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

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| IN RE 5-HOUR ENERGY® MARKETING AND SALES PRACTICES LITIGATION | MDL-_____ |

# MEMORANDUM IN SUPPORT OF MOTION OF INNOVATION VENTURES, LLC FOR TRANSFER OF ACTIONS TO THE CENTRAL DISTRICT OF CALIFORNIA PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

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Innovation Ventures, LLC ("Innovation Ventures") respectfully submits this memorandum to the Judicial Panel on Multidistrict Litigation (the "Panel") in support of its motion pursuant to 28 U.S.C. § 1407 for transfer of seven proposed class actions (along with any future "tag-along" actions) relating to the sale and marketing of 5-Hour Energy® to the United States District Court for the Central District of California and to consolidate those actions for pretrial proceedings with the two proposed class actions already pending in that district (collectively, the "5-Hour Energy® Cases").[1]

**PRELIMINARY STATEMENT**

All nine of the cases that are the subject of this motion concern the marketing and sale of the energy shot known as 5-Hour Energy® (the "Product"). In each case, the plaintiff alleges that Innovation Ventures promoted 5-Hour Energy® in an unlawful, unfair or deceptive fashion by misrepresenting the Product's effectiveness, and seeks to represent a proposed class of similarly situated individuals. Consolidation and transfer of related cases such as these is appropriate when actions involve "one or more common questions of fact" and when a transfer would serve "the convenience of parties and witnesses" and "promote the just and efficient conduct" of the cases involved. See 28 U.S.C. § 1407 (hereafter, "Section 1407").

Each of the nine complaints alleges similar factual allegations and each of them asserts nearly identical claims. They implicate common legal and factual issues that, absent consolidation, would entail substantial duplication of effort. For example, proceeding separately likely would require duplicative depositions of individuals

[1] A chart of all pending cases proposed for consolidation is attached to the motion as Schedule A. Copies of the docket sheets and complaints in those cases are attached as Exhibits A through I.

involved in creating the Product's advertising and packaging, require multiple district courts to render decisions on the same discovery issues, and require similar analyses of legal and factual questions concerning class certification and potentially dispositive pretrial motions. Those duplicative efforts would create inefficiency and waste judicial resources, and would also lead to a substantial risk of inconsistent results. The 5-Hour Energy® Cases easily satisfy the requirements for consolidation under Section 1407.

In addition, the Central District of California is the appropriate transferee forum for this litigation because two of the nine actions are already pending there (with no more than one such action pending in any other district), including the earliest-filed action by far, before the Honorable Philip S. Gutierrez. In the earliest-filed case, Judge Gutierrez already has ruled on a Rule 12(b)(6) motion to dismiss and discovery has begun (although no deposition has yet been taken). Furthermore, the median time from filing to disposition of civil cases in the Central District of California, and its accessibility, would make it an efficient and convenient forum for all parties.

Innovation Ventures respectfully requests that the Panel transfer all of the pending cases (and any future "tag-along" cases) to the Honorable Philip S. Gutierrez in the Central District of California. Judge Gutierrez is an experienced jurist, and he is familiar with the core facts giving rise to the actions because he already is supervising two of the cases, including the earliest filed case.

## BACKGROUND

Innovation Ventures manufactures and sells the leading "energy shot" sold in the United States—5-Hour Energy®. The Product contains a proprietary blend of B-vitamins, amino acids and caffeine. Plaintiffs in each of the 5-Hour Energy® Cases

contend that Innovation Ventures deceptively marketed the Product as superior to caffeine alone.

The first of these cases, styled Podobedov, et al. v. Living Essentials, LLC, Innovation Ventures, LLC, et al., was filed in the Central District of California on August 4, 2011, and is assigned to the Honorable Philip S. Gutierrez. The named plaintiffs in the Podobedov action seek recovery on behalf of a proposed class of "all persons in the United States who purchased a 5-Hour ENERGY® product," and on behalf of several proposed subclasses consisting of California, New York and "multi-pack" purchasers. (See Podobedov First Amended Compl. (Ex. A.) ¶¶ 95-105.) The operative complaint in the Podobedov action asserts claims for breach of warranty under state and federal law, and for alleged violations of California and New York consumer protection statutes arising from the "marketing, advertising and promotion of 5-Hour ENERGY®." (Id. ¶¶ 106-154.)

