Rockville, Connecticut, on Dec. 30, 1972*, 388 F. Supp. at 575 ("We recognize that some common questions of fact exist between these actions, but find that the possibility of duplicative discovery in this litigation is more illusory than real."). Because other options exist that will alleviate any issues regarding duplicative discovery or conflicting rulings, the Panel should deny Lumas' Motion.

C. The United States District Courts are not Facing an Unmanageable Number of Filed Cases to Justify Transfer.

In contrast to the number of actions pending in the various state courts, Lumas' Motion states that there are at least 11 actions pending in the United States District Courts. (Lumas Brief, p. 2.) As the Panel observed in *In re: California Wine Inorganic Arsenic Levels Products Liab. Litig.*, "[w]here only a minimal number of actions are involved, the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate." 109 F. Supp. 3d at 1363.

For the reasons set forth above, Plaintiff failed to meet her burden for centralization. Because of the limited number of cases filed in the United States District Courts, the federal courts are not facing an unmanageable number of cases. While Lumas anticipates "there will be hundreds, if not thousands, of additional case filings" (Lumas Brief, p. 8), the Panel has rejected similar conclusory arguments. As the Panel stated in *In re Zimmer, Inc., Centralign Hip Prosthesis Products Liab. Litig. (No. II)*:

> Proponents of transfer have alluded to the prospect of additional actions that are or may soon be pending in additional districts as a reason for ordering centralization. We note, however, that such actions are not now before the Panel, and their pendency does not create a persuasive reason for transfer of the five Connecticut actions that are.

366 F. Supp. 2d 1384, 1385 (J.P.M.L. 2005). Because there is no onslaught of filed cases in the Federal District Courts to justify MDL consolidation, Lumas' Motion should be denied.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff Mahnaz Khorrami respectfully requests the Panel deny Moving Plaintiff Tanashiska Lumas' Motion for Consolidation and Transfer.

Date: August 9, 2016

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PROOF OF SERVICE

In compliance with Rule 4.1 (a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that the foregoing: Plaintiff Mahnaz Khorrami's Response In Opposition To Moving Plaintiff Tanashiska Lumas' Motion For Consolidation And Transfer Pursuant To 28 U.S.C. § 1407and this Proof of Service were electronically filed with the Court of the JPML by using the CM/ECF and was served on all counsel or parties in manners indicated and addressed as follows:

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