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

**In re: Nutek Baby Wipes Litigation** **MDL-_____**

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR TRANSFER OF ACTIONS TO THE EASTERN DISTRICT OF NEW YORK AND FOR COORDINATION AND CONSOLIDATION OF ALL PRETRIAL PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407**

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## I. INTRODUCTION

On October 10, 2014, Nutek Disposables, Inc. ("Nutek") issued a voluntary recall of baby wipes it manufactured because of potential contamination with the bacteria *Burkholderia cepacia ("B. cepacia").* Nutek took this action as a precautionary measure after two complaints of odor and discoloration led it to test the wipes, thereby discovering contamination in some lots. Both Nutek and the Food and Drug Administration notified consumers that *B. cepacia* poses little medical risk to healthy people. However, individuals with certain health problems, particularly a weakened immune systems or chronic lung diseases may be more susceptible to infections.

In the month since the recall was announced, First Quality Enterprises, Inc. (hereinafter "FQE"), First Quality Consumer Products, LLC (hereinafter "FQCP"), Nutek and/or certain of their customers have been named as defendants in seven separate federal putative class action lawsuits for injuries allegedly arising from the plaintiffs' purchase and/or use of the contaminated baby wipes. In addition, a number of additional state court cases have been filed.[1] The cases have been filed in courts across the country and in varying contexts, but the basic allegations have remained constant: that Defendants designed, manufactured and sold contaminated baby wipes and Plaintiffs have suffered some type of injury as a result.

The Scheduled Actions listed below, all of which are putative class actions, present a classic case for coordination or consolidation for pretrial proceedings – namely, multiple claims pending throughout the country arising from the exact same alleged actions against one or more common defendants that allege the virtually identical legal violation.

[1] Some of these cases appear on their face to be removable because there is complete diversity between the parties. It is anticipated that those cases will be removed to federal court as soon as service has been effectuated.

Transfer of the Scheduled Actions will reduce the burden on the federal courts by eliminating what would otherwise be duplicative work and rulings. Transfer will also lessen the strain on the parties, counsel, and witnesses, many of whom otherwise would face substantial inconvenience in separately pursuing or defending these actions. Without centralization, Defendants are likely to confront duplicative discovery, substantially overlapping national classes, and inconsistent pretrial rulings – the very problems Section 1407 was designed to avoid.

Transfer to the Eastern District of New York will best promote the just and efficient resolution of the Scheduled Actions. The Eastern District of New York is easily accessible by the parties in all of the Scheduled Actions. New York is the principle place of business of defendant FQE and the location of the office of the individual responsible for spearheading the investigation into the root cause of the alleged contamination. Of the district courts in which a Scheduled Action is currently pending, the Eastern District of New York is closest to the Nutek factory (in McElhatten, Pennsylvania) in which the allegedly contaminated wipes were manufactured and therefore closest to the individuals most likely to be common witnesses in every case and the bulk of the documents that will be the subject of discovery.

Honorable Leonard D. Wexler, Judge for the United States District Court, is assigned to *Antonette Jones v. Wal-Mart Stores, Inc.; Nutek Disposables, Inc.; and First Quality Enterprises, Inc*., Case No. 2:14-cv-06305--LDW-ARL (E.D.N.Y). Judge Wexler or his colleagues in the Eastern District of New York appear well suited to handle the instant product liability litigation.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The Scheduled Actions all arise from Plaintiffs' alleged purchase and use of baby wipes allegedly contaminated with *B. cepacia*. Their specific allegations and claims are summarized below.

*1. Sam Lopez v. Wal-Mart Stores, Inc., Nutek Disposables, Inc. and First Quality Enterprises, Inc., and DOES 1-100,* Case No. 3:14-cv-04669-MMC. This is a putative class action filed on October 20, 2014 in the Northern District of California. The named plaintiff, Sam Lopez, is a California resident who alleges that between June 30, 2014 and October 10, 2014 he purchased "Simply Right" baby wipes at a "Sam's Club" store owned by Wal-Mart Stores, Inc. *Lopez.* Compl. ¶10. On October 10, 2014, Sam's Club members allegedly were sent an email alert that stated: "Our supplier, Nutek Disposables, Inc., has advised us that some Simply Right branded baby wipes offered for sale at Sam's Clubs beginning June 30th of this year may be contaminated with B. cepacia bacteria. According to the Centers for Disease Control, this bacteria "poses little medical risk to healthy people. However, people who have certain health problems like weakened immune systems or chronic lung diseases, particularly cystic fibrosis may be more susceptible to infections with B. cepacia. . . . Any consumer who purchased affected product should discontinue further use and promptly return any remaining product to Sam's Club for a full refund." *Id.* at ¶ 2.

