

BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: COLGATE OPTIC WHITE
MARKETING AND SALES PRACTICES
LITIGATION

MDL No. _____

**MEMORANDUM IN SUPPORT OF
PLAINTIFF MELISSA L. VIGIL’S MOTION FOR TRANSFER AND
CONSOLIDATION OF ACTIONS PURSUANT TO 28 U.S.C. § 1407**

Melissa L. Vigil (“Vigil”), plaintiff in the putative consumer class action *Vigil v. Colgate-Palmolive Co.*, No. 3:16-cv-02697-EDL (N.D. Cal.) (“*Vigil Action*”), hereby respectfully submits the following memorandum in support of her motion for transfer and consolidation pursuant to 28 U.S.C. § 1407:

I. INTRODUCTION

As of the date of this filing, Plaintiff Vigil’s best knowledge is that three federal judges in three districts are simultaneously presiding over overlapping putative class cases against Colgate-Palmolive Co. (“Colgate”). The filing of additional complaints is expected. Each case involves the same product and the same issue. All three cases assert that Colgate’s Optic White toothpaste falsely represents that it “Goes Beyond Surface Stain Removal To Deeply Whiten,” that Optic White “Deeply Whitens,” and that the peroxide in Optic White is clinically proven to whiten beyond the mere removal of surface stains. All three actions are in their early stages, and no classes have been certified – this is the very sort of situation for which 28 U.S.C. § 1407 was designed.¹

¹ See Schedule of Actions.

Absent transfer and consolidation, there would be significant amount of unnecessary duplication, and a needless diversion of judicial resources would be inevitable in the three federal courts hearing these matters. Moreover, there would be a serious risk of inconsistent and conflicting ruling on critical issues, such as class certification absent transfer and consolidation. For this reason, Plaintiff Vigil moves for transfer and consolidation to the District with the closest “nexus” to alleged wrongdoing and witnesses, the Southern District of New York.

II. FACTUAL BACKGROUND

The first of the putative class actions *Dean v. Colgate-Palmolive Co.*, No. 5:15-cv-00107-JGB-DTB (C.D. Cal.) (the “*Dean Action*”), was filed in the Central District of California on January 16, 2015. *See* Schedule of Actions Ex. 1, *Dean Complaint*. Defendant Colgate is a Delaware Corporation, with its principal place of business at 300 Park Avenue, New York, New York, within the Southern District of New York. *Id.*, ¶ 5. Aside from local counsel, all counsel for plaintiff Dean are located in the Southern District of New York. The complaint in the *Dean Action* seeks certification of a national class of Optic White purchasers pursuant to claims for breach of express and implied warranty, as well as a California subclass pursuant to California’s Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*, and California’s Unfair Competition Law and False Advertising Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* and 17500 *et seq.* *Dean Action*, *Id.*, ¶¶ 3, 29-30. On June 17, 2015, the Honorable Judge Jesus G. Bernal denied Colgate’s motion to dismiss the *Dean Action* in its entirety, and Colgate answered the complaint on July 1, 2015. *Dean Action*, Dkt Nos. 31-32. On April 29, 2016, plaintiff Dean filed a motion seeking to certify a class defined as: “All persons in California, Delaware, the District of Columbia, Kansas, Missouri, New Jersey, Ohio, Utah, Virginia and West Virginia

who purchased Optic White on or after October 1, 2013, or who purchased Optic White Platinum on or after February 1, 2014.” *Id.*, Dkt No. 49-2.

The second putative class action *Canale v. Colgate-Palmolive Co.* No. 7:16-cv-03308 (S.D.N.Y.) (the “*Canale Action*”) was filed on May 3, 2016 in the Southern District of New York. *See* Schedule of Actions Ex. 2, *Canale Complaint*. The *Canale Action* seeks certification of a forty (40) state class of persons who, from October 1, 2013 to the present, purchased Optic White or Optic White Platinum, by pleading a national class excluding purchasers in California, Delaware, the District of Columbia, Kansas, Missouri, New Jersey, Ohio, Utah, Virginia, and West Virginia. *Id.*, at ¶¶ 40-41. The *Canale Action* brings claims for a forty state class that alleges breach of express warranty theories, and for a New York subclass under New York’s General Business Law §§ 349-350. *Id.*, ¶ 5. The *Canale Action* has not progressed beyond the pleading stage as Colgate has not yet responded to the complaint.

The *Vigil Action* was filed on May 18, 2016 in the United States District Court for the Northern District of California. *See* Schedule of Actions Ex. 3, *Vigil Complaint*. The complaint in *Vigil* pleads a national class of Optic White purchasers for breach of express and implied warranty, and also a California subclass pursuant to California’s Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*, and California’s Unfair Competition Law and False Advertising Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* and 17500, *et seq.* *Id.*, ¶¶ 3, 29-30. Similar to *Canale*, Colgate has yet to respond to the *Vigil Action*.

