

**BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

**IN RE: TYLENOL®-BRAND
OVER-THE-COUNTER
(ACETAMINOPHEN) LIVER
TOXICITY PRODUCTS
LIABILITY LITIGATION**

MDL DOCKET NO.

**RESPONSE IN OPPOSITION TO MOVANT'S MOTION FOR TRANSFER AND
COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. §1407**

Tommie Jean Coleman, Plaintiff in *Tommie J. Coleman, Individually and on Behalf of the Estate of Robert W. Coleman, Deceased v. McNeil-PPC, Inc. and John Does 1-10*, Cause No. 3:12-cv-00591, files this her Response in Opposition to Movant's Motion for Transfer and Coordination or Consolidation Under 28 U.S.C. §1407 in accordance with 28 U.S.C. § 1407 [Dkt. No.1] and Rule 6.2 of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation. In response, Ms. Coleman would show the following:

Coleman's actions arise out of the death of her husband, Robert W. Coleman. Mr. Coleman underwent knee surgery in 2009, and subsequently took McNeil's product, Tylenol, to relieve pain. However, McNeil's product soon caused Mr. Coleman to suffer severe liver and/or kidney damage that eventually resulted in his death. Coleman filed her action in the Southern District of Mississippi, but Movants now seek to have Coleman's action consolidated and coordinated in the Eastern District of Pennsylvania with other actions involving McNeil as well as a host of other defendants as evidenced by their Motion. [Dkt. No.1]

The distance and factual and legal differences between Coleman's action and the actions that Movant seeks to consolidate will create severe hardships on Plaintiff, as consolidation in the Eastern District of Pennsylvania would be inconvenient, unjust, and inefficient for her. The facts in the matter at hand likely differ from those of the other plaintiffs in that they each suffered

different injuries, consumed different McNeil products, consumed different amount of a McNeil product, took these McNeil products of different time frames and their injuries occurred over a different time frame. Furthermore, the few existing common factual questions presented in these cases do not meet the complexity standard required for consolidation. Moreover, Movant has neither alleged, nor shown, that complexities exist to make these cases ripe for consolidation. As a result, the Panel should deny consolidation and coordination of these cases. In the alternative, this Panel should deny the consolidation and coordination of the aforementioned action, *Tommie J. Coleman, Individually and on Behalf of the Estate of Robert W. Coleman, Deceased v. McNeil-PPC, Inc. and John Does 1-10*, Cause No. 3:12-cv-00591, for the reasons set forth herein.

If consolidated, Coleman faces vast expenses in having to miss work, travel, and ensure that her countless witnesses, of whom are from Mississippi and Louisiana, can appear in the Eastern District of Pennsylvania for the related proceedings. The distance between Jackson, Mississippi and Philadelphia, Pennsylvania is well over one thousand miles. As a result, Ms. Coleman, her witnesses, and attorneys will face thousands of dollars in travelling expenses alone. Furthermore, as seen in Movant's Motion for Transfer and Coordination or Consolidation Under 28 U.S.C. §1407, these actions involve parties and their associated counsels that stretch all across the United States, creating even greater expenses for some. Moreover, McNeil, an extremely profitable corporation, is far better equipped to deal with these situations. Therefore, placing this burden on Coleman as well as the other distantly located parties is extremely inconvenient. Collectively, these burdens outweigh any potential setoff or benefits that consolidation may create, if any.

There are a significant amount of differences in the cases at issue that also make consolidation and coordination unjust and inefficient. McNeil distributes a variety of acetaminophen containing medicines, each of which require different recommended dosages, and the parties at issue have consumed different products. Obviously, each individual consumer is vastly different from the others, and each human body responds to the products in a variety of ways. As a result, McNeil's products have caused a wide range of conditions that have negatively impacted the relevant parties in different ways. Therefore, it is impossible for discovery to adequately serve all parties if these actions are consolidated and coordinated into one. Doing so would result in parties being bombarded with irrelevant documents that causes even more inconveniences, unjust results, and inefficiencies.