Plaintiff alleges that Nutek designed, manufactured, distributed and sold the contaminated baby wipes. *Id.* at ¶13. He further alleges (wrongly) that First Quality is the parent company and owner of Nutek. *Id.*. at ¶14. He does not allege that he or any member of his family actually suffered any adverse health effects from exposure to the wipes.

Plaintiff proposes the following putative class:

> All individuals in the State of California who purchased a Product from Defendant Wal-Mart Stores, Inc.'s Sam's Club retail locations beginning on June 30, 2014 through October 10, 2014.

*Id.* at ¶ 17.

Plaintiff seeks actual and compensatory damages, restitution, attorneys' fees and costs, among other things. His complaint includes claims for breach of California's

consumer warranty act and its consumer protection statutes. The case is currently pending before the Honorable Maxine M. Chesney. None of the defendants have filed their initial pleading in this action and there has been no discovery.

2. *Rochelle Endres v. Wal-Mart Stores, Inc.; Nutek Disposables, Inc.; and First Quality Enterprises, Inc.*, Case No. 3:14-cv-01149. This is a putative class action, filed on October 24, 2014 in the Southern District of Illinois. Plaintiff Rochelle Endres, a resident of Alabama, claims that she purchased baby wipes from a "Sam's Club" retail location in Alabama between June 30, 2014 and October 10, 2014. *Endres Compl.* ¶¶5-6. She further alleges that in September 2014, she became ill with symptoms consistent with the risks outlined in the recall notice. *Id.* at ¶2.

As with *Lopez,* Plaintiff alleges that Sam's Club sent out a recall notice that she received in October 2014. The content of that notice as alleged is identical to the *Lopez* complaint. *Id.* at ¶4.

Plaintiff proposes the following putative class:

> All residents of the United States who purchased a Simply Right recalled baby wipe Product at a Wal-Mart Sam's Club retail location in the United States from June 30, 2014 to October 10, 2014.

*Id*. at ¶ 16.

Plaintiff asserts claims for breach of express and implied warranties, violation of the Magnuson Moss Warranty Act and of state consumer protection laws, fraud, unjust enrichment, and declaratory relief. She seeks compensatory, consequential and statutory damages, punitive damages, attorneys' fees and costs, and injunctive relief. The case is currently pending before the Honorable Judge David R. Herndon. None of the defendants have filed their initial pleading in this action and there has been no discovery.

3. *Antonette Jones v. Wal-Mart Stores, Inc.; Nutek Disposables, Inc.; and First Quality Enterprises, Inc.*, Case No. 2:14-cv-06305. This putative class action was filed on October 27, 2014 in the Eastern District of New York. The named Plaintiff,

Antoinette Jones, is a California resident who alleges that she purchased baby wipes from a "Sam's Club" retail location in California between June 30, 2014 and October 10, 2014. *Jones* Compl. ¶¶7-8. She further alleges that she became ill in July 2014 with an illness that is "consistent with the risks outlined in the recall" (*Id.* at ¶9) and with warnings and health bulletins published by the Centers for Disease Control.

As with *Lopez*, Plaintiff alleges that Sam's Club recalled the wipes on October 10, 2014 and sent out a recall notice that she received that same month. The content of that notice as alleged is identical to the Lopez and *Endres* complaints. *Id.* at ¶6.

Plaintiff proposes the following putative class:

> All residents of the United States who purchased a Simply Right recalled baby wipe Product at a Wal-Mart Sam's Club retail location in the United States from June 30, 2014 to October 25, 2014.

*Id*. at ¶16.

Plaintiff asserts claims of breach of express warranty, breach of implied warranties, violation of the Magnuson Moss Warranty Act, violation of state consumer protection laws, fraud, unjust enrichment, and declaratory relief. She seeks compensatory, consequential and statutory damages, punitive damages, attorneys' fees and costs, and injunctive relief. The case is currently pending before the Honorable Leonard D. Wexler. None of the defendants have filed their initial pleading in this action and there has been no discovery.

