

BEFORE THE UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

_____))
IN RE: ZOFRAN® (ONDANSETRON)) MDL Docket No. 2657
PRODUCTS LIABILITY LITIGATION))
_____))

**MEMORANDUM BRIEF OF PLAINTIFF/RESPONDENT TARA HOGAN IN RESPONSE TO MOTION
FOR TRANSFER AND COORDINATION OR CONSOLIDATION**

Pursuant to 28 U.S.C. § 1407, Plaintiff in the action captioned *Tara Hogan, individually, and M.H., a minor, by and through next friend and guardian Tara Hogan*, Case No. 5:15-cv-01182-hgd (filed July 15, 2015) (hereinafter “Respondent”), now pending in the United States District Court for the Northern District of Alabama, respectfully submits this Memorandum Brief to the Motion to transfer for coordination or consolidation of the numerous federal actions pending against GlaxoSmithKline, LLC (hereinafter “Defendant” or “GSK”).

On July 6, 2015, Defendant GSK filed a Motion with this Honorable Panel to transfer all Zofran® actions to the United States District Court for the Eastern District of Pennsylvania for consolidated or coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407.

Respondent files this Motion and Brief in Support of centralization of the Zofran® (Ondansetron) Products Liability Litigation to the United States District Court for the Northern District of Alabama, and specifically before the Honorable Madeline Hughes Haikala. Judge Haikala is a jurist experienced in complex litigation and sitting in a district with the capacity, expertise, and track record to handle the Zofran® multidistrict litigation.

Six (6) Zofran® cases are currently filed in various federal districts throughout Alabama. Five (5) Zofran® cases are currently pending against Defendant in the Northern District of Alabama, assigned to the Honorable Madeline Hughes Haikala¹, the Honorable Harwell G. Davis, III², the Honorable Judge Virginia Emerson Hopkins³, the Honorable William M. Acker, Jr.⁴, and the Honorable John E. Ott⁵. One of the first cases filed nationally is the case pending before Judge Haikala.

¹ *Hunter, et al., v. GlaxoSmith Kline PLC, et al.*, Case No. 2:15-cv-00544-JEO (filed April 1, 2015).

² *Hogan, et al., v. GlaxoSmithKline LLC*, Case No. 5:15-cv-01182-HGD (filed July 15, 2015).

³ *Ragland v. GlaxoSmithKline LLC*, Case No. 2:15-cv-01053-VEH (filed June 23, 2015).

⁴ *Laird, et al., v. GlaxoSmithKline LLC*, Case No. 2:15-cv-01166-WMA (filed July 13, 2015).

⁵ *Smiley, et al., v. GlaxoSmithKline LLC*, Case No. 2:15-cv-01233-JEO (file July 23, 2015).

**INTRODUCTION AND SUMMARY OF THE CASE:
MDL TREATMENT IS WARRANTED**

Respondent's case and all other related cases listed in the Schedule of Actions or which may be included in any MDL proceeding are, or will be, against the same Defendant who is responsible for the designing, manufacturing, labeling, marketing and selling of Zofran® or its generic equivalent, Ondansetron. Respondent, and over thirty (30) other plaintiffs, allege that, as a result of ingesting of Zofran® or its generic equivalent, Ondansetron, children were born with heart defects; cleft palate and cleft lip, and other injuries, and have asserted various products-liability causes of action against Defendant. The factual allegations and asserted legal theories in every case are virtually indistinguishable and arise from the identical conduct of the Defendant.

Zofran® is a prescription medication that was approved by the Food and Drug Administration ("FDA") in 1991 to treat post-operative nausea and nausea related to cancer treatment. Although the FDA only provided approval for Zofran® as a treatment for post-operative nausea and nausea related to cancer treatment, GSK engaged in off-label marketing and promotion of Zofran® for the treatment of morning sickness during pregnancy. Plaintiffs allege that GSK was aware of scientific studies indicating the harmful effects of Zofran® when used during pregnancy, and did not discontinue its off-label marketing Zofran® for treatment of morning sickness during pregnancy.

Respondent agrees that all actions related to Zofran® should be centralized to a common jurisdiction. Respondent respectfully proposes the United States District Court for the Northern District of Alabama as the common jurisdiction for consolidation purposes and respectfully requests this Panel to enter an order transferring the pending actions filed against the Defendant, as well as any additionally filed actions that may be brought to the Panel's attention, to the United States District Court for the Northern District of Alabama.

