BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: TYLENOL (ACETAMINOPHEN) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

MDL DOCKET NO. 2436

Becker v. Novartis Consumer Health, Inc., et al.
E.D.PA. 2:12-cv-5991

NOVARTIS CONSUMER HEALTH, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. §1407

Defendant, Novartis Consumer Health, Inc. hereby submits its Response in Opposition to Plaintiffs' Motion to Transfer and Coordination or Consolidation under 28 U.S.C. 1407. In support of this Response in Opposition, Novartis Consumer Health, Inc. relies upon its accompanying Memorandum of Law.

Respectfully submitted,

Dated: February 8, 2013

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NOVARTIS CONSUMER HEALTH, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. §1407

Defendant, Novartis Consumer Health, Inc. (hereinafter "NCH")[1] hereby submits its Memorandum of Law in Support of its Response in Opposition to Plaintiffs' Motion to Transfer and Coordination or Consolidation under 28 U.S.C. 1407 (hereinafter "Motion to Transfer").

I. INTRODUCTION

Movants are twenty-one Plaintiffs in twenty-one separate civil actions consolidated in the United States District Court for the Eastern District of Pennsylvania before the Honorable Lawrence F. Stengel. NCH is a Defendant in only one of those twenty-one cases, the *Laura Becker* case. NCH is not a named Defendant in any of the other cases pending before Judge Stengel and has not been sued in any of the other eight District Courts where purportedly "related" actions are pending.[2]

Moving Plaintiffs request the creation of a Multidistrict Litigation pursuant to 28 U.S.C. 1407 to host their claims arising out of their alleged ingestion of McNeil's acetaminophen

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[1] NCH is a Defendant in a single lawsuit within the proposed MDL, the *Laura Becker* case (E.D. PA. 2:12-cv-5991). In the *Becker* case, Plaintiff also sued Novartis Pharmaceuticals Corporation and Novartis Corporation. As Plaintiffs concede in their moving papers, both Novartis Pharmaceuticals Corporation and Novartis Corporation have been dismissed from the *Becker* case.

[2] NCH is a Defendant in the matter of *Pete J. Lucio v. McNeil, et. al.* Philadelphia Court of Common Pleas, May Term, 2012, No. 286. The *Lucio* matter was initiated by Writ of Summons in May, 2012 and no complaint has been filed in the case.

containing products that are sold under McNeil's Tylenol® brand name. However, NCH does not -- and never has -- manufactured or sold Tylenol®, nor is it alleged to have done so. Accordingly, NCH requests the Panel deny Plaintiffs' request for creation of the proposed Tylenol MDL. In the alternative, inclusion of the *Becker* case in the proposed MDL is improper and NCH asks that the matter be severed from the proposed MDL.

II. STATEMENT OF FACTS

NCH is a Defendant in a just one of the cases Plaintiffs request be included in the proposed Tylenol MDL, the *Laura Becker* case. The *Becker* case which has been consolidated along with twenty (20) other cases before the Honorable Lawrence F. Stengel in the United States District Court for the Eastern District of Pennsylvania. Each of the aforementioned twenty-one (21) cases involve alleged ingestion of McNeil's Tylenol product(s). In addition to NCH, McNeil PPC Inc., McNeil Consumer Healthcare (collectively "McNeill"), Johnson & Johnson and L. Perrigo Company (hereinafter "Perrigo") are Defendants in *Becker*. *See* Becker Complaint, Exhibit "A."

In her Complaint, Laura Becker alleges that McNeil manufactured and sold Tylenol. *See* Exhibit "A" at ¶ 18. Becker further alleges that Perrigo manufactured and sold Equate Pain Reliever Acetaminophen ("Equate"). *See* Exhibit "A" at ¶ 19. Plaintiff alleges NCH manufactured and sold Theraflu®. *See* Exhibit "A" at ¶ 20. Plaintiff alleges that she took doses of Tylenol, Equate and Theraflu from approximately October 20, 2009 and October 29, 2009, which ingestion she alleges caused liver damage. *See* Exhibit "A" at ¶¶ 30 - 31.

