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

DEFENDANTS' CONSOLIDATED REPLY BRIEF IN SUPPORT OF MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

Defendants Fisher-Price, Inc. and Mattel, Inc. (collectively, "Defendants"), submit this consolidated reply brief in support of its Motion for Transfer pursuant to 28 U.S.C. § 1407.[1]

I. INTRODUCTION

None of the Plaintiffs dispute that all the Actions[2] share common issues of fact. Nor do the Plaintiffs dispute that centralization will promote the just and efficient conduct of the actions or serve the convenience of parties and witnesses. Instead, the Plaintiffs opposing Defendants' Motion argue that centralization can be achieved through alternative means instead of under 28 U.S.C. § 1407. Plaintiffs in two Actions further argue that their cases should be carved out from centralization because they subsequently dropped their nationwide classes and federal claims.

[1] Hereafter, the term "Motion" shall refer to Defendants' Amended Memorandum in Support of the Motion for Transfer (Dkt. No. 11), which updated the Memorandum originally filed on May 28, 2019 (Dkt. No. 1-1), to include subsequently-filed Actions.

[2] In this Reply, "Actions" refers to the ten cases that were included in Defendants' Amended Memorandum (Dkt. No. 11 at footnote 1) and the Second Amended Motion and Schedule of Actions (Dkt. Nos. 9 and 9-1), as well as three subsequently filed related actions: (1) *Cuddy v. Fisher-Price, Inc. & Mattel, Inc.*, Western District of New York Case No. 1:19-cv-00787 ("*Cuddy*") (Dkt. No. 17); (2) *Nadel, et al. v. Fisher-Price, Inc. & Mattel, Inc.*, Western District of New York Case No. 1:19-cv-00791 ("*Nadel*") (Dkt. No. 22); and (3) *Poppe v. Fisher-Price, Inc. & Mattel, Inc.*, Western District of New York Case No. 1:19-cv-00870 ("*Poppe*") (Dkt. No. 44). (Supplemental Declaration of Adrianne E. Marshack ["Supp. Marshack Decl."], ¶ 1 n.1.)

All of the Plaintiffs' arguments should be rejected. Centralization by other means, *i.e.*, the success of motions brought under 28 U.S.C. § 1404 and informal cooperation, is purely hypothetical and unlikely given the unusual procedural maneuverings of various Plaintiffs, making them adverse to other of the Plaintiffs. Further, even if two of the Actions have dropped their nationwide classes, the purposes of Section 1407 will best be served by including these Actions in pretrial centralization because they undeniably share significant common issues of fact with all the other Actions. In other words, Plaintiffs have failed to adequately dispute that coordination or consolidation of pretrial proceedings for all the thirteen Actions (and any tagalong actions) will serve the purposes of 28 U.S.C. § 1407 to secure the "just, speedy, and inexpensive determination" of the issues raised in the Actions.

If centralization is granted, the Plaintiffs dispute the appropriate transferee forum, with each Plaintiff suggesting the jurisdiction where his/her Action is pending. For the reasons set forth in Defendants' Motion and below, Defendants respectfully submit that Section 1407 transfer to the Central District of California (the Honorable Virginia A. Phillips) is appropriate.

II. ARGUMENT

A. Centralization Is Appropriate Under 28 U.S.C. § 1407

1. The Actions Share Significant Common Issues of Fact

While all Plaintiffs concede that each of the Actions shares common issues of fact, some attempt to minimize the existence of common issues of fact by claiming that the common facts are "too simple" to warrant centralization—a suggestion belied by the Plaintiffs' allegations themselves. (Dkt. No. 37 at 9; Dkt. No. 34 at 8-9.)

Each of the Actions is a products-liability action disguised as a false advertising case.[3]

[3] Only one of the Actions, *Drover-Mundy,* alleges personal injury.

Plaintiffs in each of the Actions allege that Fisher-Price's Rock 'n Play Sleeper ("RNPS") is inherently dangerous and unfit for the purposes for which it was advertised.[4] (*See* Dkt. No. 11 at 5-7.) The common facts involve a fundamental and central dispute about the safety and design of the RNPS, and will require discovery—including expert discovery—relating to complex facts relating to the design, testing, adequacy of warnings, and marketing of the RNPS. *See In re FCA US LLC Monostable Electronic Gearshift Litig.,* 214 F. Supp. 3d 1354, 1355 (J.P.M.L. 2014) ("*In re FCA*") (centralizing eleven class actions finding that they shared "complex factual questions arising out of allegations" that the product "is defective and unreasonably dangerous").

