

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

**IN RE: JOHNSON & JOHNSON
PRODUCTS MARKETING AND
SALES PRACTICES
LITIGATION**

MDL No.

**PLAINTIFF SMITH'S MEMORANDUM IN SUPPORT OF MOTION FOR TRANSFER
AND CONSOLIDATION OF RELATED ACTIONS TO THE NORTHERN DISTRICT
OF FLORIDA PURSUANT TO 28. U.S.C. § 1407**

TABLE OF CONTENTS

I. INTRODUCTION..... 3

II. STATEMENT OF FACTS..... 3

III. SUMMARY OF ARGUMENT 3

IV. ARGUMENT 4

 A. Coordination Pursuant to 28 U.S.C. § 1407 is Appropriate Because the Pending
 Actions Involve Common Questions of Fact 5

 B. Consolidation and Coordination Serves Judicial Economy, Efficiency of Pretrial
 Proceedings in the Actions, and Serves The Convenience Of Parties And
 Witnesses..... 6

 C. The United States District Court for the Northern District of Florida is an
 appropriate forum for coordination and consolidation..... 8

V. CONCLUSION.....9

I. INTRODUCTION

Pursuant to 28 U.S.C. § 1407 and Rule 7.2 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation (“Panel”), Plaintiffs, Ashley Smith and Noeh Smith, individually and on behalf of all others similarly situated (hereinafter “Smith” or “Plaintiff”), plaintiffs in *Smith, et al., v. Johnson & Johnson Consumer Companies, Inc.*, Case No. 4:14-cv-00223-RH-CAS (N.D. Fla.) (filed May 5, 2014) submits this Memorandum of Law in Support of its Motion for Transfer and Consolidation of Related Cases to the Northern District of Florida pursuant to 28 U.S.C. § 1407. For the reasons set forth below, *Smith* respectfully requests that the Panel enter an Order transferring all related cases to the Northern District of Florida for coordinated or consolidated proceedings.

II. STATEMENT OF FACTS

To date, two other substantially similar actions (collectively, the “Related Actions”) have been filed in three different federal districts, in addition to the *Smith* action. Including *Smith*, the Related Actions filed thus far include:

1. *Goldemberg v. Johnson & Johnson Consumer Companies, Inc.*, Case No. 7:13-cv-03073-NSR (S.D. NY)
2. *Langan v. Johnson & Johnson Consumer Companies, Inc.*, Case No. 3:13-cv-01471-RNC (D. Conn.)
3. *Smith et al. v. Johnson & Johnson, Consumer Companies, Inc.*, Case No. 4:14-cv-00223-RH-CAS (N.D. Fla.).

The three docket sheets and complaints are attached as Exhibits 1, 2 and 3, and are listed on the accompanying Schedule of Actions.

III. SUMMARY OF ARGUMENT

The Related Actions allege that the same defendant, Johnson & Johnson Consumer Companies, Inc., advertise and market their Aveeno products through the use of intentional false statements and omissions violating both federal law and state consumer protection laws. The

Related Actions further allege that the Defendant's conduct renders their Aveeno products legally misbranded and illegal to manufacture, distribute, or sell to consumers. All of the complaints in the Related Actions allege violations consumer protection laws.

Specifically, all of the Related Actions allege violations of consumer protection laws governing the advertising, marketing and labeling of Defendant's products. The actions subject to this transfer motion raise common issues of law and fact regarding the false labeling of Defendant's Aveeno products. Transfer and consolidation or coordination of these actions, and any other subsequently-filed related cases, to the designated transferee district would serve the convenience of the parties and witnesses and promote the just and efficient prosecution of these actions.

IV. ARGUMENT

Defendant sells several types of personal care products under the Aveeno brand that are widely consumed by both children and adults. Each variety of Aveeno is sold with a label on the front of the products that prominently states "Active Naturals." Additionally, the Aveeno brand is marketed on multiple mediums using numerous slogans and representations to induce the purchaser into believing that Aveeno products are natural. Despite knowing that synthetic ingredients are not natural and that Aveeno products contain synthetic ingredients, Defendant is engaging in widespread marketing and advertising campaigns to portray Aveeno products as "Active Naturals" or to otherwise represent that the Aveeno products are natural. Defendant's representations that Aveeno products are natural are false because products containing synthetic ingredients are unnatural by definition. Reasonable consumers, such as *Smith*, believe that Defendant's Aveeno products do not contain harmful, synthetic, unnatural ingredients; when in fact the Aveeno products do contain those ingredients. Thus, Defendant makes false, misleading,

and deceptive representations and omissions of Aveeno products to specifically earn greater profits because consumers are willing to pay a premium for natural products compared to products that are not natural.