4. *Katherine Melford v. Nutek Disposables, Inc.; and First Quality Consumer Products, LLC,* Case No 1:14-cv-08779. This putative class action was filed on November 4, 2014 in the Northern District of Illinois. The named Plaintiff, Katherine Melford, is an Illinois resident who alleges that she purchased baby wipes from a "Sam's Club" retail location in Illinois. *Melford* Compl. ¶11. She further alleges that her child

became ill with "inflammation and a rash" that is consistent with the illness described by the recall – although the recall as cited did not describe any such symptoms. *Ibid*

Plaintiff alleges that Sam's Club recalled the wipes on October 10, 2014 and sent out a recall notice that she received via email October 11, 2014. The content of that notice as alleged is identical to the *Lopez*, *Endres* and *Jones* complaints. Id. at ¶20.

Plaintiff proposes the following putative class:

> **National Class**: All persons in the United States that purchased the product from June 30, 2014 to the present.
>
> **Consumer Fraud Multi-State Class:** All persons in the States of California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington that purchased the Products at any time from June 30, 2014, to the present.
>
> **Illinois Subclass:** All persons in the State of Illinois that purchased the Product at any time from June 30, 2014 to the present.

*Id.* at ¶ 31.

Plaintiff alleges violations of state consumer fraud laws, violation of the Illinois Consumer Fraud Act, violation of express and implied warranties, and unjust enrichment. She seeks compensatory and actual damages, including restitution and disgorgement of Defendants' revenues to Plaintiff and other Class members, injunctive relief, statutory damages, and attorneys' fees and costs. The case is currently pending before the Honorable Sharon Johnson Coleman. Plaintiff has filed a motion for class certification but the court has not set a briefing schedule. There has been no discovery and none of the Defendants have filed their initial pleading.

5. *Toni Scott v. Walgreen Co., and Nutek Disposables, Inc.,* Case No 1:14-cv-09033. This putative class action was filed on November 11, 2014 in the Northern District of Illinois. The named plaintiff, Toni Scott, is an Illinois resident who alleges that she purchased baby wipes from a Walgreen's location in Chicago, Illinois. *Scott*

Compl. ¶11. She does not allege that she or any member of her family became ill from exposure to the bacteria.

Plaintiff proposes the following putative class:

> **National Class**: All persons in the United States that purchased the Product [defined as "Well Beginnings" baby wipes] at any time prior to October 21, 2014.
>
> **Consumer Fraud Multi-State Class**: All persons in the States of California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington that purchased the Products at any time prior to October 21, 2014.
>
> **Illinois Subclass**: All persons in the State of Illinois that purchased the Product at any time prior to October 21, 2014.

Id. at ¶ 31.

Plaintiff does not claim that she was placed on notice by the retailer of the product she purchased. However, she does cite a statement from the FDA dated October 25, 2014 which notified consumers that Nutek had issued a safety alert due to potential bacteria in its baby wipes and had voluntarily withdrawn the product from the market. As with the "Sam's Club" recall notice cited in the other complaints, the FDA alert advised consumers that "*B. cepacia* poses little medical risk to healthy people. However, people who have certain health problems, like weakened immune systems or chronic lung diseases, particularly cystic fibrosis, may be more susceptible to infections with *B. cepacia*." *Id.* at ¶19.

Plaintiff alleges violations of state consumer fraud laws, violation of the Illinois Consumer Fraud Act, violation of express and implied warranties, and unjust enrichment. She seeks compensatory and actual damages, including restitution and disgorgement of Defendants' revenues to Plaintiff and other Class members, injunctive relief, statutory damages, and attorneys' fees and costs. The case is currently pending before the Honorable Charles R. Norgle, Sr. Plaintiff has filed a motion for class certification but

the court has not set a briefing schedule. None of the defendants have filed their initial pleading in this action and there has been no discovery.

