

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

**IN RE: DAILY FANTASY SPORTS
MARKETING AND SALES PRACTICES
LITIGATION**

MDL Docket No. _____

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF PLAINTIFF DAVID
WHITE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
FOR TRANSFER AND CONSOLIDATION OF RELATED ACTIONS TO THE
SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. § 1407**

Plaintiff David White respectfully submits this memorandum of law in support of his motion to transfer related *Daily Fantasy Sports Deceptive Trade Practices Litigation* actions to the Southern District of New York for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407. Plaintiff respectfully submits that the Southern District of New York is the most appropriate forum for coordination of the Related Actions (identified below) because it offers the best combination of accessibility, expertise, and efficiency and because it is the site of the first-filed case, as well as the plurality of cases. For these reasons, and for others set forth below, transfer to and pretrial coordination in the Southern District of New York will most effectively promote the just and efficient conduct of these Related Actions.

I. INTRODUCTION

As of the filing of this motion, five lawsuits alleging violations of common-law and statutory laws have been filed in federal district courts throughout the United States:

Southern District of New York

- *White, et al. v. DraftKings, et al.*, No. 1:15-cv-08123 (filed Oct. 15, 2015)
- *Johnson, et al. v. FanDuel, Inc., et al.*, No. 1:15-cv-07963 (filed Oct. 8, 2015)

Southern District of Illinois

- *Guarino, et al. v. DraftKings, Inc., et al.*, No. 3:15-cv-1123 (filed Oct. 9, 2015)

Eastern District of Louisiana

- *Genchanok, et al. v. FanDuel, Inc., et al.*, No. 2:15-cv-05127 (filed Oct. 13, 2015)

District of Massachusetts

- *Wicksman, et al. v. DraftKings, Inc.*, No. 1:15-cv-13559 (filed Oct. 13, 2015)

The actions Plaintiff seeks to consolidate are consumer class action lawsuits against DraftKings, Inc. and FanDuel, Inc. (collectively “Defendants”), Delaware corporations that operate daily fantasy sports websites. These actions meet all of the recognized criteria for transfer and consolidation.

Plaintiff seeks the transfer of the Related Actions for coordinated pretrial proceedings to the District Court for the Southern District of New York pursuant to 28 U.S.C. § 1407. All actions filed to date involve common questions of fact and, thus, centralization of the cases “will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.” *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006). Plaintiff respectfully submits that the appropriate transferee forum is the Southern District of New York because (i) it is the site of the first-filed case; (ii) a plurality of the cases are there; (iii) it has the resources and expertise to manage this matter expeditiously; and (iv) it is the most convenient and easily accessible jurisdiction for the attorneys and witnesses in this action.

II. LEGAL STANDARD

Actions containing allegations with common questions of fact may be transferred and consolidated under § 1407 if transfer will be for the convenience of the parties and witnesses, and will promote the just and efficient conduct of the transferred cases. 28 U.S.C. § 1407. The Panel typically considers the following four factors in deciding whether to transfer a case under § 1407:

- a. the elimination of duplication in discovery;
- b. the avoidance of conflicting rules and schedules;
- c. the reduction of litigation cost; and
- d. the conservation of the time and effort of the parties, attorneys, witnesses and courts.

See Manual for Complex Litigation (Third) § 31.131 (1995) (citing *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.L. 1968)). Each of these factors favors transfer and consolidation of the cases filed against Fifth Generation.

III. ARGUMENT

A. The Litigation Satisfies the Requirements for Consolidation and Transfer Under 28 U.S.C. § 1407

Pretrial transfer and consolidation under § 1407 is appropriate and necessary. These cases involve the same allegations and legal standards and they will likely be numerous. Unless these cases are consolidated, the parties will incur excessive costs due to duplicative discovery, and will face the risk of inconsistent rulings on a variety of matters.

1. The Litigation Involves Common Questions of Fact

In assessing the appropriateness of consolidation under section 1407, the Panel looks to the pleadings to determine the extent to which common questions of fact are present. The Complaints in these cases clearly present common questions of fact. Each Complaint is based on

allegations that Defendants engaged in deceptive business practices by misrepresenting that their fantasy sports contests were fair games of skills and omitting that their employees were permitted to participate in competitors' fantasy sports contests using non-public information that gave them a competitive advantage.

The cases also present other common questions of fact. As plaintiffs in these cases have pleaded, the actions will require adjudication of fact questions, such as whether Defendants engaged in unlawful, unfair, or deceptive business practices and whether Defendants negligently allowed employees with access to non-public information to participate in their daily fantasy sports contests. In addition, the Complaints generally seek certification of similar classes.

2. The Parties Face Duplicative Discovery Absent Transfer and Consolidation

Because the allegations of all the cases are essentially the same, the parties face duplicative discovery if the cases are not consolidated and transferred. This is an important consideration for the Panel in that transfer and consolidation “ensure[s] that the actions are supervised by a single judge who, from day-to-day contact with all aspects of the litigation, will be in the best position to design a pretrial program that will prevent duplicative discovery . . . and substantially conserve the time and efforts of the parties, the witnesses and the federal judiciary.” *Resource Exploration Inc. Sec. Litig.*, 483 F. Supp. 817, 821 (J.P.M.L. 1980).