A. Coordination Pursuant to 28 U.S.C. § 1407 is Appropriate Because the Pending Actions Involve Common Questions of Fact

Section 1407(a) authorizes the transfer of civil actions in different federal district courts involving common questions of fact to a single federal district court for coordinated or consolidated pretrial proceedings. The purpose of such transfers is to serve the convenience of the parties and witnesses and to promote just and efficient litigation. 28 U.S.C. § 1407. Section 1407(a) provides in relevant part:

When 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. Such transfers shall be made by the Judicial Panel on Multidistrict Litigation authorized by this Section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

As a general rule, common questions are presumed “when two or more complaints assert comparable allegations against identical defendants based on similar transactions and events.” *In re Air West, Inc. Securities Litig.*, 506 F. Supp. 609, 611 (J.P.M.L. 1974); *see also In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 654-55 (J.P.M.L. 1981).

Additionally, the presence of individualized factual issues in the pending cases are not barriers to transfer and consolidation under Section 1407 as it “does not require a complete identity or even a majority of common factual issues as a prerequisite to centralization.” *In re: Zimmer Durom Hip Cup Prods. Liab. Litig.*, 717 F. Supp. 2d 1376, 1378 (J.P.M.L. 2010); *see also In re: North Sea Bent Crude Oil Futures Litig.*, 2013 WL 5701579 (J.P.M.L. 2013) (quoting *In re: Park West Galleries, Inc., Litig.*, 887 F.Supp.2d 1385, 1385 (J.P.M.L. 2012)).

The actions proposed for transfer and coordination or consolidation allege essentially the same unlawful, false and deceptive advertising of product's labels relating to Defendant's Aveeno products. The actions proposed for transfer allege the same Defendant to have committed the false labeling during the same period of time and based on the same underlying facts. The Related Actions are therefore appropriate for a § 1407 transfer. The only deviation of similarity between the Related Actions is the purported class each action seeks to certify, whether a statewide class or national class.

All of the Defendant's alleged conduct involve several common questions of fact and law including, but not limited to: (1) Whether Defendant labeled, marketed, advertised, and/or sold the Products to Plaintiffs and those similarly situated using false, misleading, and/or deceptive statements or representations, including statements or representations concerning the ingredients of the Products; (2) Whether Defendant omitted and/or misrepresented material facts in connection with the sales of the Products; (3) Whether Defendant participated in and pursued the common course of conduct complained of herein; and (4) Whether Defendant's labeling, marketing, advertising, and/or selling of the Products with the representation "Active Naturals" herein constitutes a deceptive consumer sales practice. Lastly, it is anticipated that several additional actions from other districts will be forthcoming relatively soon.

B. Consolidation and Coordination Serves Judicial Economy, Efficiency of Pretrial Proceedings in the Actions, and Serves The Convenience Of Parties And Witnesses

An important factor in selecting the transferee court is the location and convenience of the parties, witnesses and documents. *In re Continental Corp. Sec. Litig.*, 130 F.R.D. 475, 476 (J.P.M.L. 1990); *In re Cuisinart Food Processor Antitrust Litig.*, 506 F.Supp. 651, 654-55

(J.P.M.L. 1981). Coordination of these actions would spare the parties the significant time and expense associated with traveling for hearings and depositions in multiple jurisdictions and preparing filings and discovery for numerous separate proceedings. *Polychloroprene Rubber Antitrust Litig.*, 360 F. Supp. 2d 1348, 1351 (J.P.M.L. 2005) (coordination is necessary to conserve the parties' resources). Transfer and coordination is also necessary to avoid duplication of both the courts' and the parties' efforts. *In re: Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981). Litigating these actions separately would give rise to duplicative discovery, briefing, and hearings, forcing the parties in each case to independently proceed through portions of the case they could otherwise proceed through collectively and forcing multiple courts to handle proceedings that could be handled by one court. Discovery with respect to the Related Actions will involve the same oral testimony and documentary evidence relating to the same alleged conduct. Accordingly, the coordination or consolidation of these Related Actions would avoid duplicative, redundant and costly discovery proceedings, including repetitive motion practice and potentially conflicting discovery and other pretrial rulings. *See in re Amino Acid Lysine Antitrust Litig.*, 910 F. Supp. 696, 698 (J.P.M.L. 1995). *See also In re Multi-Piece Rim Prod. Liab. Litig.*, 464 F. Supp. 969, 974 (J.P.M.L. 1978).