6. *Kristin Travis, individually and as parent, guardian and next friend of K.W. a minor*[2] *v. Nutek Disposables, Inc.; First Quality Enterprises, Inc.; and Family Dollar Stores, Inc.,* Case No 1:14-cv-09094. This putative class action was filed on November 12, 2014 in the Northern District of Illinois. The named plaintiff, Kristin Travis, is an Illinois resident who alleges that she purchased baby wipes from a Family Dollar Stores retail store in Illinois. *Travis* Compl. ¶¶12, 17. Plaintiff does not claim that she was placed on notice by the retailer of the product she purchased. However, she does cite a Press Release issued by Nutek on October 25, 2014, which notified consumers that Nutek had voluntarily withdrawn the product from the market. The release advised consumers that "*B. cepacia* poses little medical risk to healthy people. However, people who have certain health problems, like weakened immune systems or chronic lung diseases, particularly cystic fibrosis, may be more susceptible to infections with *B. cepacia*." *Id.* at ¶2.

Plaintiff further alleges that after use of those wipes her daughter, K.W. became ill due to a bacterial infection consistent with the type of illness described by Nutek in the October 25, 2014 recall notice (which range from rash and irritation to infections, fever, gastro-intestinal issues, and respiratory issues, all of which are clearly common in the general population).

Plaintiff proposes the following putative class:

> **National Class**: All persons in the United States who suffered economic or financial damages as a result of purchase or use of the Products.
>
> **Personal Injury Class:** All individuals who suffered personal injuries and resulting damages as a result of the use of the Products.

[2] Defendants are using the minor's initials in place of her full name and have redacted her name from the Complaint in compliance with Rule 5.2 of the Federal Rules of Civil Procedure.

Id. at ¶ 34.

Plaintiffs' Complaint asserts claims for strict liability, negligence, violation of consumer fraud and deceptive trade practices acts, breach of express warranty, and breach of implied warranties. She seeks economic damages, including restitution, equitable relief, punitive damages, and attorneys' fees and costs. The case is currently pending before the Honorable Sara L. Ellis. Plaintiff has filed a motion for class certification but the court has not set a briefing schedule. None of the defendants have filed their initial pleading in this action and there has been no discovery.

7. *Shameka Rogers v. Family Dollar, Inc. and Nutek Disposables, Inc.*, Case No 1:14-cv-09134. This putative class action was filed on November 13, 2014 in the Northern District of Illinois. The named plaintiff, Shameka Rogers, is an Illinois resident who alleges that she purchased baby wipes from a Family Dollar retail location in Chicago, Illinois. *Rogers* Compl. ¶11. She alleges that her son developed a skin boil from exposure to the bacteria. *Id.* at ¶25.

Plaintiff proposes the following putative class:

> **National Class**: All persons in the United States that purchased the Product [defined as "Kidget" baby wipes] at any time prior to October 21, 2014.
>
> **Consumer Fraud Multi-State Class**: All persons in the States of California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington that purchased the Products at any time prior to October 21, 2014.
>
> **Illinois Subclass**: All persons in the State of Illinois that purchased the Product at any time prior to October 21, 2014.

Id. at ¶ 31.

Plaintiff does not claim that she was placed on notice by the retailer of the product she purchased. However, she does cite a statement from the FDA dated October 25, 2014 which notified consumers that Nutek had issued a safety alert due to potential bacteria in

its baby wipes and had voluntarily withdrawn the product from the market. As with the "Sam's Club" recall notice cited in the other complaints, the FDA alert advised consumers that "*B. cepacia* poses little medical risk to healthy people. However, people who have certain health problems, like weakened immune systems or chronic lung diseases, particularly cystic fibrosis, may be more susceptible to infections with *B. cepacia*." *Id.* at ¶19.

Plaintiff alleges violations of state consumer fraud laws, violation of the Illinois Consumer Fraud Act, violation of express and implied warranties, and unjust enrichment. She seeks compensatory and actual damages, including restitution and disgorgement of Defendants' revenues to Plaintiff and other Class members, injunctive relief, statutory damages, and attorneys' fees and costs. The case is currently pending before the Honorable Sara L. Ellis. Plaintiff has filed a motion for class certification but the court has not set a briefing schedule. None of the defendants have filed their initial pleading in this action and there has been no discovery.