PENDING ACTIONS

Respondent believes that at least thirty (30) cases have been instituted against Defendant involving Zofran® in twenty (20) federal district courts⁶. There may be other pending actions of which Respondent is unaware and Respondent anticipates that other actions will be filed in the future. Pursuant to Panel Rule 7.5(e) regarding notice of "tag-along" actions, all pending actions and future-filed actions should be transferable.

⁶ Northern District of Alabama, Southern District of Alabama, Eastern District of Arkansas, Central District of California, Northern District of California, Southern District of Florida, Southern District of Illinois, Eastern District of Louisiana, Western District of Louisiana, District of Massachusetts, Southern District of Mississippi, Eastern District of Missouri, District of Montana, District of New Jersey, Southern District of New York, Northern District of Ohio, Southern District of Ohio, District of Pennsylvania, Eastern District of Texas, and Southern District of Texas.

THE NORTHERN DISTRICT OF ALABAMA IS THE MOST APPROPRIATE FORUM TO HEAR THIS COMPLEX LITIGATION.

While Defendant seeks centralization of all Zofran® actions before the United States District Court for the Eastern District of Pennsylvania, Respondent respectfully contends that the Northern District of Alabama would be the most appropriate MDL forum for these actions and, therefore, desires to present this Panel with reasons why the Northern District of Alabama would be the most suitable forum.

Multiple factors are considered in deciding which district court to assign an MDL. From prior MDL transfer orders, the following is a list of germane factors: (a) significant pretrial progress of an action pending in the transferee district; (b) the docket conditions or resources of the transferee judge or district; (c) the location of the first-filed action; (d) the geographic centrality or proximity of the transferee district to the filed actions; (e) the concentration of the actions between or among district courts; (f) the concentration of potential tag-along actions between or among district courts; (g) the proximity of the transferee forum to relevant documents or potential witnesses; (h) the location of related court proceedings; (i) the general experience of the transferee judge; (j) the experience of the transferee judge due to preside over one of the constituent actions; (k) the familiarity of the transferee judge with the factual or legal issues in the MDL as a result of presiding over a previous action involving similar issues; (l) the preference of the parties; (m) the proximity of the transferee district to the operations or residence of a party to the action, (n) the proximity to an important third party; (o) the accessibility of the transferee district court; and, (o) the proximity of the transferee district to the conduct or event at issue. Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 Fordham L. Rev. 311, 321-22 (Oct. 2009)(citations omitted).

The weight allocated to any single factor varies depending on the particular circumstances of the litigation. In the present matter, an overall consideration of these factors, when weighted properly, compels the finding that the Northern District of Alabama is the most appropriate forum for this MDL.

1. The Northern District of Alabama Has the Experience and Resources to Properly Conduct this Litigation and, Even More Significantly, Has Demonstrated Its Efficiency in Resolving Cases.

The docket of the Northern District of Alabama is ripe for an MDL with only two (2) MDL actions presently pending⁷. The Northern District of Alabama's docket and available resources are extremely favorable to efficiently and effectively administer an MDL, while not adversely affecting the other pending actions in the district, because civil filings in the Northern District of Alabama are down 33% since 2013⁸. The Northern District of Alabama is not overtaxed with pending MDL matters or civil trial filings at the present moment, yet the Northern District of Alabama is currently and has efficiently handled MDL matters⁹.

In *In re Phenylpropanolamine Products Liability Litigation*, 173 F. Supp. 2d 1377, 1379-80 (Jud. Pan. Mult. Lit. 2001), the Panel selected a transferee court based, in part, on the fact that the selected district court was located in "a major metropolitan court that i) is not currently overtaxed with other multidistrict dockets and ii) possesses the necessary resources to be able to devote the substantial time and effort to pretrial matters that this complex docket is likely to require." As already demonstrated, the Northern District of Alabama is located in a metropolitan area with more than adequate access by air travel and is equipped, experienced and capable of handling the Zofran® MDL.

In *In re Silicone Gel Breast Implants Products Liability Litigation* (MDL 926), the Panel transferred a mass tort matter involving a medical product to the Northern District of Alabama, despite there being no action pending in the district at the time of the transfer, because of the experience and qualifications of the judges in the Northern District of Alabama. The Panel noted that, in its belief, the Northern District of Alabama has both the ability and temperament to steer a complex litigation on a steady course while sensitive to the concerns of all parties.