Finally, although there are a few common questions existing among the cases, Movant has not sufficiently shown complexities among the commonalities required for consolidation and coordination. Furthermore, the Movant carries the burden of proving consolidation is favorable for the parties and that the factors considered for consolidation and transfer are met. In the present action, Movant has failed to do so. The common facts center on causation-related issues that do not meet the complexity requirement and thus make these actions ineligible for consolidation and coordination.

Accordingly, Tommie Jean Coleman, Plaintiff in *Tommie J. Coleman, Individually and on Behalf of the Estate of Robert W. Coleman, Deceased v. McNeil-PPC, Inc. and John Does 1-10*, Cause No. 3:12-cv-00591, respectfully requests that the Judicial Panel on Multidistrict Litigation deny Movant's Motion for Transfer and Coordination or Consolidation Under 28 U.S.C. §1407. In the alternative, Ms. Coleman respectfully requests that the Panel deny the consolidation of the action styled *Tommie J. Coleman, Individually and on Behalf of the Estate*

of Robert W. Coleman, Deceased v. McNeil-PPC, Inc. and John Does 1-10, Cause No. 3:12-cv-00591.

THIS, the 8th day of February, 2013.

Respectfully submitted,

**TOMMIE JEAN COLEMAN, INDIVIDUALLY
AND ON BEHALF OF THE ESTATE OF
ROBERT W. COLEMAN, DECEASED
PLAINTIFF**

By: /s/ Kathryn L. White

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CERTIFICATE OF SERVICE

Pursuant to Rule 4.1(a) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation, I hereby certify that the foregoing document was served on February 8, 2013, via CM/ECF. The JPML's Notice of Electronic filing shall constitute service on registered counsel.

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THIS, the 8th day of February, 2013.

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MDL DOCKET NO.

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE IN
OPPOSITION TO MOTION FOR TRANSFER AND
COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. §1407**

INTRODUCTION

Tommie Jean Coleman, Plaintiff in *Tommie J. Coleman, Individually and on Behalf of the Estate of Robert W. Coleman, Deceased v. McNeil-PPC, Inc. and John Does 1-10*, Cause No. 3:12-cv-00591, files this her Memorandum of Law in Support of Plaintiff's Response in Opposition to Motion for Transfer and Coordination or Consolidation Under 28 U.S.C. §1407. In the Motion for Transfer and Coordination or Consolidation Under 28 U.S.C. §1407 [Dkt. No.1], Movant Lucky T. Pettersen, along with other plaintiffs in related actions, seek to consolidate and coordinate twenty-eight cases in the Eastern District of Pennsylvania. 28 U.S.C. § 1407 states that transfers for proceedings such as the ones at issue are allowed when it is determined that consolidation would be for the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions.

Coleman's actions arise out of the August 21, 2009, death of her husband, Robert W. Coleman. Prior to his death, Mr. Coleman underwent multiple knee surgeries and used Defendant McNeil's acetaminophen product, Tylenol, to alleviate his pain. Mr. Coleman and those administering the Tylenol to him were aware of the recommended dosage limits provided by Defendant on their product labels and boxes and abided by these dose recommendations.

However, Decedent nor Plaintiff were aware of the harmful side effects, such as liver failure, caused by the consumption of acetaminophen, the main ingredient in Tylenol products, the consumption of which ultimately lead to his death. [See Plaintiff's Complaint].

On June 13, 2009, after several months of taking Tylenol, Mr. Coleman reported to St. Dominic-Jackson Memorial Hospital complaining of abdominal pain and jaundice. *Id.* He had surgery (laparoscopic cholecystectomy and liver biopsy) on June 19, 2009, in which his gall bladder was removed in pieces and it was noted that his liver was large, hard and abnormal. *Id.* He was soon sent to Tulane University Hospital. While at Tulane, Dr. Mallikarjum ordered the Plaintiff to bring in all of the Decedent's current medication and vitamins so that the internists could perform testing on the medication in order to help discover the cause of the decedent's liver failure. *Id.* Pursuant to this testing, it was specifically stated in the decedent's medical records that his liver failure etiology stemmed from acetaminophen and ibuprofen usage which resulted in a diagnosis of cholestatic hepatitis. *Id.* This was further confirmed by Mr. Coleman's death certificate, which states that the underlying cause of death was acetaminophen toxicity, which lead to cholestatic hepatitis that eventually resulted in the septic shock that caused Mr. Coleman's untimely death. As a result of decedent's specific injuries from ingestion of Defendant McNeil's products which were consumed in the Southern District of Mississippi, Coleman filed her action in the Southern District of Mississippi, but Movant Lucky Pettersen and other plaintiffs now seek to have the actions consolidated and coordinated with their actions in the Eastern District of Pennsylvania.