As purported evidence that the RNPS is inherently dangerous, Plaintiffs point to the deaths of approximately thirty infants that allegedly occurred while in a RNPS, and which Plaintiffs contend were caused solely by the design of the RNPS and no other factor. (*See* Dkt. No. 11 at 6.) That allegation will be vigorously challenged. Because Plaintiffs have put these deaths and the reasons therefor at issue, however, discovery regarding the infant deaths may be necessary. These facts are hardly "simple," and make this case a far cry from the straightforward food labeling cases on which Plaintiffs rely.[5] Indeed, one need only look at the number of defense witnesses preliminarily identified by Plaintiffs (ten) to determine that the facts are

[4] One might assume the Panel already recognized that the Actions present more than just run-of-the-mill false advertising cases when it elected to title the multi-district litigation as "Marketing, Sales Practices, **and Products Liability** Litigation" (emphasis added).

[5] Plaintiffs rely on *In re Minute Maid Pomegranate Blueberry Flavored Juice Blend Mktg. & Sales Practices Litig.*, 84 F. Supp. 3d 1365 (J.P.M.L. 2015), *In re Kashi Company Mktg. & Sales Practices Litig.*, 959 F. Supp. 2d 1357 (J.P.M.L. 2013) (*see* Dkt. 37 at 9), and *In re Quaker Oats Maple & Brown Sugar Instant Oatmeal Mktg. & Sales Practices, Litig.,* 190 F. Supp. 3d 1349 (J.P.M.L. 2016) (*see* Dkt. No. 34 at 9). *In re Minute Maid* involved only two false advertising actions regarding the ingredients in a particular juice, where there was no dispute over the product's ingredients, just whether the advertising was misleading. 84 F. Supp. 3d at 1365. *In re Kashi* involved four false advertising actions relating to whether the defendant inappropriately listed "evaporated cane juice" as an ingredient in its products. 959 F. Supp. 2d at 1357-58. *In re Quaker Oats* involved four false advertising cases alleging that oatmeal labels were misleading because the oatmeal contained maple sugar rather than maple syrup, as pictured on the label. 190 F. Supp. 3d at 1350.

complex. Discovery relating to the admittedly common facts will necessarily be time-consuming, and thus, centralization is warranted to prevent duplicative discovery and to streamline the processes. *See In re: BP Prod. N. Am., Inc., Antitrust Litig. (No. II)*, 560 F. Supp. 2d 1377, 1379 (J.P.M.L. 2008) (centralizing cases and rejecting the arguments that the common questions of fact were not complex and that alternative means of coordination would be preferable, determining that "[t]hese seventeen actions [pending in two districts] present overlapping and, in many instances, nearly identical factual allegations that will likely require duplicative discovery and motion practice."). The inapposite cases relied on by Plaintiffs—which all involved six or fewer actions for centralization—do not demonstrate otherwise.[6] (See Dkt. No. 34 at 9.) The requirement that the Actions share common facts is readily satisfied.

2. Pretrial Centralization Will Advance the Just and Efficient Conduct of the Actions

As demonstrated in Defendants' Motion, centralization of the (now thirteen) Actions will serve the purposes of centralization to secure the "just, speedy and inexpensive determination of every action" by eliminating duplicative discovery, preventing inconsistent pretrial rulings, and conserving the resources of the parties, their counsel, and the judiciary. *In re Generic Digoxin &*

[6] Plaintiffs rely on *In re Nissan N. Am. Inc. Infiniti FX Dashboard Prods. Liab. Litig.*, 715 F. Supp. 2d 1355 (J.P.M.L. 2010), which involved only two actions seeking certification of two different classes. In *In re Medicare Fee Schedule Locality Litigation*, 560 F. Supp. 2d 1344 (J.P.M.L. 2008), there were similarly "only two purported class actions with distinctly separate classes," unlike the Actions here. Plaintiffs' reliance on *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litigation*, 446 F. Supp. 242 (J.P.M.L. 1978), is also misplaced. That matter involved only three cases, none of which were class actions. *In re Texas Instruments Inc. Employment Practices Litigation*, 441 F. Supp. 928 (J.P.M.L. 1977), involved only two separate actions alleging employment discrimination. Finally, *In re Xytex Corp. Sperm Donor Products Liability Litigation*, 223 F. Supp. 3d 1351 (J.P.M.L. 2016), involved six individual actions alleging that a sperm bank failed to properly screen one of its donors. The JPML recognized that the common questions relating to intake and screening procedures of the sperm bank were "not particularly complex," but that those common factual questions would not "predominate over the plaintiff-specific factual and legal questions presented in these actions," such as the representations to each plaintiff, limiting benefits gained through centralization. 223 F. Supp. 3d at 1352. If Plaintiffs contend that here, as in *In re Xytex,* the common issues are simple and overwhelmed by the more complex individual issues, they should immediately dismiss their class claims or risk violating Rule 11 of the Federal Rules of Civil Procedure.