While the *Becker* Complaint implicates three products of three different manufacturers, Plaintiffs' Motion to Transfer demonstrates that the proposed MDL is intended to serve as a forum for the litigation of claims involving Tylenol ingestion. *See* Plaintiffs' Memorandum, at

p. 2 ("The legal theories and facts asserted in all of these Related actions arise from the virtually identical conduct of the McNeil Defendants' designing, manufacturing, sale of and putting into the stream of commerce their defective acetaminophen containing OTC Tylenol® products.") Plaintiffs' Memorandum also sets forth a history of the McNeil's Tylenol product line. *See* Plaintiffs' Memorandum, at p. 4 ("McNeil was the first to market acetaminophen products in the United States in 1955, with its Tylenol® Elixer for Children…). There is no such chronology of the history of Theraflu or Equate in Plaintiffs' Motion to Transfer. Plaintiffs further contend that the Related Actions "involve common factual issues (i.e. whether McNeil's "OTC" Tylenol® products are defective) as well as common issues of law (i.e., whether McNeil failed to properly warn Plaintiffs of the risks of liver toxicity and whether McNeil breached various warranties owed to plaintiffs)." *See* Plaintiffs' Memorandum, at p. 5. However, the *Becker* case clearly stands apart from the other matters designated for inclusion in the proposed MDL.

III. LEGAL ARGUMENT

A. NCH opposes Transfer and Creation of MDL 2346.

NCH objects to Plaintiffs' request for transfer and coordination or consolidation under 28 U.S.C. § 1407. NCH adopts and incorporates the arguments set forth in the Response in Opposition of Defendants McNEIL-PPC, Inc., McNeil Consumer Healthcare Division of McNEIL-PPC, Inc. and Johnson & Johnson and requests that the Panel deny Plaintiffs' Motion for Transfer and the relief sought therein.

B. Alternatively, the *Becker* Case should be severed from the Tylenol MDL.

In the alternative, the *Becker* case should be severed from the Related Actions, and not transferred to the proposed MDL, as the *Becker* case involves facts not common to the Related Actions and transfer would inconvenience the parties and the Court. *See In re Dow Chemical*

Company "Sarabound" Products Liability Litigation, 650 F. Supp. 187 (J.P.M.L. 1986) (authorizing transfer of less than all pending cases to newly created MDL).

1. The *Becker* case does not involve sufficient common questions of fact.

Transfer of two or more civil actions is appropriate only where the cases involve "one or more common questions of fact" and upon a determination that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. 1407. The *Becker* case does not present sufficient fact questions common to the other Related Actions to warrant transfer. In all but a few instances, the cases Plaintiffs propose to transfer involve only McNeill and Johnson & Johnson as Defendants. Resolution of those cases necessarily involves a determination of factual questions regarding the development of Tylenol, its marketing, the risks of liver toxicity stemming from Tylenol use and whether McNeil failed to warn consumers of the risks associated with Tylenol use. In *Becker*, however, the likely issues are not only the claims related to Tylenol, but also Plaintiff's allegations relating to the manufacture and sale of Theraflu and Equate and the warnings accompanying those products, as well as the Plaintiffs' damages claims. Moreover, unique to *Becker* is the question of Plaintiffs' alleged use of Tylenol, Theraflu and Equate in combination. The *Becker* case presents its own unique factual questions, making transfer improper. *See In re Bestline Products Ec. & Antitrust Litig.* 375 F. Supp. 926, 927 (J.P.M.L. 1974)(holding that where "two actions stand factually isolated, no purpose would be served by transferring them under Section 1407 for coordinated or consolidated pretrial proceedings….")

In its *In re Shoulder Pain Pump - Chondrolysis Prods. Liab. Litig.* decision, the Panel denied a request for coordination under Section 1407, finding there were insufficient common

questions of fact to warrant transfer of various personal injury claims involving multiple manufacturers' pain pumps. 571 F. Supp. 2d 1367 (J.P.M.L. 288). The Panel explained:

> Although these personal injury actions have some commonality as to whether shoulder pain pumps and/or the anesthetic drugs used in those pumps cause glenohumeral chondrolysis, an indeterminate number of different pain pumps made by different manufacturers are at issue, as are different anesthetic drugs made by different pharmaceutical companies. Moreover, not all of the thirteen constituent actions involve pharmaceutical company defendants, and many defendants are sued only in a minority of those actions.

Id.. at 1368. In the *Becker* case, at least three different over-the-counter acetaminophen-containing products manufactured by three different Defendants are at issue. Perhaps more importantly, the case presents a unique, uncommon question concerning the use of multiple acetaminophen-containing products. These facts cause the *Becker* case to stand out from the remaining Related Actions, making transfer improper.

2. NCH is a Defendant in only the *Becker* case.

The Panel has not established hard and fast rules as to how many cases are "enough" to warrant participation in a consolidated proceeding. Plaintiffs will point to a handful of cases where the Panel has authorized transfer of as few as two highly complex matters. Nevertheless, the larger the number of cases, the stronger the argument that participation in some coordinated pretrial proceeding is warranted to save the parties and the Court the time and expense associated with repetitive pleadings, discovery responses and disputes, and motions.