Given the similarity of the issues raised in the pending actions and the varying procedural dispositions of the actions, the possibility of overlapping and inconsistent pleading determinations is likely if the actions are not centralized for coordinated pretrial proceedings. Judicial coordination of the attendant discovery and review of pretrial proceedings will streamline the actions' course, promoting the most efficient use of resources for the parties and the federal bench. Centralization of these actions will ease the burden on the individual parties, their attorneys, and presiding judges by distributing the workload into a more manageable,

structured proceeding. Transfer of the above-referenced actions to Florida serves the convenience of parties and witnesses because the proposed transferee court is a geographically central location for those cases currently pending and is the site for a case already pending. Lastly, Florida is the state of residency for several of the plaintiffs and/or alleged events that lead to individual cases. It is anticipated that several additional plaintiffs from Florida and various other districts will be joining this action.

C. The United States District Court for the Northern District of Florida is an appropriate forum for coordination and consolidation

The JPML previously has recognized the Northern District of Florida as a proper transferee court. *See In re Progressive Corp. Ins. Underwriting & Rating Practices Litig.*, 259 F. Supp. 2d 1370, 1371 (J.P.M.L. 2003); *In re Nicaraguan Contra/Narcotics Trafficking Litig.*, 2000 U.S. Dist. LEXIS 1564, at *3-4 (J.P.M.L. Feb. 16, 2000); *In re Commercial Tissue Prods. Antitrust Litig.*, 1997 U.S. Dist. LEXIS 16060, at *3-4 (J.P.M.L. Oct. 15, 1997); *In re Fairchild Industries, Inc.*, 1989 U.S. Dist. LEXIS 15513, at *2 (J.P.M.L. Dec. 5, 1989). The Honorable Robert L. Hinkle, who has been assigned the *Smith* case, is an accomplished jurist with the skill and experience to guide these actions in a just and efficient manner. Judge Hinkle has been on the federal bench since 1996 and served as Chief Judge for the Northern District of Florida from 2004-2009.¹

Furthermore, the Northern District of Florida's caseload, another important factor in the selection of a transferee court, supports a transfer to that district. *See In re Silica Prods. Liab. Litig.*, 280 F. Supp. 2d 1381, 1383 (J.P.M.L. 2003); *In re: Classicstar Mare Lease Litig.*, 528 F. Supp. 2d at 1347 ("district's general docket conditions permit us to make the *Section 1407* assignment knowing that the court has the resources available to manage this litigation"). The

¹ See <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx>.

Northern District of Florida has more capacity to preside over an MDL at this time than the District of New York. For example, there were 9,562 civil cases commenced in the Southern District of New York in 2013, and 13,377 civil cases pending in 2013.² In contrast, the Northern District of Florida had 1,953 civil case filings in 2013, and 1,623 civil cases pending in 2013.

The Northern District of Florida also is the best transferee court because plaintiffs in *Smith*, are represented by counsel located in the Northern District of Florida. *See In re Baldwin-United Corp. Litig.*, 581 F. Supp. at 741 (location of plaintiffs' counsel is important factor). The Northern District of Florida is a convenient forum for litigation because it is located in a major metropolitan center, Tallahassee, which is well served by major airlines, provides ample hotel and office accommodations, and offers a well-developed support system for legal services.

Defendant's likely argument for transfer to the District of New York will be unavailing. Defendants will argue that most of the documents and witnesses are located in the District of New Jersey or New York. However, "[s]ince a *Section 1407* transfer is for pretrial proceedings only, there is usually no need for the parties and witnesses to travel to the transferee district for depositions or otherwise." *In re Baldwin-United Corp. Litig.*, 581 F. Supp. 739, 740 (J.P.M.L. 1984). In addition, even if some documents are located in New Jersey, that factor should be given little weight since most document productions today are electronic and thus parties rarely need to travel to where documents are located.

III. CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that the Panel centralize the actions set forth in the Schedule of Actions filed herewith, as well as any tag-along actions or other cases, such as may be subsequently filed in, or removed to, federal court asserting related

² *See* United States Administrative Office of the Courts, Federal Judicial Caseload Statistics, Table C of at 1, available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx>.

or similar claims, in the United States District Court for the Northern District of Florida before the Honorable Robert L. Hinkle pursuant to 28 U.S.C. § 1407.

Dated: June 19, 2014

Respectfully submitted,

/s/ Tim Howard

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