According to Movant Lucky Pettersen, this case is one of many others against McNeil. Nevertheless, Movant has failed to show that consolidation and coordination of the cases at issue is appropriate primarily because consolidation and coordination would force serious hardship

and inconveniences on the parties outside of Pennsylvania and will not suffice as judicially just and efficient as required pursuant to U.S.C. § 1407.

ARGUMENT

Movant's Motion for Transfer and Coordination or Consolidation Under 28 U.S.C. §1407 neither satisfies the requirements for convenience of the parties, nor is it just and efficient. [Dkt. No.1]. The distance that Coleman along with her counsel and numerous witnesses, as well as other distantly located parties in the actions at issue would be forced to travel would create substantial hardships and unnecessary, countless expenses on them. Defendant McNeil's is in a better financial situation to make necessary travel arrangements for their witnesses as they are a profitable corporation. Additionally, Defendant McNeil's lead counsel is located in the Southern District of Mississippi making said venue convenient, just and efficient for this specific matter. Furthermore, the difference in facts make it neither just, nor efficient, to consolidate all of the cases at issue. Moreover, of the few common facts between the cases, none possess the complexity necessary to warrant consolidation. Therefore, this Panel should find that these actions are not ripe for consolidation.

1. The vast distance and factual and legal differences in the cases at hand make them unsuitable for consolidation under 28 U.S.C. § 1407.

Consolidation or coordination is inappropriate in this case because the distance causes serious hardships and inconveniences, and the differences in the facts and legal issues significantly set them apart. Although there may be a few similar issues, this is not enough to justify transfer where transfer will not necessarily serve the convenience of the parties and witnesses and promote just and efficient conduct of the action where there were significant individual factual questions. *In re Luminex Intern. Inc. Products Liability Litigation*, 434 F.Supp. 668 (Jud. Pan. Mult. Lit. 1977).

- A. Because of the distance and the time, expenses, and hardships associated therewith, consolidation and coordination poses serious inconveniences to the parties at hand.

The distance between the Eastern District of Pennsylvania and many of the parties at issue creates a significant hardship that will cause great burdens and inconveniences upon the parties. Clearly, one of the purposes for consolidation is convenience of the parties. Case law shows that the Panel places high emphasis and consideration on the proximity of courts. In *In re Anthracite Coal Antitrust Litigation*, the Panel openly considered the proximity of transferee courts, and then determined whether each would “seriously inconvenience” any party. 436 F.Supp. 402, 403 (Jud. Pan. Mult. Lit. 1977). Though the Panel found no inconveniences based on the proximity of the courts in that case, the present action is distinguishable. In *In re Anthracite*, the distances between each court ranged under one hundred fifty miles. In the present action, Coleman, her witnesses, and attorneys face well over *one thousand* miles of travel. Additionally, Defendant McNeil’s counsel is located in Mississippi and would face over 1,000 miles of travel each time these particular parties needed to convene or appear. Furthermore, there are other parties who face distances even greater. In other words, the Panel has placed high emphasis on the convenience of parties and in this case, this particular factor does not weigh in favor of consolidation and transfer.