The *In re Total Body Formula Products Liability Litigation* (MDL 1985) was recently resolved in the Northern District of Alabama and was one of the most efficiently handled of all MDLs. As noted in media reports,

⁷ The Honorable R. David Proctor is administering the *In re: Blue Cross Blue Shield Antitrust Litigation* (MDL No. 2406), and the Honorable Karen O. Bowdre is administering the *In re: Community Health Systems, Inc. Customer Data Security Breach Litigation* (MDL No. 2595).

⁸ United States District Court National Judicial Caseloads Profiles; see <http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-march-2015>

⁹ The Honorable Inge P. Johnson completed the successful administration of *In re: Chantix (varenicline) Products Liability Litigation*, which included over 2,500 actions.

there was unprecedented (a) cooperation among the parties and their counsel and (b) discovery coordination between federal and state courts.¹⁰

In light of the Northern District of Alabama's established ability to manage complex MDL matters, the panel transferred *In re: Blue Cross Blue Shield Antitrust Litigation* to the Northern District of Alabama. The Honorable R. David Proctor's administration of this matter is pending, yet the inclusiveness and organization of the process has been lauded by counsel engaged and external to the litigation. His prowess in managing the litigation is reflected in the diversity reflected amongst leadership, and in the significant and informed decisions that have been issued by Judge Proctor rather early in the complex antitrust litigation.

The Northern District of Alabama is presently not overburdened with pending MDL matters, and the judges in the Northern District of Alabama have historically demonstrated the experience, knowledge and ability to handle assigned MDL cases with care, understanding and with efficiency.

2. Judge Haikala Has the Skill and Experience to Supervise the Zofran® MDL.

a. Judge Haikala Possesses Substantial Complex Litigation Experience and Ability

The availability of an experienced and capable judge weighs in favor of transferring a case to that district. *See, for example, In re Hawaiian Hotel Rate Antitrust Litig.*, 438 F. Supp. 935, 936 (Jud. Pan. Mult. Lit. 1977); *In re Sugar Indus. Antitrust Litig.*, 437 F. Supp. 2d 1204, 1208 (Jud. Pan. Mult. Lit. 1977); *In re Ampicillin Antitrust Litig.*, 315 F. Supp. 317, 319 (Jud. Pan. Mult. Lit. 1970). The experience and knowledge of a particular judge is one of the factors that may be considered in determining the appropriate transferee forum. *See, e.g., In re Factor VIII or LX Concentrate Blood Prod. Litig.*, 853 F. Supp. 454, 455 (Jud. Pan. Mult. Lit. 1993); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1101 (Jud. Pan. Mult. Lit. 1992); *In re Data General Corp. Antitrust Litig.*, 470 F. Supp. 855, 859 (J.P.M.L. 1979).

Judge Madeline Hughes Haikala would be an excellent choice to manage this potentially complex and large litigation. A native of New Orleans, Judge Haikala received her Bachelor of Arts degree in 1986 from Williams College. She received her Juris Doctorate in 1989 from Tulane University Law School, graduating as a member of the Order of the Coif.

¹⁰ *See* <http://www.law.com/jsp/article.jsp?id=1202470897664>. In this August 23, 2010 article, DeKalb County, Georgia, State Court Judge Wong noted that District Judge Proctor actively promoted cross-jurisdictional cooperation that allowed the lawyers and judges to avoid redundancies in the discovery process and invited him to participate in the mass mediation that resulted in a settlement of the cases consolidated in the MDL and some of the cases pending in various state courts. The article noted that the lawyers appreciated the electronic document repository that the federal court created for all pending cases, whether filed in federal court or state court.

From 2012 to 2013 the Honorable Haikala served as United States Magistrate Judge in the Northern District of Alabama. On May 9, 2013 President Barack Obama nominated Judge Haikala to serve as a United States District Judge in the United States District Court for the Northern District of Alabama, to take the seat vacated by Judge Inge Prytz Johnson.

