

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

IN RE: FISHER-PRICE ROCK ‘N PLAY
SLEEPER MARKETING, SALES
PRACTICES, AND PRODUCTS
LIABILITY LITIGATION

MDL No. 2903

***DROVER-MUNDY* ACTION PLAINTIFFS’ MEMORANDUM IN OPPOSITION
TO DEFENDANTS’ MOTION FOR TRANSFER OF ACTIONS TO THE
CENTRAL DISTRICT OF CALIFORNIA**

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Plaintiffs Samantha Drover-Mundy and Zachary Mundy, each individually and as representatives of the Estate of L.M., on behalf of themselves and all others similarly situated, and Rebecca Drover on behalf of herself and all others similarly situated, Plaintiffs in *Drover-Mundy et al. v. Fisher-Price, Inc. et al.*, Western District of New York Case No. 1:19-cv-00512 (the “*Drover-Mundy* Action”), submit this brief in opposition to Defendants Fisher-Price, Inc. (“Fisher-Price”) and Mattel, Inc.’s (“Mattel”) Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 to the Central District of California (Western Division) for Coordination or Consolidation of Pretrial Proceedings.

I. INTRODUCTION

This litigation concerns a defective product marketed by Defendants Fisher-Price, Inc. and Mattel, Inc., the Rock ‘n Play Sleeper, which has resulted in dozens of deaths and hundreds of injuries to infants. The product has been recalled, but Fisher-Price has refused to make corrective disclosures regarding the dangerous nature of the product and has offered paltry compensation to purchasers (and no compensation to those affected by death or injury). A number of families who purchased or were impacted by the defective Rock ‘n Play Sleeper have filed actions against Fisher-Price and Mattel, including the *Drover-Mundy* Action.

Fisher-Price and Mattel now seek to transfer all of those actions to the Central District of California via the multi-district litigation process pursuant to 28 U.S.C. § 1407 (“MDL” treatment). An MDL transfer is unnecessary; the cases outside the Western District of New York (“WDNY”) are few, and the cases in the Central District of California already have pending motions to transfer to the WDNY pursuant to 28 U.S.C. § 1404. In any event, however, Defendants’ choice of the Central District of California as a forum is fundamentally wrong. The Rock ‘n Play was a Fisher-Price branded product conceived, designed, and marketed by Fisher-Price from its headquarters in the WDNY. The bulk of the discovery in this action, both with respect to documents and witnesses,

will be concentrated in the WDNY. Unsurprisingly, the bulk of the cases are already in that District. This litigation's minimal ties to the Central District of California pale in comparison.

II. PROCEDURAL BACKGROUND

On April 18, 2019, Plaintiffs filed the *Drover-Mundy* Action against Fisher-Price, Mattel, and Amazon.com, Inc. ("Amazon") alleging that, *inter alia*, for nearly a decade, Fisher-Price sold a defective and dangerous product, the Rock 'n Play inclined infant sleeper; that defects in the Rock 'n Play Sleeper caused numerous infant deaths and injuries, including the death of named Plaintiffs' daughter and granddaughter, L.M.; and that despite knowing of these defects and dangers, Fisher-Price continued to manufacture and sell the product. Subsequently, plaintiffs who purchased Rock 'n Play Sleepers have filed an additional 11 consumer class action complaints in various jurisdictions (including seven in the WDNY), which complaints make related allegations against Fisher-Price and Mattel (generally, that Fisher-Price marketed and sold a defective product and that the recall of the product in April 2019 was inadequate).¹

On May 28, 2019, Defendants Fisher-Price and Mattel filed a Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 to the Central District of California for Coordination or Consolidation of Pretrial Proceedings (ECF No. 1) (the "MDL Motion") in the *Drover-Mundy*

¹ The other currently pending cases in order of filing are: (1) *Mulvey v. Fisher-Price, et al.*, No. 1:19-cv-00518 (W.D.N.Y.); (2) *Black v. Mattel, et al.*, No. 2:19-cv-3209 (C.D. Cal.); (3) *Shaffer v. Fisher-Price et al.*, No. 1:19-cv-667 (W.D.N.Y.); (4) *Nabong v. Fisher-Price et al.*, No. 1:19-cv-0668 (W.D.N.Y.); (5) *Barton v. Fisher-Price, et al.*, No. 1:19-cv-0670 (W.D.N.Y.); (6) *Kimmel v. Fisher-Price, et al.*, No. 1:19-cv-00695 (W.D.N.Y.); (7) *Fieker v. Fisher-Price, et al.*, No. 4:19-cv-0295 (N.D. Okla.); (8) *Flores v. Fisher-Price, et al.*, No. 8:19-cv-1073 (C.D. Cal.); (9) *Wray v. Fisher-Price*, No. 1:19-cv-1603 (D. Colo.); (10) *Cuddy v. Fisher-Price, et al.*, No. 1:19-cv-0787 (W.D.N.Y.); and (11) *Nadel, et al. v. Fisher-Price, Inc., et al.*, No. 1:19-cv-0791 (W.D.N.Y.) (collectively the "Rock 'n Play Actions" and those filed in the Western District of New York the "WDNY Actions.").