Innovation Ventures and its co-defendants in the Podobedov action filed a Rule 12(b)(6) motion to dismiss the original complaint, which Judge Gutierrez granted in part by order dated March 22, 2012. Although discovery has commenced in the Podobedov action, no depositions have been noticed or taken.

By contrast, the eight follow-on cases were filed between January 24, 2013 and February 14, 2013.[2] (See Exs. B through I.) As required by J.P.M.L. Rule 6.1(b)(ii), a chart enumerating these cases is submitted herewith as Schedule A. In these follow-on cases—as in the Podobedov action—each putative class plaintiff asserts claims for breach

[2] A second proposed class action, Soto v. Innovation Ventures, was filed in the Central District of California on January 28, 2013. (See Ex. D.)

of warranty and/or violations of various state consumer protection statutes and alleges "deceptive and misleading representations as to the Product's superior energy producing [*sic*] conveyed through its marketing and advertising campaigns."[3] (See generally id.) Five of the eight follow-on cases are nearly verbatim copies of one another.[4] One of the follow-on cases already has been reassigned to Judge Gutierrez, pursuant to the Local Rules of the Central District of California.

## ARGUMENT

### I. THE 5-HOUR ENERGY® CASES SHOULD BE TRANSFERRED FOR COORDINATED PRETRIAL PROCEEDINGS IN A SINGLE FORUM

Section 1407 provides that, "[w]hen 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." 28 U.S.C. § 1407(a). Transfers under Section 1407 "shall be made by the judicial panel on multidistrict litigation . . . upon its determination that [such a transfer] will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." Id.

Innovation Ventures respectfully submits that transfer and consolidation of the 5-Hour Energy® Cases (and any subsequent "tag-along" actions) in one forum, for all pretrial proceedings, squarely meets the criteria set forth in Section 1407. Among other

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[3] See Hermida v. Innovation Ventures (Ex. B) ¶ 45; Forrest v. Innovation Ventures (Ex. C) ¶ 46; Soto v. Innovation Ventures (Ex. D) ¶ 45; Waring v. Innovation Ventures (Ex. E) ¶ 46; Feiner v. Innovation Ventures (Ex. F) ¶ 32; Guarino v. Innovation Ventures (Ex. G) ¶ 20; Pettway v. Innovation Ventures (Ex. H) ¶¶ 16-17; and Berger v. Innovation Ventures (Ex. I) ¶ 46.

[4] Compare Hermida Compl. (Ex. B) ¶¶ 1-8, 15-57, & 61-68, with Soto Compl. (Ex. D) ¶¶ 1-8, 15-57, & 61-68, and Forrest Compl. (Ex. C) ¶¶ 1-8, 15-57, & 61-68, and Waring Compl. (Ex. E) ¶¶ 1-8, 15-57, & 61-68, and Berger Compl. (Ex. I) ¶¶ 1-8, 15-57, & 61-68.

things, consolidation and coordination of these cases will significantly advance the "just and efficient" conduct of the litigation and the "convenience of parties and witnesses." Id. Given that two of the actions—including the first-filed, most-advanced case—are pending in the Central District of California, that district is the best transferee forum for these proceedings.

### A. The 5-Hour Energy® Cases Allege Similar Factual Allegations and Claims For Relief

As the Multidistrict Litigation Panel has repeatedly recognized, consolidation is appropriate where multiple actions challenge the same marketing practices for a given consumer product. See, e.g., In re Glaceau Vitamin Water Mktg. and Sales Practices Litig., 764 F. Supp. 2d 1349, 1350-51 (J.P.M.L. 2011) (consolidating "actions [that] share factual questions arising out of allegations that defendants misrepresented their Vitamin Water product as a healthy alternative to soft drinks though it contains almost as much sugar"); In re Groupon, Inc. Mktg. and Sales Practices Litig., 787 F. Supp. 2d 1362, 1363 (J.P.M.L. 2011); In re Zicam Cold Remedy Mktg. and Sales Practices Litig., 655 F. Supp. 2d 1371, 1372-73 (J.P.M.L. 2009). The factual allegations of the nine cases brought against Innovation Ventures are substantially—and in of the five cases are *literally*—identical. Each of the complaints focuses on the marketing and promotion of 5-Hour Energy® and alleges that advertisements misled consumers concerning the Product's effectiveness.