The parties in these actions will necessarily engage in duplicative discovery. All plaintiffs will be seeking the same documentation from Defendants and will likely request to depose the same parties. In response, Defendants will raise the same class certification objections and discovery objections, seek the same protective orders, and assert the same privileges in each case. However, if the Panel consolidates and transfers the cases, the parties will coordinate their efforts and thus save all parties time and money.

3. *Transfer and Consolidation Will Prevent Inconsistent Rulings*

The Panel considers the possibility of inconsistent rulings on pretrial issues because of the possible res judicata or collateral estoppel effects on other cases. *See In re Enron Securities Derivative & ERISA Litig.*, 196 F. Supp. 2d 1375, 76 (J.P.M.L. 2002) (granting a transfer in part to prevent inconsistent pretrial rulings, particularly with respect to questions of class certification). Because of the similarity of the allegations in the Complaints, and the likelihood that future filed actions will contain the same, the possibility of inconsistent rulings on pretrial motions is substantially increased.

4. *There is Sufficient Numerosity to Support Transfer and Consolidation*

The Panel has routinely ordered transfer and consolidation of five or fewer cases. *See In re Wireless Tel. Replacement Protection Programs Litig.*, 180 F.Supp.2d 1381, 1382 (J.P.M.L. 2002) (granting transfer and centralization of three consumer protection cases and determining that pending motions can be presented to and decided by the transferee judge); *In re Phila. Life Ins. Co. Sales Practices Litig.*, 149 F.Supp.2d 937, 938 (J.P.M.L. 2001) (granting transfer of two deceptive insurance sales cases and finding that such transfer would promote the just and efficient conduct of the litigation); *In re Amoxicillin Patent & Antitrust Litig.*, 449 F. Supp. 601, 603 (J.P.M.L. 1978) (granting transfer of three cases involving patent and antitrust issues); *In re Alodex Corp.*, 380 F. Supp. 790, 791 (J.P.M.L. 1974) (granting transfer of three securities actions). There have already been five cases filed regarding this matter. Moreover, it is likely that additional cases will be filed in a multitude of districts, making transfer and consolidation essential. As a result, there is sufficient authority for the transfer and consolidation of these actions against Defendants.

B. The Southern District of New York Is the Appropriate Transferee Forum.

Based on the Panel’s jurisprudence, a number of potential transferee forums can be appropriate venues for nearly any multidistrict litigation. However, careful analysis of the key factors make the United States District Court for the Southern District of New York the most appropriate district for transfer of the current and future Related Actions for pretrial proceedings.

1. The Southern District of New York Is the Site of the First-Filed Action

The Panel tends to favor consolidation at the site of the first-filed and most advanced action. *See, e.g., In re Land Rover LR3 Tire Wear Products Liab. Litig.*, 598 F. Supp. 2d 1384, 1386 (J.M.P.L. 2009) (“The Central District of California is an appropriate transferee forum because the first-filed and most procedurally advanced actions are pending there.”); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 293 F. Supp. 2d 1378, 1380 (J.P.M.L. 2003) (transferring cases to a district which, among other things, presides over “the first-filed and furthest advanced actions”). Here, the first-filed action – *Johnson, et al. v. FanDuel, Inc., et al.*, No. 1:15-cv-07963 – was filed on October 8, 2015 in the Southern District of New York.

2. A Plurality of the Actions Are in the Southern District of New York

There are two cases pending in the Southern District of New York, while all other districts have only one case. This, too, militates towards consolidation in the Southern District of New York. *In re Conseco Life Ins. Cost of Ins. Lit.*, 323 F. Supp. 2d 1381, 1383 (J.P.M.L. 2004) (centralizing where a “plurality of cases” were pending).

3. The Southern District of New York Has Relevant Expertise

The Southern District of New York is well equipped to manage this type of multi-district litigation, given the District and its judges’ vast experience handling complex litigation. It currently hosts 33 MDLs, and given the complexity of class action litigation, the Southern

District of New York's expertise will be advantageous to the organization and management of the claims and discovery.

4. *Convenience and Accessibility Favor Transfer to the Southern District of New York*

A proposed transferee forum's accessibility to parties and witnesses is a factor that the Panel has given significant weight in choosing transferee forums. *See, e.g., In re Hypodermic Prods. Antitrust Litig.*, 408 F. Supp. 2d 1356, 1357 (J.P.M.L. 2007) (choosing transferee forum, in part, because it was "easily accessible"). Defendant FanDuel, Inc. is headquartered in the Southern District of New York. Additionally, the Southern District of New York is an easily accessible transferee forum, a consideration that is particularly important here, because the plaintiffs are geographically dispersed across the United States. *See In re Mirena IUD Products Liab. Litig.*, 938 F. Supp. 2d 1355, 1358 (J.P.M.L. 2013) (consolidating actions in the Southern District of New York in part because the district would "be easily accessible for this nationwide litigation").

IV. CONCLUSION

For the reasons set forth herein, the Southern District of New York is the most appropriate district for transfer and pretrial coordination of the Related Actions. Plaintiff David White respectfully requests that the Panel transfer the Related Actions, and any future Related Actions, to the United States District Court for the Southern District of New York.

Dated: October 15, 2015

Respectfully submitted,

/s/ Charles J. LaDuca

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