Action and other pending cases.² On June 18, 2019, the Panel scheduled a hearing for July 25, 2019 in Portland, Oregon. *See* ECF No. 26.

On June 3, 2019, Defendants filed motions to stay proceedings in six of the WDNY Actions pending determination of the MDL Motion – *Drover-Mundy, Mulvey, Shaffer, Nabong, Barton, and Cuddy*. Sorkowitz Dec. ¶ 5. These motions were granted on June 4, 2019 on an *ex parte* basis, but without prejudice to plaintiffs’ right to move to lift the stay at any time. Sorkowitz Dec. ¶ 5. On June 24, 2019, plaintiffs in five of the actions pending in the WDNY – *Mulvey, Shaffer, Nabong, Barton, and Cuddy* – filed motions to lift the stays. *See* ECF No. 6. Plaintiffs in the *Drover-Mundy* Action are filing a motion to lift the stay concurrent with the filing of this motion.

The two actions pending in the Central District of California – *Black v. Mattel, et al.* (2:19-cv-3209) and *Flores v. Fisher-Price, et al.* (1:19-cv-0670) – were stayed by stipulation of the parties on May 31, 2019 and June 13, 2019 respectively. On June 11, 2019, plaintiffs in the then-pending WDNY Actions moved to lift the stay and intervene in the *Flores* action pending in the Central District of California and to transfer the *Flores* action to the WDNY pursuant to 28 U.S.C. § 1404(a).³ *See* ECF No. 3. On June 14, 2019, plaintiffs in the WDNY Actions filed a motion seeking the same relief in the *Black* action. *See* ECF No. 4 (both motions referred to collectively as the “1404 Motions”). The gist of the 1404 Motions is that the Western District of New York is the most proper venue for these cases because most of the key witnesses and the bulk of the evidence are located in that District. The 1404 Motions remain pending.

² The MDL Motion has been subsequently amended and corrected to reflect additional actions and changes in the status of certain of the Rock ‘n Play Actions.

³ Plaintiffs in the *Cuddy* and *Nadel* actions did not join the 1404 Motions because their complaints were not filed until June 13th and 14th respectively.

III. ARGUMENT

A. Transfer Under § 1407 is Not Necessary Here

“[W]here a reasonable prospect exists that the resolution of a Section 1404 motion or motions could eliminate the multidistrict character of a litigation, transfer under Section 1404 is preferable to Section 1407 centralization.” *In re Am. Bd. of Med. Specialties Maint. of Certification Antitrust Litig.*, No. MDL 2888, 2019 WL 2366487, at *1 (J.P.M.L. June 5, 2019). “[C]entralization under Section 1407 should be the last solution after considered review of all other options.” *In re Best Buy, Inc., Calif. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011). “Informal coordination among [] relatively few involved attorneys and coordination between the involved courts to prevent duplicative proceedings and inconsistent rulings . . . are practical alternatives to centralization.” *In re United States Soccer Fed'n Pay Discrim. Litig.*, No. MDL 2890, 2019 WL 2385637, at *1 (J.P.M.L. June 5, 2019).

Centralization pursuant to § 1407 is not necessary here because transfer of the outlier cases to the WDNY pursuant to § 1404 and informal cooperation between the relatively small number of attorneys involved is sufficient to mitigate Defendants’ concerns about inconsistent rulings and efficient use of judicial resources and to eliminate the multidistrict character of the litigation.

First, “where a reasonable prospect exists that resolution of Section 1404 motions could eliminate the multidistrict character of a litigation, transfer under Section 1404 is preferable to centralization.” *In re Gerber Probiotic Prods. Marketing and Sales Practices Litig.*, 899 F. Supp. 2d 1378, 1380 (J.P.M.L. 2012). The 12 Rock ‘n Play Actions are pending in only four different judicial districts – the WDNY, the Central District of California, the Northern District of Oklahoma, and the District of Colorado. *See* ECF No. 9-1 (MDL Motion Second Amended Schedule of Actions); ECF No. 17-1 (Notice of Related Action – *Cuddy*); ECF No. 22-1 (Notice of Related Action – *Nadel*). Of those, eight are pending in the WDNY. *Id.* Only two cases are

pending in the Central District of California and only one is pending in each of the Northern District of Oklahoma and in the District of Colorado. *Id.* Given just four outlier cases in districts other than the WDNY – which, as set forth *infra*, is the center of gravity of this litigation and the proper forum for all 12 cases – transfer pursuant to Section 1404 is sufficient to eliminate the multidistrict character of this litigation and eliminate the need for centralization. This is especially so because it is unlikely any party will seek to transfer cases to the District of Oklahoma or the District of Colorado, where no Defendant is based. If the California cases are transferred to the WDNY, the Oklahoma and Colorado cases are sure to follow suit.⁴