The claims for relief alleged in each of the 5-Hour Energy® Cases are also facially similar.[5] All of the complaints purport to state claims for breach of warranty, violations of various state consumer protection statutes, and/or unjust enrichment.

The cases more than satisfy Section 1407 criteria for transfer. After all, "Section 1407 does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer." In re Glaceau Vitamin Water Mktg. and Sales Practices Litig., 764 F. Supp. 2d at 1351; see also In re Volkswagen and Audi Warranty Extension Litig., 452 F. Supp. 2d 1354, 1355-56 (J.P.M.L. 2006) (ordering consolidation of cases with "various state common law claims such as breach of contract and unjust enrichment, in addition to claims under state statutory law concerning consumer fraud and deceptive trade practices"). "Nor does [Section 1407] require an identity of common parties." In re Glaceau Vitamin Water Mktg. and Sales Practices Litig., 764 F. Supp. 2d at 1351. For these reasons, a "transferee judge has the broad discretion to design a

[5] See Hermida Compl. (Ex. B) ¶¶ 74-109 (alleging breach of express warranty, unjust enrichment, fraud, violation of the Florida Deceptive and Unfair Trade Practices Act, and injunctive relief); Forrest Compl. (Ex. C) ¶¶ 81-121 (alleging breach of express warranty, unjust enrichment, fraud, violation of the Missouri Merchandising Practices Act, and injunctive relief); Soto Compl. (Ex. D) ¶¶ 74-110 (alleging breach of express warranty, unjust enrichment, fraud, violation of the California Consumer Legal Remedies Act, violation of the California Unfair Business Practices Act, and injunctive relief); Waring Compl. (Ex. E) ¶¶ 74-103 (alleging breach of warranty, unjust enrichment, fraud, and injunctive relief); Feiner Compl. (Ex. F) ¶¶ 55-79 (alleging violation of the Florida Deceptive and Unfair Trade Practices Act, and unjust enrichment); Guarino Compl. (Ex. G) ¶¶ 30-73 (alleging breach of warranty, violation of the Magnuson-Moss Warranty Act, violation of the Illinois Unfair Practices Act, and unjust enrichment); Pettway Compl. (Ex. H) ¶¶ 27-53 (alleging breach of warranty, violation of the Alabama Deceptive Trade Practices Act, and unjust enrichment); Berger Compl. (Ex. I) ¶¶ 96-121 (alleging breach of express warranty, unjust enrichment, fraud, and injunctive relief); and Podobedov Compl. (Ex. A) ¶¶ 106-154 (alleging breach of warranty, violation of the Magnuson-Moss Warranty Act, violation of the California Consumer Legal Remedies Act, violation of the California Unfair Business Practices Act, violation of the California False Advertising Law, and violation of the New York Deceptive Trade Practices Act).

pretrial program that will allow discovery on any issues in particular actions to proceed concurrently with discovery on common issues." In re General Motors Corp. Engine Interchange Litig., 441 F. Supp. 933, 935 (J.P.M.L. 1977).

Because the same conduct is alleged in every one of the nine cases before the Panel, the actions present "common questions of fact" that satisfy the requirements for transfer and consolidation under Section 1407.

**B. Transfer Will Conserve Time and Effort of the Parties, the Witnesses and the Judiciary, and Prevent Inconsistent Results**

The Panel has repeatedly recognized the significant efficiencies that can be gained from consolidating marketing and sales practices litigation of the kind filed against Innovation Ventures. See, e.g., In re Groupon, Inc. Mktg. and Sales Practices Litig., 787 F. Supp. 2d at 1363-64; In re Frito-Lay "All Natural" Litig., MDL Nos. 2413& 2414, 2012 WL 6554657, at *1 (J.P.M.L. Dec. 12, 2012). Consolidating the nine actions, and any subsequent "tag-along" actions, would be efficient for the parties, the witnesses and the judiciary.