Prior to becoming an Article I judge, Judge Haikala distinguished herself in her complex commercial litigation practice and appellate as a partner in the prestigious firm of Lightfoot, Franklin & White LLC (“Lightfoot Franklin”)¹¹ from 1990 to 2012. Judge Haikala helped the firm to develop a specialized appellate practice involving multi-million dollar verdicts. From 2007-2012, Judge Haikala handled varied complex matters such as product liability wrongful death actions and environmental class actions. She wrote and argued motions, and at trial, was responsible for record preservation, motion practice and charge conferences. As Lightfoot Franklin maintains a national practice, Judge Haikala was responsible for mastering various state laws applicable to the firm’s national litigation docket.

As Judge Haikala stated in her responses to the United States Senate Committee on the Judiciary Public Questionnaire for Judicial Nominees, “I often was a triage lawyer, coming into a case after it jumped off track either before or after trial. My task was to master the case quickly and to help move the case toward a favorable resolution.”¹² Among other significant matters, Judge Haikala represented E.I. DuPont de Nemours & Co., in the environmental class action matter of *Rowe v. E.I. DuPont de Nemours & Co.*, 2011 WL 3837106 in the District Court of New Jersey. To say that Judge Haikala is comfortable with complex litigation and capable of handling the Zofran® MDL is an understatement.

Judge Haikala’s dedication to the law is reflected in a recent 102 page opinion in the 51-year old desegregation matter of *Hereford, et al., v. Huntsville Board of Education, et al.*, Case No. 5:63-cv-00109-MHH, in the Northern District of Alabama, where Judge Haikala refused to approve a rezoning plan, finding that the City of Huntsville was not doing enough to end segregation in its school district. Her Honor appointed a special magistrate, Judge John Ott to oversee mediation and fact-finding on racial disparities within the school district.

b. Judge Haikala is Familiar with the Litigation

The first case Zofran® case filed was assigned to Judge Haikala. In the *Hunter Zofran®* litigation, Judge

¹¹ Prior to practicing with the firm of Lightfoot Franklin, Judge Haikala served as an adjunct professor at the Cumberland School of Law.

¹² Responses to United States Senate Committee on the Judiciary Questionnaire for Judicial Nominations, May 10, 2014.

Haikala has already entertained a Motion to Dismiss filed by former Defendant GlaxoSmithKline, PLLC, and has received a Rule 26(f) Report from the parties. Judge Haikala is familiar with this litigation, and is familiar with complex litigation generally as indicated above.

3. The Northern District of Alabama Is a Convenient Forum for the Parties and Witnesses

Zofran® was marketed nationwide. Present plaintiffs and future plaintiffs do and will reside in federal districts throughout the nation. No single accident or event engenders one district court as the obvious choice to oversee the MDL. Witnesses and experts shall span the country. There simply is no material “concentration of actions” in a single district court.

GSK LLC’s headquarters is in Philadelphia, Pennsylvania, yet, it is believed that the designers and developers of Zofran®, as well as other witnesses, are located in various locations throughout the country. Geographically speaking, the Northern District of Alabama is close and accessible to Defendants headquarters, and a majority of the parties than any other suggested venue.

Convenience of all parties and witnesses is a notable consideration in deciding whether and where to create a MDL. 28 U.S.C. § 1407(a). Convenience of parties and witnesses must also be a consideration in selecting the transferee court and, thus, accessibility of the transferee court is a material factor in selecting a transferee court. *See, e.g., In re High Pressure Laminate Antitrust Litig.*, 2000 US Dist. LEXIS 14849 and 2000 WL 33180479 (Jud. Pan. Mult. Lit. Oct. 6, 2000); *In re Polyester Staple Antitrust Litig.*, 259 F. Supp. 2d 1376, 1380 (Jud. Pan. Mult. Lit. 2003); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 290 F. Supp. 2d 1374, 1376 (Jud. Pan. Mult. Lit. 2003). *See also* Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 Me. Bar. J. 16, 19 (2004)(“[W]e take into account ... the accessibility of the court, particularly air travel in selecting a transferee district.”)

The Birmingham-Hoover Metropolitan Statistical Area has a population in excess of one million. Birmingham offers more than 13,000 hotel rooms in proximity to the federal courthouse.¹³ Where the actions, subject to a transfer motion, are geographically dispersed, the Panel traditionally has sought to identify a location that maximizes accessibility and convenience for the parties and their counsel. *See, e.g., In re Methyl Methacrylate (MMA) Antitrust Litig.*, 435 F. Supp. 2d 1345, 1347 (J.P.M.L June 20, 2006)(weighing geographic convenience in the transfer decision).