Second, the plaintiffs are represented by only a handful of attorneys, who would be able to coordinate and cooperate in order to streamline discovery for the two common defendants – Fisher-Price and Mattel (which, of course, are themselves represented by the same attorneys across these cases). Information coordination is therefore practicable among the actions absent MDL. *See In re Uber Tech., Inc., Wage & Hour Employment Pract.*, 158 F. Supp. 3d 1372, 1373 (J.P.M.L. 2016) (“Given the limited number of counsel, informal coordination of discovery and pretrial motions should be practicable.”). Coordination is not hypothetical here. Plaintiffs are represented by only nine law firms, three of which – Pierce Bainbridge Beck Price & Hecht LLP, Wolf Haldenstein Adler Freeman & Herz LLP, and DeNittis Osefchen Prince, P.C. – are already working together and have collaborated on the jointly-filed 1404 Motions in the *Black* and *Flores* actions.

⁴ Plaintiffs stand ready to file motions to intervene and transfer the *Fieker* (N.D. Okla.) and *Wray* (D. Colo.) actions similar to those filed in the *Black* and *Flores* actions if need be.

B. In the Alternative, If the Panel Agrees that Centralization Is Appropriate, the WDNY Is the Proper Forum for These Actions

Although MDL treatment is unnecessary for the reasons set forth above, whatever the procedural posture, the litigation at issue here belongs in the WDNY. Defendants characterize Plaintiffs’ choice of forum in the WDNY as a “clear attempt to forum shop” and argue that the number of actions pending in the WDNY is the “*only* factor in that district’s favor.” MDL Motion at 15 (emphasis in original). This suggestion is nonsensical; a review of the facts demonstrates the opposite, as shown below. There are numerous valid reasons why the majority of these cases have been filed in the WDNY. Faced with this reality, Defendants argue that the WDNY is not an appropriate forum for logistical reasons – arguments that both ignore the paramount consideration informing the analysis and fail on their own terms. *See* MDL Motion at 16-19; *In re RAH Color Techs. LLC Patent Litig.*, 347 F. Supp. 3d 1359, 1360 (J.P.M.L. 2018) (transferring to district where significant evidence and third-party discovery is located over district favored by common defendant).

1. The Western District of New York Is the Natural and Definitive Forum for These Cases

The WDNY is the center of gravity of this controversy. As set forth below, the primary defendant in these cases – Fisher-Price – has its corporate headquarters in the WDNY; the Rock ‘n Play Sleeper was conceived and designed in the WDNY; the vast majority of the work of conceiving, testing, designing, and marketing the Rock ‘n Play was conducted in the WDNY and therefore it is almost a certainty that all documents, prototypes, tested models, and other records from the development process remain at Fisher-Price’s location in East Aurora; and almost all of the known key witnesses are located in the WDNY. Additionally, of the 12 Rock ‘n Play Actions

currently pending, eight are currently pending in the WDNV before Judge Geoffrey Crawford.⁵ Judge Crawford, the Chief Judge of the U.S. District Court for the District of Vermont, hears cases before in the WDNV pursuant to a judge-sharing program.⁶

a. Most Witnesses Are in the WDNV

The Panel regularly transfers actions to judicial districts based on the location of a defendant's corporate headquarters, the location of documents and other evidence, and the location of key witnesses. *E.g., In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 363 F. Supp. 3d 1372, 1374–75 (J.P.M.L. 2019) (“We select the District of Maryland as the transferee district for this litigation. Marriott is headquartered in that district, and relevant documents and witnesses thus likely will be found there . . . [and] far more actions are pending there than in any other district.”); *In re Hill's Pet Nutrition, Inc., Dog Food Prod. Liab. Litig.*, No. MDL 2887, 2019 WL 2366489, at *1 (J.P.M.L. June 4, 2019) (“We select the District of Kansas as the transferee district. Hill's is headquartered in that district, and it represents that its key evidence and witnesses are located there.”); *In re RAH Color Techs. LLC Patent Litig.*, 347 F. Supp. 3d 1359, 1360 (J.P.M.L. 2018) (transferring to district where two of three defendants were headquartered).