First, consolidation would significantly streamline discovery. As the Seventh Circuit has observed, "[a] principal purpose of § 1407 is to allow one judge to take control of complex proceedings, the better to avoid unnecessary duplication in discovery." Matter of Orthopedic Bone Screw Prods. Liab. Litig., 79 F.3d 46, 48 (7th Cir. 1996). Here, each of the plaintiffs is likely to seek documents from, and depositions of, the individuals involved in the marketing of the Product, as well as those individuals knowledgeable about the Product's "effectiveness." Absent consolidation of these actions, the witnesses likely would be subjected to multiple sets of document requests and burdensome, duplicative depositions. Similarly, consolidation would avoid duplication

of expensive expert discovery concerning the 5-Hour Energy® Product, such as repetitive Rule 26(a)(2) expert reports and expert depositions. All of these tasks would be conducted more efficiently and at less expense if the actions were consolidated for pretrial purposes.

Second, consolidation is important here to avoid duplicative motion practice and inconsistent pretrial rulings, including rulings on class certification and dispositive motions. See In re Higher One OneAccount Mktg. and Sales Litig., MDL No. 2407, 2012 WL 6554438, at *1 (J.P.M.L. Dec. 11, 2012). To be sure, absent transfer and consolidation of these cases, each court would face the same or similar motions on essentially the same issues, constituting a wasteful and unnecessary duplication of effort. Consolidation and transfer would alleviate these concerns and achieve all of the efficiencies intended by Section 1407. See In re Zicam Cold Remedy Mktg. and Sales Practices Litig., 655 F. Supp. 2d at 1373 ("Centralization of all actions . . . will allow a single judge to structure pretrial proceedings to accommodate all parties' legitimate discovery needs while ensuring that the common parties and witnesses are not subjected to . . . demands that duplicate activity. . ."). 

Further, transfer "is appropriate, if not necessary, where the possibility of inconsistent class determinations exists." In re Sugar Indus. Antitrust Litig., 395 F. Supp. 1271, 1273 (J.P.M.L. 1975); see also In re Zicam Cold Remedy Mktg. and Sales Practices Litig., 655 F. Supp. 2d at 1372 ("Centralization under Section 1407 will . . . prevent inconsistent pretrial rulings (particularly with respect to class certification), and conserve the resources of the parties"). Of the nine actions against Innovation Ventures, seven of them are brought on behalf of proposed nationwide and (one or more) proposed

statewide classes, two on behalf of a proposed Florida class, and two on behalf of a proposed California class. The proposed statewide classes not only overlap with one another, but their members are within the definitions of the proposed nationwide classes asserted in other actions. Contradictory class certification decisions could subject proposed class members, as well as Innovation Ventures, to inconsistent rights and obligations and would waste judicial and party resources.

Third, because the parties may seek discovery of substantial amounts of proprietary or confidential information, the parties' interests would be served by a uniform protective order, with a single court presiding over any disputes arising under that order.

All of these efficiencies, among others, would be achieved by consolidation of the 5-Hour Energy® Cases (and any tag-along actions) in a single court.

## II. THE CENTRAL DISTRICT OF CALIFORNIA IS THE MOST APPROPRIATE TRANSFEREE FORUM

Innovation Ventures respectfully submits that, should these actions be transferred to a single forum, the Central District of California, where two actions are currently pending (the Podobedov and Soto actions), is the most appropriate forum.