¹³ For more information about Birmingham, see <http://www.informationbirmingham.com/about-birmingham.aspx>.

The Birmingham-Shuttlesworth International Airport is situated close to downtown Birmingham and the federal courthouse. It has recently undergone a \$200 million dollar expansion and modernization. On a daily basis, the airport offers one hundred and twenty flights daily, and handles nearly three million travelers annually. Non-stop flights to approximately thirty (30) major cities in the United States, including Philadelphia, New York, Chicago, Dallas, Phoenix, Baltimore, Las Vegas, Charlotte, Tampa, New Orleans Houston, Memphis, Atlanta, Orlando, St. Louis and Tampa, are provided daily by six (6) major airlines. Several of these cities are major hubs for one or more airlines. The airport is capable of handling a large number of passengers; for example, in the first five months of 2015, over 1,065,387 passengers utilized the airport.¹⁴ By air, parties, witnesses and attorneys may conveniently and easily travel to and from Birmingham.

GSK Headquarters are very close to the Philadelphia International Airport, which has daily, direct flights from Philadelphia to Birmingham.

4. Other Factors Are Not Germane or Should Be Afforded Little or No Weight.

Given that Zofran® was marketed nationwide, several of the factors are not germane in the present matter or should be afforded little or no weight. First, aside from the Rule 26 Conference held in Judge Haikala's matter, there has not been any "significant pretrial progress" in any single district court since a majority of Zofran® cases were filed in the previous three (3) months, and no district court has yet become familiar with these cases or conducted material pretrial activities.

Second, selecting the district court in which the *majority* of lawsuits have been filed is inappropriate given that pending lawsuits have only been active for three months and reasonable minds would agree many more suits will be filed. That said, sixteen percent (16%) of the cases filed to date are in the Northern District of Alabama¹⁵.

The Northern District of Alabama was chosen to administer *In re Chantix (Varenicline) Products Liability Litigation* (MDL 2092) although the defendant was headquartered in New York. MDL 2092 involves plaintiffs and counsel from around the country with a New York defendant.

The Northern District of Alabama was chosen to administer *In re Blue Cross Blue Shield Productions Liability Litigation* (MDL 2406) although defendant Blue Cross Blue Shield Association was headquartered in Chicago, Illinois. MDL 2406 involves plaintiffs' counsel from around the country.

¹⁴ For more information about the Birmingham-Shuttlesworth International Airport, see <http://www.flybirmingham.com/aboutbhm-reports.shtml> and <http://www.bhamintlairport.com>.

¹⁵ Twenty percent (20%) of the cases filed to date have been filed in the Northern and Southern districts of Alabama.

Third, there is no consensus preference among the parties. There is no “important third party” to consider. In the present matter, there was no single accident or event that would make one district court the obvious choice to oversee the MDL; instead, this is a product liability action involving a product that was marketed nationwide and that injured individuals throughout the nation. Individuals involved in the design, development and marketing of this product and relevant documents will likely be located at various locations throughout the country.

Finally, Respondent notes that five cases currently have been filed in the Northern District of Alabama, and Counsel for Respondent has also been made aware that additional cases will most likely be filed in the Northern District of Alabama prior to the Panel hearing on October 1st. An updated case listing for the Northern District of Alabama will be provided prior to the hearing or made available during oral presentations at the hearing.

CONCLUSION

For the foregoing reasons and in light of the similar allegations regarding the Defendant’s conduct and given the likelihood of overlapping discovery and the potential for conflicting pretrial rulings, Respondent respectfully requests that this Panel order that the related actions be centralized and transferred to the Honorable Madeline Hughes Haikala of the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. § 1407.

Respectfully submitted, the 28th day of July, 2015

/s/ *Diandra S. Debrosse Zimmermann*

Of Counsel for Respondent
Bar Number: ASB-2956-N76D

Zarzaur Mujumdar & Debrosse - Trial Lawyers
2332 2nd Avenue North
Birmingham, Alabama 35203
(205) 983-7985 (telephone)
(888) 505-0523 facsimile
Email: fuli@zarzaur.com

ATTORNEY FOR RESPONDENT TARA HOGAN