Almost all of the witnesses with essential information are known or expected to be in the WDNV. Defendant Fisher-Price, the primary defendant in this Action, has its headquarters at 636 Girard Avenue, East Aurora, New York, which is in the WDNV. Fisher-Price and its employees are likely to be the most significant sources of discovery.

⁵ That the *Drover-Mundy* Action, the first-filed of the Rock ‘n Play Actions, was filed in the WDNV also supports transfer to that District. *See In re Ranbaxy Generic Drug Application Antitrust Litig.*, 355 F. Supp. 3d 1382, 1383 (J.P.M.L. 2019) (transferring actions to district where the “first-filed and most advanced” action is pending).

⁶ <https://www.nywd.uscourts.gov/news/usdc-wdny-judge-sharing-program-implementation-date-january-2017> (describing the judge-sharing program that the Western District of New York has with the District of Vermont).

The key factual witnesses in this litigation will be persons with information about: the design, development, testing, and manufacture of the Rock 'n Play Sleeper and its components; complaints, concerns, and communications received about the Rock 'n Play Sleeper; the marketing and packaging for these products; and the recall announced on April 12, 2019. While Fisher-Price and its corporate parent Mattel, Inc. have argued in their MDL motion that “some potential witnesses” will be located in the Central District of California while others will be located in Buffalo, New York, they fail to identify any witnesses in either location. *See* MDL Motion, ECF No. 1, at 2, 2 n.2. Although Mattel also faces liability in these actions, the essential design and marketing decisions at issue can be readily traced to Fisher-Price and thus the WDNY.

Witnesses located in the WDNY include the following:⁷

Linda Chapman, Director of Product Design – Newcomers Play and Sleep, Fisher-Price: Linda Chapman is the product designer at Fisher-Price who came up with the idea for the Rock 'n Play Sleeper. According to Ms. Chapman's profile on LinkedIn.com,⁸ she is based in East Aurora, New York. She received her current title, “Director of Product Design – Newcomers Play and Sleep” in April 2019, virtually contemporaneously with Fisher-Price's announcement of the recall of the Rock 'n Plays that she designed. She has held various design titles at Fisher-Price dating since 1987.

For years, Fisher-Price used Ms. Chapman's “story” to market the device. On its website it stated, in words from Ms. Chapman:

I'm a product designer, right? We could create a safe, contained space for babies – with an incline. When we approached the Fisher-Price Safety Committee with this idea ... they had concerns. But they also recognized the need. Our design

⁷ Much of the discussion below necessarily overlaps with the 1404 Motions and the Motion to Lift the Stay in the *Drover-Mundy* Action and is restated here because of its continuing relevance and for the Panel's convenience.

⁸ <https://www.linkedin.com/in/linda-chapman-2ab34414/> (last visited June 26, 2019).

and engineering team put a lot of thought into the best way to do this.

We had to find just the right angle for elevation We talked to experts, made several prototypes, tested lots of ergonomic variations, learned about all the possible issues....

Sorkowitz Decl. Ex. A. Ms. Chapman will be a key witness. She is in a position to know what the safety commissions “concerns” were. She will know what “thought” the design team put into the design, and who the members of that team were. Similarly, Ms. Chapman will know who the “experts” she worked with are and what they tested and discussed. Given Ms. Chapman’s centrality to this process, it is likely that those she worked with are also in the Western District of New York.

In addition, a recent Washington Post article, which discussed Ms. Chapman’s involvement with the Rock ’n Play Sleeper, also reported that that no pediatricians had tested Rock ’n Play Sleeper at any time during the product’s release and development, and that, in fact, the first time a pediatrician tested it was in response to a lawsuit concerning an infant’s death.⁹ By virtue of her position and experience, Ms. Chapman is likely to have knowledge of these matters.

Members of the Fisher-Price Safety Committee: In her “story” as quoted in the Fisher-Price website material cited above, Ms. Chapman references the Fisher-Price Safety Committee, which expressed “concerns” about her idea for the Rock ’n Play Sleeper. Given that it is a “Fisher-

⁹ Todd C. Frankel, “Fisher-Price invented a popular baby sleeper without medical safety tests and kept selling it, even as babies died,” The Washington Post (May 30, 2019) *available at* https://www.washingtonpost.com/business/economy/how-fisher-price-invented-a-popular-baby-sleeper-without-safety-tests-and-kept-it-on-the-market-even-as-babies-died/2019/05/30/78c2707a-7731-11e9-b3f5-5673edf2d127_story.html?utm_term=.dcaf6af5c097.