## III. ARGUMENT

Transfer for coordinated or consolidated pretrial proceedings is appropriate where federal civil actions present "common questions of fact" and transfer will serve "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. Product liability cases are particularly well-suited for coordination because they allege common questions of fact concerning the "development, testing, manufacturing and marketing" of the products. *See, e.g., In re Accutane Prods. Liab. Litig.*, 343 F. Supp. 2d 1382, 1383 (J.P.M.L. 2004)*; In re Trasylol Prods. Liab. Litig.*, 545 F. Supp. 2d 1357, 1358 (J.P.M.L. 2008) (common questions regarding the safety profile of a drug and the manufacturer's warnings)*; In re Vytorin / Zetia Mktg., Sales Practices & Prods. Liab. Litig.*, 543 F. Supp. 2d 1378, 1380 (J.P.M.L. 2008)

(common questions regarding the use and/or marketing of two pharmaceutical drugs). For the following reasons, the Scheduled Actions merit the same treatment.

### A. The Scheduled Actions Share Common Factual Issues Arising Out of Identical Legal Issues.

This panel has noted that "[t]ransfer under 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 Denture Cream Prods. Liab. Litig.*, 624 F.Supp.2d 1379, 1381 (J.P.M.L. 2009). Although these actions may present some individual issues of fact, this is usually true of products liability cases and does not preclude transfer under Section 1407. *In re Cook Med., Inc.*, 949 F.Supp.2d 1373, 1375 (J.P.M.L. 2013). The Scheduled Actions allege a core of common questions of fact, including the design, manufacture, safety, testing, marketing and performance of these wipes, as well as whether the Defendants knew or should have known of the contamination of their product; when that contamination began and when contaminated product was withdrawn; whether the Defendants were negligent in marketing, promoting or distributing the product; whether the product conformed to the Defendants' implied warranties.[3] Thus, although some Scheduled Actions may allege additional factual disputes or allege additional causes of action, coordination and consolidation remains appropriate.

### B. Centralization Will Serve the Interests of the Courts, the Parties, and Witnesses.

Transferring the Scheduled Actions for pretrial proceedings will significantly reduce the burden on the federal courts, the parties, and the witnesses involved. Without transfer, the federal court system will be forced to administer – and Defendants will be forced to defend – numerous similar actions spread across the country on different pretrial schedules. The actions generally allege the same legal violations and necessarily

[3] *See In re Kugel Mesh Hernia Patch Prods. Liab. Litig*.. 493 F.Supp.2d 1371, 1372 (J.P.M.L. 200) [Transfer appropriate in product liability action where "[a]ll actions can thus be expected to share factual questions concerning such matters as the design, manufacture, safety, testing, marketing and performance of these patches."]

require overlapping factual inquiries. Discovery in each will require much of the same information from Defendants and Defendants' witnesses, and, to a lesser extent, from co-defendants, particularly Wal-Mart Stores, Inc.

Transferring the Scheduled Actions to a single judge will produce significant economies for the federal court system, avoiding the need for multiple federal judges in four different districts to address identical legal issues and similar factual patterns. In addition, transfer will save Defendants and their witnesses from duplicative document production, duplicative written discovery responses, redundant depositions, and the significant likelihood of conflicting scheduling obligations. Transfer is appropriate to mitigate these burdens. *In Re Portfolio Recovery Assoc.*, 846 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011); *In re Capital One Telephone Consumer Protection Act Litig.*, 908 F. Supp. 2d 1366, 1367 (J.P.M.L. 2012).

Moreover, any inconvenience to the individual parties does not outweigh the substantial economies centralization offers the litigation as a whole. *See, e.g., In re Crown Life Ins. Premium Litig.*, 178 F. Supp. 2d 1365, 1366 (J.P.M.L. 2001) (noting that "transfer is often necessary to further the expeditious resolution of the litigation taken as a whole.") The assigned transferee judge can minimize unnecessary inconvenience and expense through a pretrial discovery plan that "consider[s] all parties' legitimate discovery needs, while ensuring that common parties and witnesses are not subjected to duplicative discovery demands." *In re Rembrandt Techs., LP, Patent Litig.*, 493 F. Supp. 2d 1367, 1369 (J.P.M.L. 2007). The plan may also allow for discovery regarding any non-common issues, such as those related to some plaintiffs' individual injuries or other state law claims to proceed alongside common discovery. *See In re Satyam Computer Servs.*, 712 F. Supp. 2d 1381, 1382 (J.P.M.L. 2010).