All three cases are based on the same allegations: Colgate falsely and misleadingly represents, in breach of warranty and state consumer protection statutes, that its Optic White toothpaste fails to *deeply* whiten teeth. *Cf.* Sched. of Actions, Exs. 1-3.

III. DISCUSSION

A. **THESE CASES EASILY MEET THE STANDARD FOR TRANSFER AND CONSOLIDATION PURSUANT TO 28 U.S.C. § 1407**

Multiple overlapping class actions alleging the same questions of law and fact, in front of three different federal judges presents precisely the situation for which 28 U.S.C. § 1407 was enacted. Accordingly, the three actions plainly meet the standards for transfer and consolidation consistently articulated by this Panel. *See, e.g., In re Food Fair*, 465 F.Supp. 1301, 1304-05 (J.P.M.L. 1979); *In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403 (J.P.M.L. 1977).²

Given the very similar allegations in each of the actions, the threshold requirement that the actions involve common issues of fact is easily met. See 28 U.S.C. § 1407. Moreover, there are several other benefits to transfer and consolidation, including the fact that it would promote efficiency, minimize the potential for duplicative discovery, and minimize the likelihood of inconsistent pretrial decisions (including inconsistent class decisions).

1. The Three Overlapping Actions Contain Nearly Identical Claims And Factual Allegations

As noted above, Colgate is currently defending three putative class actions in three different federal district courts in which relief is sought for nearly identical classes based upon

² As the Panel well knows, transfer and consolidation is appropriate when actions pending in different judicial districts involve similar questions of fact such that consolidating pretrial proceedings would “promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407. In relevant part, 28 U.S.C. §1407 provides as follows:

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.

Id.; *see also, e.g., In re Nifedipine*, 266 F.Supp.2d 1382, 1382 (J.P.M.L. 2003).

nearly identical factual allegations. This alone is generally sufficient to warrant transfer and consolidation. *See, e.g., In re HSBC Bank*, 2013 WL 2570558, at *1 (J.P.M.L. 2013) (transferring and consolidating three class actions); *In re Foot Locker*, 787 F.Supp.2d 1364, 1366 (J.P.M.L. 2011) (transferring and consolidating four class actions); *In re VA Data Theft*, 461 F.Supp.2d 1367, 1369 (J.P.M.L. 2006) (transferring and consolidating three class actions); *see also In re Plumbing Fixtures*, 308 F.Supp. 242, 244 (J.P.M.L. 1970) (“Such a potential for conflicting or overlapping class actions presents one of the strongest reasons for transferring such related actions to a single district for coordinated or consolidated pretrial proceedings which will include an early resolution of such potential conflicts.”).

2. Transfer And Consolidation Would Promote Efficiency And Minimize The Potential For Duplicative Discovery

Transfer and consolidation of these actions would promote efficiency and minimize the potential for duplicative discovery. *See, e.g., In re Foundry Resins*, 342 F.Supp.2d 1346, 1347 (J.P.M.L. 2004). Because each of the three actions pending in federal court is based upon nearly identical allegations, plaintiffs in each of the actions are, in turn, likely to seek overlapping discovery. *See In re Auto Body Shop*, 2014 WL 3908000, at *1-2 (J.P.M.L. 2014) (noting that transfer and consolidation were appropriate to eliminate duplicative discovery when the actions shared a common factual core). These actions are also likely to involve complicated issues regarding the efficacy of Colgate’s Optic White toothpaste on “subsurface” (versus “surface”) stains, and consumer expectations, among other things, that will normally result in expert reports and likely *Daubert* hearings. All these issues would be more efficiently handled in a consolidated proceeding. *See, e.g., In re Natrol, Inc. Glucosamine/Chondroitin*, 2014 WL 2616783, at *1 (J.P.M.L. 2014). Similarly, plaintiffs in each of the actions are likely to seek to depose many of the very same Colgate witnesses. *See, e.g., In re Auto Body Shop*, 2014 WL 3908000, at *1

(transfer before a single judge was beneficial because he or she could “structure pretrial proceedings to accommodate all parties’ legitimate discovery needs while ensuring that common witnesses are not subjected to duplicative discovery demands”); *In re Enfamil Lipil*, 764 F.Supp.2d 1356, 1357 (J.P.M.L. 2011) (“Centralizing the actions will allow for the efficient resolution of common issues and prevent unnecessary or duplicative pretrial burdens from being placed on the common parties and witnesses.”).