Price Safety Committee,” rather than a Mattel one, it is likely that its members are located in the Western District of New York.

Michael Steinwachs – Senior Manager, Quality Engineering, Fisher-Price: As reported in a Consumer Reports article issued shortly prior to the recall, Mr. Steinwachs was one of the primary engineers at Fisher-Price involved in designing the Rock ’n Play.¹⁰ According to his profile on ZoomInfo.com, he is based at Fisher-Price in East Aurora, New York.¹¹

Fisher-Price has conceded that Mr. Steinwachs is a person with relevant information. According to Defendant Fisher-Price’s initial disclosures in an infant death case filed in 2013, *Torres et al. v. Imperial Manufactory Ltd., et al.* (S.D. Texas, Civ. No. 15-444) (“*Torres*”), Mr. Steinwachs “has knowledge about defendants’ product safety procedures and record, the manufacturing and testing of the Rock ’n Play Sleeper, the marketing and warnings for the Rock ’n Play Sleeper and other issues related to the Rock ’n Play Sleeper.” *See* Sorkowitz Decl. Ex. B.

Cathy (Kitty) Pilarz – Vice President for Product Safety and Regulatory Compliance, Fisher-Price: Cathy (Kitty) Pilarz is a Vice President for Product Safety and Regulatory Compliance with knowledge of significant information relevant to each of the actions against Defendants concerning the Rock ’n Play Sleeper. According to her LinkedIn profile, Ms. Pilarz is based in East Aurora, New York.¹²

As with Mr. Steinwachs, Fisher-Price has indicated that Ms. Pilarz has knowledge of relevant facts. Fisher-Price stated in its initial disclosures in the *Torres* infant death case that this witness “has knowledge about Defendants’ product safety procedures and record, the design and

¹⁰ <https://www.consumerreports.org/recalls/fisher-price-rock-n-play-sleeper-should-be-recalled-consumer-reports-says/> (last visited June 26, 2019).

¹¹ <https://www.zoominfo.com/p/Mike-Steinwachs/1874515890> (last visited June 26, 2019).

¹² <https://www.linkedin.com/in/kitty-pilarz-7112697/> (last visited June 26, 2019).

development of the Rock 'n Play Sleeper, the marketing and warnings for the Rock 'n Play Sleeper and other issues related to the Rock 'n Play Sleeper.” *See* Sorkowitz Decl. Ex. B.

Kurt Huntsberger – Vice President of Design, Fisher-Price: Kurt Huntsberger, Vice President of Design at Fisher-Price, was Ms. Chapman’s supervisor at the time that Ms. Chapman devised the Rock 'n Play Sleeper. Mr. Huntsberger’s ZoomInfo page indicates that he is based at Fisher-Price in East Aurora, New York.¹³

Margo Moulin – Soft Goods Engineer: Margo Moulin is a soft goods engineer who worked on the Rock 'n Play Sleeper. Ms. Moulin’s LinkedIn page indicates that she is based in “Buffalo/Niagara, New York Area.”¹⁴

During her deposition in yet another case arising from use of a Rock 'n Play Sleeper, *Goodrich v. Fisher-Price* (N.D. Ga., 1:16-CV-03116-TWT) (the “*Goodrich* Action”), Ms. Chapman testified that Ms. Moulin “helped to develop the sling that ultimately ... became the housing that held the structure for the Rock-N-Play seat.” *See* Sorkowitz Decl. Ex. C.

Other (as yet unidentified) Members of the Research and Development Team for the Rock 'n Play Sleeper: A recent Washington Post article indicated that the Rock 'n Play Sleeper was developed by “a small team of engineers at the toy company outside Buffalo.”¹⁵ It may be reasonably expected that through discovery additional members of the team will be disclosed, and they will be located, as the article indicates, in the Western District of New York.

Chuck Scothon – General Manager, Fisher-Price: Chuck Scothon is the General Manager of Fisher-Price and Global Lead Infant/Preschool, Buffalo, New York. According to his

¹³ <https://www.zoominfo.com/p/Kurt-Huntsberger/-1508334013> (last visited June 26, 2019).

¹⁴ <https://www.linkedin.com/in/margo-moulin/> (last visited June 27, 2019).

¹⁵ Frankel, *supra* note 9.