McNeil’s witnesses are much more adequately equipped to travel than plaintiffs, such as Coleman. McNeil is an extremely profitable corporation that spends a countless amount of money each year as it markets and distributes its products throughout the nation. McNeil faces no “inconveniences” as it sends representatives all over the world to promote, market, and distribute its products year-round. Therefore, it should have no “inconveniences” to pay for its witnesses to travel to court proceedings. Regardless, the burden facing Ms. Coleman and other distantly located parties far outweighs any potential benefits to be gained for consolidation and

coordination, if any. Additionally, as previously mentioned, McNeil's lead counsel is also located in the Southern District of Mississippi. If the matter at hand is consolidated and transferred to the Eastern District of Pennsylvania, both sides would be traveling from Mississippi to Pennsylvania. Both parties in this matter could save time and money by remaining in Mississippi and by this matter remaining in the Southern District of Mississippi. Furthermore, Southern District of Mississippi is a competent court which moves cases appropriately through its docket and to trial as quickly as possible. If this matter is consolidated it may prevent both sides from reaching a quicker conclusion as the other cases involved contain different facts and issues.

Counsel, witnesses, and plaintiffs in the actions which Movant seeks to consolidate and transfer are spread all over the United States, from California to Florida. Many of these plaintiffs are injured or have lost loved ones due to the harmful effects of McNeil's product making travel even more burdensome. These plaintiffs, such as Tommie Jean Coleman, will face a loss of earnings from having to miss work because of the extensive travel required if consolidation is granted. Furthermore, Coleman will face hardships and unnecessary, extra expenses in having her witnesses transported to Pennsylvania, if necessary. Moreover, each of Coleman's numerous witnesses (including the treating physicians) are located in or around Mississippi and Louisiana. Therefore, Coleman and her witnesses will be better suited if this matter is to remain in the Southern District of Mississippi.

In short, McNeil faces far less, if any, inconveniences in the present situation as it stands in its unconsolidated state. Regardless, McNeil is far better equipped to deal with any said inconveniences, as many of the plaintiffs are seriously injured or have lost loved one due to

McNeil's products. Furthermore, this has resulted in limited income for many of them, and the excessive distance creates severe hardships.

- B. Because of significant individual factual questions, transfer of the cases at issue is not just and efficient.

The cases at hand present many individually-relevant factual questions, thus creating significant differences that are inappropriate for consolidation. In *In re Ambulatory Pain Pump-Chondrolysis Products Liability Litigation*, the Panel found that centralization for pretrial proceedings of 102 actions and multiple potential tag-along actions, pending in multiple districts and alleging that the use of ambulatory pain pumps and/or the anesthetic drugs used in those pumps caused chondrolysis, would, taken as a whole, neither serve the convenience of the parties nor promote just and efficient conduct of the litigation. 709 F.Supp. 2d 1375 (Jud. Pan. Mult. Lit. 2010). Furthermore, an indeterminate number of different pain pumps and anesthetics were at issue, individual issues of causation and liability were likely to overwhelm any efficiencies that might be gained by centralization, and the actions were at widely varying procedural stages. *Id.*

In *In re Ambulatory Pain Pump*, plaintiffs moved for centralized pretrial proceedings alleging that the use of ambulatory pain pumps and/or the anesthetic drugs used in those pumps caused chondrolysis. *Id.* 1374. The pain pumps at issue came in different sizes and designs, with differing volume, duration, and flow capacities and the same anesthetic was not used in all surgeries. *Id.* at 1377. Furthermore, Plaintiffs had different medical histories regarding the number of surgeries each had undergone using the pain pump. *Id.* at 1377. Based on these facts, among others, the Panel found that this case was not ripe for consolidation. *Id.* at 1375.

Furthermore, in *In re Luminex Intern. Inc. Products Liability Litigation*, 434 F.Supp 668, 669 (Jud. Pan. Mult. Lit. 1977), (a case involving a defective lens), the Panel found that the

actions involved significant individual factual questions on the issue of liability concerning the condition of the particular lens used by each plaintiff that caused damage.

Similarly, the actions at bar involve different types of Tylenol causing different issues regarding liability. It is no secret that McNeil manufactures a number of substantially different products that each contain acetaminophen. Furthermore, depending on each individual case, Tylenol users often require differing amounts of the drug depending on their pain and other health conditions.

Moreover, depending on each individual case, the timing as well as the frequency of the use of the drug differs. Every human body is different and potentially responds to medicines and treatments in different ways. In other words, the health, lifestyle, etc. of each individual plaintiff will present significant differences that could play a significant role in determining the extent of damage that McNeil's product caused. Therefore, it is not *just* to lump these cases together as if they are all the same.