### C. Coordination or Consolidation Will Promote the Just and Efficient Conduct of the Litigation.

In cases involving putative class actions, this Panel has frequently noted the importance of avoiding inconsistent class certification rulings. *See, e.g.*, *In re Charlotte Russe, Inc. Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 505 F. Supp. 2d 1377, 1378 (J.P.M.L. 2007) ("Centralization will . . . prevent inconsistent trial rulings, especially with respect to class certification . . . ."); *In re Sugar Indus. Antitrust Litig.*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975) ("We have consistently held that transfer of actions under Section 1407 is appropriate, if not necessary, where the possibility of inconsistent class determination exists."); *In re Portfolio Recovery Assocs., LLC*. 846 F. Supp. At 1381 (noting that centralization would "eliminate the risk of inconsistent rulings on class certification, where statewide classes were 'subsumed' by the nationwide class"); *see also* David F. Herr, MULTIDISTRICT LITIGATION MANUAL *§ 5.24* (2012) (explaining that existence of potentially conflicting class actions is a "dominating" factor in favor of transfer). This consideration weighs strongly in favor of consolidation or coordination here. For example, the nationwide class proposed in *Jones,* covering any purchases of Simply Right baby wipes at any Sam's Club retail location between June 30, 2014 and October 10, 2014 subsumes the classes proposed in *Lopez* and *Endres.* Further, it is substantially identical to the proposed class in *Melford,* differing only in that *Melford* would include recalled products that were allegedly purchased (if actually available) after the date of the recall. Transfer will thus ensure consistent application of Rule 23 and avoid the risk of overlapping or inconsistent classes.

Additionally, all of the Scheduled Actions remain sufficiently early in litigation to reap the substantial benefits of coordination or consolidation with minimal transaction costs. The operative class action complaints were all filed within the last month; several by the same firm or firms. In all of the Scheduled Actions, there has been no discovery. Plaintiffs thus cannot complain that their proceedings have advanced too far to merit centralization, as significant discovery obligations and pretrial proceedings remain in

each. *In re Fosamax (Alendronate Sodium) Prods. Liability Litig., (No. II)*, 787 F. Supp. 2d 1355, 1356 (J.P.M.L. 2011) ("While the point at which an action should be excluded from centralized proceedings is not definite, neither of the actions sought to be excluded has professed to that point.").

**D. The Eastern District of New York is the Most Appropriate Forum for Coordination or Consolidation.**

In selecting the transferee court, the Panel considers several factors, including, but not limited to, "where the largest number of cases is pending, where discovery has occurred, where cases have progressed furthest, the site of the occurrence of the common facts, where the cost and inconvenience will be minimized, and the experience, skill, and caseloads of available judges." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2010). In this case, no discovery has occurred in any of the cases and there have been no substantive rulings by any of the courts. The determining factor therefore should be which court is best positioned for purposes of anticipated discovery of the "common facts."

Defendants seek coordination or consolidation of the Scheduled Actions, which are dispersed throughout the United States, to the Eastern District of New York. The members of the putative nationwide plaintiff classes reside in all 50 states. The Eastern District of New York is home to one of the earliest-filed actions, the *Jones* matter, and offers a convenient location in this extreme geographical spread. The Eastern District of New York is also within a reasonable distance of several regional and international airports which offer regular flights throughout the country.

Furthermore, selection of the Eastern District of New York is appropriate given the location of the defendant manufacturer headquarters. See *In re London Silver Fixing Ltd. Antitrust Litig.*, 2014 WL 5105921, at *1 (J.P.M.L. Oct. 9, 2014) (transferring case to district where defendants' corporate offices were located); *In re Standard & Poor's Rating Agency Litig.*, 949 F. Supp. 2d 1360, 1362 (J.P.M.L. 2013) (transferring case to

district where defendant's principal place of business was located); *In re: Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, Prods. Liab. Litig.*, 704 F. Supp. 2d 1379, 1382 (J.P.M.L. 2010) (holding Central District of California was the most appropriate because "Toyota maintains its United States corporate headquarters within this district…."). New York is the corporate home of FQE. The New York courts are close to the factory that manufactured and packaged the allegedly contaminated wipes. Many of the individuals who are potential witnesses in this matter, including employees of Nutek, FQE and FQCP and others, live or work in the area of in McElhattan, Pennsylvania or Great Neck, New York. This includes those individuals responsible for operations, quality control, maintenance, planning, and engineering as well as regulatory affairs. Thus, the factory and its employees are considerably closer to the Eastern District of New York than any of the other district courts with an action pending. Since that location will be the subject of discovery common to all cases and all parties, proximity to it is of critical importance.