LinkedIn profile, Mr. Scothon is based at Fisher-Price's headquarters in East Aurora, New York. Fisher-Price's "Entity Information Document" filed with the State of New York (Sorkowitz Decl. Ex. D) lists Mr. Scothon as Fisher-Price's Chief Executive Officer, and lists his contact address in East Aurora. Mr. Scothon publicly stated on April 5, 2019 that the Rock 'n Play Sleeper meets all applicable safety standards. Despite voluntarily recalling the potentially deadly product on April 12, 2019, Mr. Scothon, again claimed that the product was safe if used correctly, stating when announcing the recall:

We stand by the safety of our products. However, due to reported incidents in which the product was used contrary to the safety warnings and instructions, we have decided to conduct a voluntary recall of the Rock 'n Play Sleeper in partnership with the Consumer Product Safety Commission.⁹

Fisher-Price has used Mr. Scothon as a face for the recall. On its website, on the page announcing the recall, it includes a video of Mr. Scothon, stating, "While we continue to stand by the safety of all of our products, given the reported incidents in which the product was used contrary to safety warnings and instructions, we've decided in partnership with the Consumer Product Safety Commission (CPSC), that this voluntary recall is the best course of action."¹⁶

Mr. Scothon will be deposed to testify about his statements, which continue to mislead the public into believing the Rock 'n Play is safe (it is not). Mr. Scothon is also expected to know about Defendant's product safety, marketing, and disclosure decisions, including the decisions to issue the above described statements.

Joel Taft – Senior Manager, Product Safety, Fisher-Price: Joel Taft has been a Senior Manager of Product Safety at Fisher-Price for more than 18 years. According to his LinkedIn profile, he is based in "Buffalo/Niagara Falls," New York.¹⁷ Mr. Taft's LinkedIn profile states

¹⁶ <https://fisher-pricesafety.com> (last visited June 26, 2019).

¹⁷ <https://www.linkedin.com/in/joel-taft-348b8a33> (last visited June 26, 2019).

that his responsibilities include, inter alia:

Responsible for product safety of all Fisher-Price and Mattel products. Review toys and juvenile products to design-in safety during the product development process. Chairman of the Hazard Analysis Committee - perform Hazard Analysis of every Fisher-Price Core product. Determine the need for product safety changes that go above and beyond that which is required by global regulations and industry standards.

Review consumer returns and consumer incident data as part of a continuous improvement process. Responsible for reviewing consumer returned products and assessing the products for potential issues and to recommend corrective actions, when appropriate. Perform continual review and provide analysis of the Consumer Affairs database to identify trends that may indicate potential concerns within the existing product line.

Develop internal safety and reliability requirements. Conduct reviews/updates of internal procedures and test methods to ensure that they are current and reflect issues that have been revealed by the consumer data, by recalls of competitors' products, or by changes in global regulatory standards

Given these responsibilities, and the duration of his work at Fisher-Price in the Western District of New York, it is highly likely that Mr. Taft has information relevant to this case.

Bryan Brown, Vice President of Quality, Design and North American Manufacturing, Mattel, Inc.: During the period when Rock 'n Play Sleepers were designed and sold, Bryan Brown held various relevant leadership positions in the area of product quality and manufacture at Mattel. At all relevant times, Mr. Brown was based in East Aurora, New York.¹⁸

His positions demonstrate that he has knowledge relevant to this litigation. For example, as Vice President, Quality Engineering from August 2014 through October 2016, he was responsible for "insuring that all new product[s] developed as well as continuing product[s] meet all internal and external safety, regulatory and quality requirements for all Mattel brands."¹⁹ From October 2016 to the present, as VP, Quality, Design and North American Manufacturing, he has

¹⁸ <https://www.linkedin.com/in/bryan-brown-aa314433> (last visited June 26, 2019).

¹⁹ *Id.*

been “[r]esponsible for diverse group of Quality professionals supporting many facets of product development and manufacturing. Support[ed] early product development with safety and regulatory requirements in addition to infusing the voice of consumer in new product designs. Ha[d] overall responsibility for the US based call center, supporting all warranty claims.”²⁰ These tasks, which he performed from Fisher-Price’s location in the Western District of New York, gave him responsibility for insuring that Rock ’n Play Sleeper met safety standards, and would have given him an awareness of how many customers called with problems and complaints and the nature of the issues that they raised.

Tony DiSimone, Marketing Executive, Fisher-Price: Tony DiSimone held a number of significant marketing positions during the relevant period that indicate he is a witness with material knowledge.²¹ For example, from 2004 through 2011, he was Director / Senior Director of Marketing for Fisher-Price in East Aurora, New York. In that capacity, he “provided strategic and creative direction for marketing programs both traditional and non-traditional in scope. Examples include: TV advertising, Print advertising, Digital, Social, PR, Custom Publications, Magalogs, Website, Packaging and Sampling.” From March 2012 through October 2013, as Vice President of Global Marketing, he had an even more extensive array of responsibilities with respect to marketing.