As stated, NCH is a Defendant in just one case, the *Becker* case. Whatever arguments Plaintiffs may offer in support of coordinating the cases pending against other parties, there are no compelling reasons for inclusion of the sole case involving NCH in the proposed MDL. *See In Re Shoulder Pain Pump*, 571 F. Supp. 2d at 1368. (holding that since "many defendants [were] sued only in a minority of [the] actions" weighs against transfer to MDL).

Moreover, the paucity of new case filings against NCH in the last nine months further illustrates that inclusion of the *Becker* case in the proposed MDL is not warranted The lawyers for the moving Plaintiffs have only sued NCH in one other matter, the *Pete Lucio* case. In the *Lucio* case, commenced in May, 2012, no complaint has been filed and the case remains in Pennsylvania state court and is not counted among the Plaintiffs' Related Actions. With just one of the Related Actions naming NCH, and no new filing against NCH in any acetaminophen-related case since early 2012, there can be no argument that the mere prospect of future filings justifies including the sole case naming NCH in the proposed MDL.

3. Transfer is inconvenient for the Court and the Parties.

Plaintiffs argue that consolidation of the Related Actions will serve the convenience of both the parties and witnesses because "[d]iscovery from the McNeil Defendants in all of these Related Actions will involve substantially the same testimony, documentary evidence, and experts." *See* Plaintiffs' Memorandum, at p. 6. Plaintiffs further argue that consolidation will avoid the need for duplicative motion practice. *See* Plaintiffs' Memorandum, at p. 6. This argument falls short, however, when considered in light of the parties named in the *Becker* case. NCH and Perrigo are Defendants in only one of the Related Actions, the *Becker* case. It is neither convenient, nor reasonable, for NCH to be joined in a coordinated proceeding when it is a party in just a single case. NCH's inclusion as a Defendant in only one case does not warrant the devotion of time, effort and money necessarily involved in participating in an MDL proceeding. Similarly, it is not convenient for the Court to manage an MDL that includes an outlier case like *Becker*. Indeed, even if Plaintiffs can establish the existence of some common factual issues between *Becker* and the balance of the Related Actions, where a proposed transfer would neither serve convenience of parties and witnesses, nor promote just and efficient conduct of litigation,

transfer is improper. *See In re Brandywine Associates Antitrust & Mortg. Foreclosure Litig.* 407 F Supp 236 (J.P.M.L. 1976).

4. Alternatives to transfer are available to prevent duplicative discovery and/or inconsistent rulings.

While Plaintiffs may argue that excluding *Becker* from the proposed MDL will result in time expended on duplicative discovery or lead to inconsistent rulings, the parties (and the Court) can avail themselves of alternatives to a Section 1407 transfer in order to minimize whatever possibility there might be of duplicative discovery and/or inconsistent pretrial rulings. *See, e.g., In re Eli Lilly and Co. (Cephalexin Monohydrate) Patent Litig.* 446 F.Supp. 242, 244 (J.P.M.L. 1978); *see also In re USS Trenton Disaster Litig.* 383 F Supp 1406 (J.P.M.L. 1974) (possibility of duplicative discovery could easily be avoided through co-operative efforts among the parties); *see also In re Sigg Switz. (USA), Inc. Aluminum Bottles Mktg.* 682 F. Supp. 2d 1347, 1348 (J.P.M.L. 2010). For example, the depositions of McNeil witnesses in the MDL could be cross-noticed in the *Becker* case, avoiding the need for re-deposing McNeil witnesses. The use of this, and other measures, can easily prevent duplicative discovery without requiring NCH to participate in the additional activities associated with an MDL proceeding.

5. NCH's opposition weighs against transfer.

NCH, along with the other Defendants in the *Becker* case, oppose Plaintiffs' Motion for Transfer. The Panel has previously recognized that opposition to a transfer motion is a factor in the Panel's decision. *See In re Asbestos & Asbestos Insulation Material Products Liability Litig.* 431 F. Supp. 906 (J.P.M.L. 1977). Here, this factor weighs entirely against transfer.

IV. CONCLUSION

Plaintiffs have failed to demonstrate that transfer, and creation of the proposed MDL, is appropriate. Accordingly, Plaintiffs' Motion to Transfer should be denied. Alternatively, to the extent the Panel determines some of the Related Actions should be transferred to the proposed MDL, the *Becker* case should be severed from the Related Actions.

Respectfully submitted,

Dated: February 8, 2013

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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 JMPL's Notice of Electronic (NEF) filing shall constitute service of pleadings on registered counsel.

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Further, under Rule 4.1(a), counsel or parties who are identified by NEF as having no email address will be mailed hard copies via first-class United States mail.

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