Because the cases at issue involve different types of McNeil products as well as different usages, this will create vast differences throughout discovery. Obviously, each plaintiff will have differing medical records and other tangible evidence that will not duplicate other plaintiffs. Furthermore, because different products were used, McNeil will have to disclose different information about each specific product. Furthermore, if McNeil is allowed to simply send the same discovery to the plaintiffs in each action, each plaintiff will be left with a countless number of completely irrelevant documents thus thwarting any "efficiency" gained by allowing McNeil to dump the same documents on each plaintiff.

Furthermore, the Panel has recognized that options are available to minimize the possibility of duplicate discovery if a matter is not consolidated. *In re Eli Lilly & Co.*

(Cephalexin Monohydrate) Patent Litigation, 446 F.Supp. 242, 243-244 (Jud. Pan. Mult. Lit. 1978). For example, notices for a particular deposition could be filed in all actions, thereby making the deposition applicable in each action or the parties could seek to agree upon a stipulation that any discovery relevant to more than one action may be used in all those actions. See *In re Commercial Lighting Products, Inc. Contract Litigation*, 415 F.Supp. 392, 393 (Jud.Pan.Mult.Lit.1976). See also Manual for Complex Litigation, Parts I and II, ss 3.11 (rev. ed. 1977). Therefore, the parties have other options, aside from consolidation, to promote justness and efficiency with in the discovery and trial processes.

2. Movant has not sufficiently proven that the common factual issues are significantly complex.

Consolidation or coordination is inappropriate in this case because the issues are not significantly complex. In *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litigation*, this Panel held that the movants did not show that the common questions of fact were sufficiently complex to justify or that accompanying discovery would be so time consuming as to justify transfer under Section 1407. *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litigation*, 446 F.Supp. 242, 243-244 (Jud. Pan. Mult. Lit. 1978). In that case, the key issue was whether two patents held on pharmaceutical substances were valid. *Id.* at 242. In the aforementioned *In re Luminex Intern. Inc. Products Liability Litigation* case, the Panel held that though there were common questions of fact relating to the manufacturing process of a lens, the factual questions were not complex enough to justify transfer. 434 F.Supp 668, 669 (Jud. Pan. Mult. Lit. 1977).

In the present case, it is evident that there will be some common questions of fact relating to McNeil's acetaminophen containing products. However, under *In re Eli Lilly* and *In re Luminex Intern. Inc.* the common questions of fact must be complex enough to justify transfer.

Furthermore, under *In re Eli Lilly*, the Panel found that the *movants* did not show that the facts were complex thus showing that it's the movant's burden to show complexity. 242, 243-244 (Jud. Pan. Mult. Lit. 1978) (emphasis added).

In short, the present action is strikingly similar to the situation in *In re Luminex*. Similar to the factual questions in *In re Luminex* regarding the manufacturing process of a lens to show a defect or causation, the present actions involve factual questions regarding the product labels of McNeil's products to show defect or causation. Therefore, if this Panel found that the relevant factual questions in *In re Luminex* were not complex enough to warrant consolidation, then it makes little sense to argue that the causation factors in the present actions are complex enough for consolidation.

Regardless, the Movant has completely neglected to carry the burden of showing complexity. However, this is not to say that there are no differing facts in the cases at issue, as there are a significant number of different facts that do not warrant consolidation of these cases. However, the common facts that are present, are not complex enough to warrant the need for consolidation.

CONCLUSION

For the aforementioned reasons, this Panel should find that the cases at issue are not ripe for consolidation. The distance creates heavy burdens and inconveniences. Furthermore, each case has significant, individual differences that set it apart from the whole rendering consolidation unjust and inefficient. Nevertheless, the common facts that are present are not complex enough to warrant consolidation.

THIS, the 8th day of February, 2013.

Respectfully submitted,

TOMMIE JEAN COLEMAN, INDIVIDUALLY

**AND ON BEHALF OF THE ESTATE OF
ROBERT W. COLEMAN, DECEASED
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THIS, the 8th of February, 2013.

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