The testimony of a marketing executive is important because Plaintiffs’ consumer protection claims arise out of Defendants’ misrepresentations and omissions in marketing the Rock ’n Play Sleepers. They are also important because, as Ms. Chapman testified in the *Goodrich* case, product development was typically driven by marketing people. Sorkowitz Decl. Ex. C at 23:24

²⁰ *Id.*

²¹ <https://www.linkedin.com/in/tonydesimone1> (last visited June 26, 2019).

– 24:16. At all relevant times, Mr. DiSimone was based in East Aurora, New York. Though he has left Fisher-Price, he is apparently still based in the Western District of New York.²² The presence of nonparty witnesses in this District (including former Fisher-Price employee witnesses such as Ms. DiSimone) makes it especially important that the cases remain in this District so that a jury may consider their live testimony at trial.

Ronda Strauss – Manager – Risk Management: Ronda Strauss is a Manager in Risk Management at Fisher-Price Toys/Mattel. Upon information and belief, at all relevant times Ms. Strauss has been based in the Buffalo, New York area.²³

A case filed against Fisher-Price concerning a different Mattel product described Ms. Strauss’s role as “a non-lawyer manager in the Risk Management Legal Department whose function is similar to an adjuster.” *Zeigler v. Fisher-Price, Inc.*, No. C01-3089-PAZ, 2003 WL 1889021, at *2 (N.D. Iowa Mar. 13, 2003). Her work includes handling return evaluation forms for products returned by customers. As such, she is likely to be a witness with significant knowledge about customer complaints and concerns about the potential danger relating to the Rock ’n Play Sleepers.

b. Additional Evidence in the WDNY

In addition to witnesses, the documentary and physical evidence to be relied on by key factual witnesses and experts and in support and defense of claims are concentrated in the WDNY.

First, as is clear from the foregoing witness descriptions, the Rock ’n Play Sleeper was developed by a team working in the Western District of New York. All remaining documents, prototypes, tested models, and other records from the development process almost certainly remain

²² *Id.*

²³ <https://www.linkedin.com/in/ronda-strauss-670370170/> (last visited June 27, 2019).

at Fisher-Price's headquarters in East Aurora, New York. For example, any of the prototypes referenced in Ms. Chapman's "story" (*supra*) that still exist are also likely to be in this District.

Furthermore, based on Mr. DiSimone's marketing work being done out of East Aurora, it is likely that there is a team of marketers for products like the Rock 'n Play based in the Western District of New York. It is also likely that the records from such marketing, including both documents, and potentially non-documentary evidence, such as test packaging, remain in the Western District of New York.

Similarly, the presence of Mr. Taft, a senior manager in product safety who reviewed returned products and monitored customer complaint logs, and Ms. Strauss, in the Risk Management function, indicates that there is risk management department that addresses customer complaints and returned products in Fisher-Price's East Aurora offices. Relevant evidence is likely to be found in that department.

In addition, the instruction sheets included in boxes with Rock 'n Plays provide the following address for the service contact in the United States: "Fisher-Price, Inc., 636 Girard Avenue, East Aurora, NY 14052." Sorkowitz Decl. Ex. E. As such, it is likely that written complaints and returns were sent to Fisher-Price in the Western District of New York.

As yet another indicator of the likelihood of evidence being found in the Western District of New York, the recall notice jointly issued by the Consumer Product Safety Commission and Defendants states that the "Importer" of the product is "Fisher-Price, of East Aurora, N.Y." Sorkowitz Decl. Ex. F. As the "Importer," Fisher-Price of East Aurora is also most likely to have documents concerning manufacture and design of the product and its misleading packaging.

Accordingly, because the Western District of New York is the most concentrated forum for witnesses and evidence, for the convenience of witnesses and parties, the case should be

transferred, if any, to that District. *See In re Library Editions of Children's Books*, 297 F. Supp. 385, 387 (J.P.M.L. 1968) (coordinating litigation in the Northern District of Illinois because it was the “center of gravity” of the litigation).

2. Defendants’ Arguments Against the WDNY Are Unavailing

Defendants argue that the WDNY is “not an ideal forum to transfer the actions primarily because of the overcrowded dockets of the judges”; the “unusually heavy case load in that District”; and because “the Western District of New York only appears to have handled one MDL action in the past ten years.” MDL Motion at 3. These reasons do not stand up to scrutiny and, anyway, do not nearly overcome the basic fact that the product this case centers on was devised, tested, designed and marketed in the WDNY.