As for counsel, "the judicious use of liaison counsel, lead counsel and steering committees will eliminate the need for most counsel to ever travel to the transferee district." *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422 (J.P.M.L. 1991). In addition, one of the plaintiff's counsel in the Scheduled Actions is in New York, and the same firm is co-counsel with Jones Ward, the firm that represents the plaintiff in the Endres case, as well as the plaintiff in one of the state court actions that it is anticipated will be removed to federal court. Parties and witnesses (beyond those of the locally-based manufacturer defendant witnesses) will not be inconvenienced by transfer to the Eastern District of New York. "Since § 1407 transfer is primarily for pretrial, there is usually no need for the parties and witnesses to travel to the transferee district for depositions or otherwise. *Ibid.*; see also *In re Cont'l Grain Co.*, 482 F. Supp. 330, 332 (J.P.M.L. 1979) ("depositions of parties and witnesses may occur in proximity to where they reside.").While there are a greater number of cases pending in district

courts in Illinois, Illinois is six-hundred miles from the factory involved in the manufacture of the allegedly contaminated wipes. One of the Illinois cases (*Endres*) involves a plaintiff who is a resident of Alabama and the other three are essentially identical cases filed by *the same law firm* and differ only in the specific store in which the putative class representative purchased the product at issue. Given the geographic spread of the cases and parties, the location of the witnesses, documents and physical location mostly likely to be subject to discovery in all of the Subject Actions, and the location of the Defendants, transfer to the Eastern District of New York will most promote the convenience of the parties and the just and efficient conduct of the litigation.

### E. The Honorable Leonard D. Wexler is an Ideal Transferee Judge for the Proposed Nutek Baby Wipes Litigation MDL.

The Honorable Leonard D. Wexler, United States District Court Judge for the Eastern District of New York, is the assigned Judge in the *Jones* matter. He is well-suited to accept the coordinated or consolidated proceedings.

"The ideal transferee judge is one with some existing knowledge of one of the cases to be centralized and who may already have some experience with complex cases." Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*. 82 Tul. L. Rev. 2225, 2240 (2008). While none of the potential transferee judges has substantive knowledge of the cases because of the early procedural status, Judge Wexler is undeniably experienced with complex cases. He has handled MDL proceedings in the past, specifically *In re Energy Systems Equipment Leasing SEC* (MDL 637).

In addition, he has substantial experience with complex class action and putative class action litigation. (*See e.g. Hepler v. Abercrombie & Fitch Co. et al*., No. 2:13-cv-02815-LDW-SIL; *City of Ann Arbor Employees Retirement System v. Citigroup Mortgage Loan Trust Inc. et al*., No. 2:08-cv-01418-LDW-ETB; *Ulmer v. NBTY, Inc. et al*., No. 2:04-cv-02619-LDW-ETB.) Finally, he is equally familiar with product liability litigation. (*See e.g. Burkett v. Smith & Nephew, Inc. et al*, No. 2:12-cv-04895-LDW-

ARL [allegedly defective medical device];) He currently has no other MDLs on his docket. Judge Wexler has the requisite experience, is available and able to manage the proposed Nutek baby wipes MDL, and is therefore an ideal transferee judge.

In the event that Judge Wexler's docket does not permit him to undertake this case, other Judicial Officers in the Eastern District of New York appear sufficiently suited to handle the instant proposed MDL. As an example, Chief Judge Carol Bagley Amon is a potential alternative. She also has experience with complex MDL proceedings, having handled *In re JetBlue Airways Corp. Privacy* (MDL 1587), a case involving fifteen separate class action lawsuits with multiple parties and attorneys. She does not currently have any MDL proceedings on her docket. Further, she has experience with product liability cases presenting many issues that will be similar to those in the Scheduled Actions. For example, she presided over *Caronia v. Philip Morris United States, Inc*., No. 1:06-cv-00224 [a putative class action involving claims of unnecessarily dangerous levels of carcinogens in cigarettes], through class certification and summary judgment motions.

## IV. CONCLUSION

For the foregoing reasons, Defendants respectfully requests that, pursuant to 28 U.S.C. § 1407, this Panel transfer the Scheduled Actions for coordinated or consolidated pretrial proceedings.

Dated: December 9, 2014

Respectfully submitted,

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