An important factor in selecting a transferee district is the relative advancement of the various cases. See In re Groupon, Inc. Mktg. and Sales Practices Litig., 787 F. Supp. 2d at 1364 ("where the first-filed action is pending, stands out as an appropriate transferee forum"); see also In re Mattel, Inc. Toy Lead Paint Prods. Liab. Litig., 528 F. Supp. 2d 1367, 1369 (J.P.M.L. 2007) (same). As already noted, Podobedov was the first-filed of the nine currently pending actions, and the other complaints appear to have been modeled on it. A motion to dismiss has been considered and ruled upon in Podobedov

and discovery is proceeding. It is, by far, the most advanced of the 5-Hour Energy® Cases.

In addition, the Panel gives significant weight to the presence of multiple actions pending in a single potential transferee district. See, e.g., In re Tyson Foods, Inc. Chicken Raised Without Antibiotics Consumer Litig., 582 F. Supp. 2d 1378, 1379 (J.P.M.L. 2008) ("We are persuaded that the District of Maryland is an appropriate transferee district for pretrial proceedings in this litigation, in part because two of the nine actions are already pending there . . ."). Here, two of the nine actions are already pending in the Central District of California, with no more than one pending in any other district. Furthermore, both of those actions are already pending before the same judge, the Honorable Philip S. Gutierrez.

Another factor that the Panel may consider that supports the Central District of California as the transferee forum is the relative congestion of a potential transferee district's docket. See In re Air Crash Disaster, 407 F. Supp. 244, 246 (J.P.M.L. 1976). According to the Federal Court Management Statistics though September 2012, the median time from filing to disposition for civil cases in the Central District of California is five months—the second "fastest" docket among the district courts where the 5-Hour Energy® Cases are pending.[6] See Fed. Court Mgmt. Statistics (Sept. 2012), available at www.uscourts.gov/Statistics/FederalCourtManagementStatistics/district-courts-september-2012.aspx (last visited Feb. 12, 2013).[7]

[6] Most recent data show the Central District of Florida docket to be "faster" by 0.2 months over the life of a case—an infinitesimal difference.

[7] Over the same period, the other seven district courts had the following median times from filing to disposition: Eastern District of Louisiana: 11.4 months; Southern District

Finally, the Los Angeles International Airport is served by all major airlines, experiences few weather-related delays, and is located within close proximity of the federal courthouse.[8]

## III. THE HONORABLE PHILIP S. GUTIERREZ IS THE MOST APPROPRIATE TRANSFEREE JUDGE

Innovation Ventures respectfully submits that, should the follow-on actions be transferred to the Central District of California, Judge Gutierrez is the most appropriate transferee judge.

In selecting a transferee judge, the Panel routinely considers multidistrict litigation experience and familiarity with the facts of the case. See, e.g., In re Groupon, Inc. Mktg. and Sales Practices Litig., 787 F. Supp. 2d at 1364 ("we are selecting a jurist experienced in multidistrict litigation"); In re Tyson Foods, Inc. Chicken Raised Without Antibiotics Consumer Litig., 582 F. Supp. 2d at 1379 (selecting a transferee judge, in part, because he has "already developed a significant familiarity with the facts underlying the litigation"). Judge Gutierrez is an excellent jurist who has successfully overseen thirteen multidistrict litigations.[9] Equally as important, Judge Gutierrez is familiar with the core facts at issue in the actions, as he has supervised the earliest filed case for about a year.

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of Illinois: 10.5; Eastern District of Ohio: 8.3 months; Eastern District of Missouri: 7.9 months; Northern District of Alabama: 7.4; Southern District of Florida: 5.8 months; Central District of Florida: 5.0 months.

[8] See http://www.lawa.org/welcome_lax.aspx?id=32 (last visited Feb. 13, 2013).

[9] See J.P.M.L. MDL Statistics Report - Distribution of Pending MDL Dockets (Sept. 2012), available at http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets-By-District-September-2012.pdf (last visited Feb. 12, 2013).

## CONCLUSION

For the foregoing reasons, Innovation Ventures respectfully requests that this Panel assume jurisdiction over the currently pending 5-Hour Energy® Cases and enter an order transferring them, as well as any future "tag-along" actions, to the Central District of California, before the Honorable Philip S. Gutierrez, for consolidated pretrial proceedings.

DATED: February 15, 2013 CRONE HAWXHURST LLP

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