First, docket congestion alone cannot justify transfer. The Panel routinely transfers cases to districts with more crowded dockets because other factors favor the transfer. *See Miller v. Regency Mar. Corp.*, 824 F. Supp. 200, 204 (N.D. Fla. 1992) (directing transfer to SDNY despite alleged over-crowding because it was the proper forum pursuant to forum selection clause); *In re Library Editions of Children's Books*, 297 F. Supp. 385, 387 (J.P.M.L. 1968) (“In any event, delays caused by calendar congestion may be avoided by the appointment of a judge for all purposes within the district or by the appointment of another judge from outside the district in accordance with Section 1407(b).”); *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 407 F. Supp. 244, 246 (J.P.M.L. 1976) (transferring to Eastern District of New York despite argument that it was “far more congested” than other districts); *In re: IntraMTA Switched Access Charges Litig.*, 67 F. Supp. 3d 1378, 1379 (J.P.M.L. 2014) (same).

Second, concerns about the time to trial in this case can be mitigated by efficient case management and securing a judge from outside the district (here, Judge Crawford) to manage the cases. *See In re San Juan, Puerto Rico Air Crash Disaster*, 316 F. Supp. 981, 982 (J.P.M.L. 1970)

(“Where it is appropriate to transfer litigation to a district with an unusually heavy caseload, it is frequently necessary to secure an outside judge to conduct coordinated or consolidated pretrial proceedings.”); *Dimplex N. Am. Ltd. v. Twin-Star Int’l Inc.*, No. 13-CV-14415, 2014 WL 3558174, at *5 (E.D. Mich. July 18, 2014) (time-to-trial statistics are not sufficient on their own to justify a transfer); *Securities and Exchange Commission v. Christian Stanley, Inc.*, No. CV 11-7147-GHK (MANx), 2012 WL 13012496, at *4 (C.D. Cal. April 4, 2012) (“administrative considerations such as docket congestion are given little weight in this circuit in assessing the propriety of a [transfer].”).

Third, the fact that the WDNY has not handled an MDL since 2009 does not indicate that the District is somehow incapable of doing so, and indeed, it would be preposterous to indicate that any federal district somehow lacks such capability. The Panel regularly transfers actions to districts with little experience handling MDLs and to jurists who have not yet had the opportunity to preside over one. *E.g.*, *In re: TD Bank, N.A., Debit Card Overdraft Fee Litig.*, 96 F. Supp. 3d 1378, 1379 (J.P.M.L. 2015) (noting that allowing the Panel to “assign [the] litigation to ... an experienced and capable jurist who has not yet presided over a multidistrict litigation” weighs in support of transfer); *In re: Lidoderm Antitrust Litig.*, 11 F. Supp. 3d 1344, 1345–46 (J.P.M.L. 2014) (same); *In re: TLI Commc’ns LLC Patent Litig.*, 26 F. Supp. 3d 1396, 1397 (J.P.M.L. 2014) (same); *In re: Loestrin 24 Fe Antitrust Litig.*, 978 F. Supp. 2d 1371, 1372 (J.P.M.L. 2013) (same); *In re: Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 949 F. Supp. 2d 1365, 1366 (J.P.M.L. 2013) (same).

Fourth, contrary to Defendants’ assertions about the convenience of the Central District of California, the WDNY is the most convenient forum for the Rock ‘n Play Actions. *See* MDL Motion at 11. The convenience of the litigants substantially weighs in favor of transfer to the

WDNY. Fisher-Price, the primary defendant in this Action, is headquartered there. Seven of the Rock ‘n Play Actions are currently pending there. Travel to and from the WDNY presents no greater burden than travel to and from the Central District of California. Both cities are served by international airports. In terms of delays, Los Angeles International Airport is ranked 10th worst in the nation.²⁴ By contrast, Buffalo-Niagara International Airport is ranked as the best airport in its class.²⁵ On information and belief, hotels in the WDNY are typically less expensive and less congested than those in Los Angeles. The *Drover-Mundy* Plaintiffs reside in Florida and Pennsylvania, from which Buffalo is easier to reach than Los Angeles. On balance, it is more convenient for the litigants to be in the WDNY, and certainly no less convenient.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the MDL Motion be denied in favor of information coordination and cooperation between the parties with respect to discovery. In the alternative, if the Panel agrees with Defendants that the Rock ‘n Play Actions should be transferred pursuant to § 1407, Plaintiffs respectfully request that the actions that are not pending in the WDNY be transferred to the WDNY under 28 U.S.C. § 1407 and be consolidated or coordinated for pretrial proceedings before the Honorable Geoffrey Crawford.

²⁴ <https://www.forbes.com/sites/laurabegleybloom/2018/10/22/15-best-and-worst-airports-in-the-us-for-flight-delays/#346466b77bca> (last visited June 26, 2019).

²⁵ <https://www.jdpower.com/business/press-releases/2018-north-america-airport-satisfaction-study> (last visited June 26, 2019).

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