Given the similarity of the actions and the potential for duplicative discovery, transfer and consolidation would inevitably conserve the resources of the parties. *See, e.g., In re Air Crash at Dallas/Fort Worth Airport*, 623 F.Supp. 634, 635 (J.P.M.L. 1985). It would also conserve the resources of the judiciary, as it would assign responsibility for overseeing a pretrial plan to one judge as opposed to three different federal judges. *See, e.g., In re Pineapple*, 342 F.Supp.2d 1348, 1349 (J.P.M.L. 2004); *In re Advanced Inv. Mgmt.*, 254 F.Supp.2d at 1379.

3. Transfer And Consolidation Would Minimize The Risk Of Inconsistent Pretrial Decisions, Including Inconsistent Class Certification Decisions

There can be no legitimate dispute that three actions containing similar allegations and asserting similar causes of action pending before three different federal judges materially increases the likelihood of inconsistent pretrial decisions, ranging from inconsistent discovery rulings to inconsistent decisions on class certification. *See In re AZEK Bldg. Products*, 999 F.Supp.2d 1366, 1368 (J.P.M.L. 2014); *In re Toyota Motor Corp. Hybrid Brake*, 732 F.Supp.2d 1375, 1376-77 (J.P.M.L. 2010).

As the Panel has previously recognized, “[c]entralization will enable the transferee judge to make consistent rulings on such discovery disputes from a global vantage point” and will otherwise prevent inconsistent pretrial rulings on common factual issues. *See In re Yamaha*, 597

F.Supp.2d at 1378; *see also In re Dow Chem.*, 650 F.Supp. 187, 188 (J.P.M.L. 1986). In addition and perhaps most critically, it will prevent inconsistent pretrial rulings with respect to class certification. *See, e.g., In re H&R Block*, 435 F.Supp.2d 1347, 1349 (J.P.M.L. 2006) (“The three actions contain competing class allegations and involve facts of sufficient intricacy that could spawn challenging procedural questions and pose the risk of inconsistent and/or conflicting judgments.”). Indeed, the Panel has long recognized that preventing inconsistent class decisions “presents one of the strongest reasons for” transfer and consolidation:

[T]here are at least three other actions with class action claims which are in potential conflict with the claims asserted by these plaintiffs. Such a potential for conflicting or overlapping class actions presents one of the strongest reasons for transferring such related actions to a single district for coordinated or consolidated pretrial proceedings which will include an early resolution of such potential conflicts.

In re Multidistrict Private Civ. Treble Damage, 308 F.Supp. at 243-44; *see also In re Sugar Industry*, 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.”).

B. THE SOUTHERN DISTRICT OF NEW YORK HAS THE MOST SIGNIFICANT NEXUS TO THE RELATED ACTIONS SINCE COLGATE IS HEADQUARTERED THERE

The Panel can consider the nexus between the transferee forum and the parties to the litigation when resolving requests for transfer under 28 U.S.C. § 1407. A significant “nexus” exists when a party who is common to all actions (*e.g.*, the sole defendant) is headquartered or has facilities that are located within the transferee court’s jurisdiction, such that relevant witnesses and documentary evidence common to all the actions are likely to be found there. *See, e.g., In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, 381 F.Supp.2d 1383, 1384 (J.P.M.L. 2005) (granting motion of sole defendant to transfer all related actions to the Northern

District of Illinois after noting that “relevant discovery will likely be found within this district, because Sears’s corporate headquarters and many of its documents and witnesses are located there”); *In re Google Inc. St. View Elec. Commc’ns Litig.*, 733 F.Supp.2d 1381, 1382 (J.P.M.L. 2010) (transferring to district where “[t]he sole defendant, Google, is headquartered there, and most relevant documents and witnesses are likely located there.”); *St. Jude Med., Inc., Silzone Heart Valves Products Liab. Litig.*, MDL No. 1396, 2001 WL 36292052, at *2 (J.P.M.L. Apr. 18, 2001) (transferring litigation to district because “as the situs of the headquarters of the sole defendant in all actions, the district is likely to be a substantial source of witnesses and documents subject to discovery”). In this instance, the Southern District of New York has the strongest nexus to this litigation as Colgate headquarters are located within that district. As such, documents relevant to determining the key issue of whether Colgate’s claim that Optic White toothpaste “Deeply Whitens” is false and misleading and/or breaches warranties, are within the Southern District of New York. The majority of witnesses regarding the same (including advertising and public relations firms), are also located at or near Colgate’s New York City headquarters.

III. CONCLUSION

For the reasons stated herein, Plaintiff Vigil respectfully requests that the Panel issue an order transferring the actions listed on the Schedule of Actions to the United States District Court for the Southern District of New York for consolidated pretrial proceedings.

Respectfully submitted,

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Dated: June 27, 2016

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