Doxycycline Antitrust Litigation, 222 F. Supp. 3d 1341, 1344 (J.P.M.L. 2017).

Plaintiffs do not dispute that centralization will, in fact, serve all of these intended purposes. Rather, Plaintiffs offer a patchwork of other arguments suggesting why centralization under 28 U.S.C. § 1407 should not be granted. Each argument should be rejected.

a. There Are a Sufficient Number of Actions to Warrant Centralization.

Plaintiffs suggest that the thirteen Actions, and counting, are not sufficient in number to be centralized, and suggest that Defendants bear a "heavier burden to demonstrate centralization is appropriate" based on the number of Actions. (*See* Dkt. No. 37 at 6.) Plaintiffs' argument is meritless. As an initial matter, Plaintiffs do not cite a single case imposing the "heavier burden" standard in cases where there were more than ten related cases, as there are here.[7] (*See* Dkt. No. 37 at 6.) Further, Plaintiffs do not point to a single decision denying centralization where there were thirteen putative class actions sharing common issues of fact, as there are here.

Plaintiffs' citations to cases where the Panel declined to centralize thirteen or more pending cases are misplaced and misleading. (*See* Dkt. No. 37 at 6.) In *In re Route 91 Harvest Festival Shootings in Las Vegas, Nevada, on October 1, 2017*, 347 F. Supp. 3d 1355 (J.P.M.L.

[7] Plaintiffs rely on *In re Samsung Galaxy Smartphone Mktg. & Sales Practices Litig.*, 273 F. Supp. 3d 1371 (J.P.M.L. 2017), which involved eight actions with separate putative state classes (only one action alleged a nationwide class), so, unlike here, there was not a danger of inconsistent rulings on class certification. Also unlike here, the cases asserted only one common claim. Further, the majority of the actions were pending in the same or adjacent districts, and with relatively few counsel representing the plaintiffs, on balance, the Panel decided the heavier burden was not met under a totality of the circumstances. *Id.* at 1373. Plaintiffs also cite *In re Enhanced Recovery Company, LLC, Fair Debt Collection Practices Act (FDCPA) Litigation*, 363 F. Supp. 3d 1375 (J.P.M.L. 2019), which involved seven actions, and non-overlapping putative state classes of consumers. Unlike here, there was no substantial risk of conflicting pretrial rulings, so the Panel determined that the "heavier burden" had not been met. *Id.* Plaintiffs also rely on *In re Forcefield Energy, Inc., Securities and Derivative Litigation*, 154 F. Supp. 3d 1351 (J.P.M.L. 2015), which is inapposite. That case involved only five actions: two derivative actions and three securities actions that were already consolidated. The Panel recognized that they had certified other litigation that involved fewer cases but given the consolidation and the fact that the cases were pending in adjacent districts, the Panel believed formal centralization was not necessary. *Id.* at 1352.

2018), the Panel denied centralization because the cases did not share common issues of fact. After the Panel eliminated nine declaratory judgment cases from possible centralization because they raised purely legal, not factual, issues, only four individual negligence actions remained for consideration, three of which were pending in the same district before a single judge with significant overlap of counsel.[8] *Id.* at 1357-58. Under these unique circumstances, the Panel determined that alternatives to centralization could be easily achieved. Similarly, in *In re National Credit Union Administration Board Mortgage-Backed Securities Litigation*, 996 F. Supp. 2d 1374 (J.P.M.L. 2014), centralization of eleven actions plus three tagalong actions was denied because the actions involved different facts. *Id.* at 1375-76. The Panel did not deny centralization because the number of actions was too low, nor did it impose a "heavier burden" in light of the number of actions, which is similar to the number of Actions currently at issue.

Plaintiffs' suggestion that there are "only three" cases for the purpose of this Motion is wrong. (*See* Dkt. No. 37 at 5.) There are thirteen separate and distinct Actions with seven unique sets of lead counsel currently pending before five different judges.[9] (Supp. Marshack Decl., ¶¶ 4-5.) All of the Actions have been treated separately, requiring separate filings, even when the same relief has been sought. Since the filing of this Motion, there have been no fewer than thirty-two (32) motions or stipulations filed in the Actions seeking to obtain similar relief. (*Id.* at ¶ 6.) This volume would not be necessary if there were truly only three Actions, as Plaintiffs proffer, and is an inefficiency that can be remedied by centralization.

Plaintiffs argue that the three sets of counsel in the Western District of New York

[8] It was only in the context of discussing these four negligence actions that the Panel imposed the "heavier burden" requirement; the Panel did not impose the heavier burden when discussing the combined thirteen actions. *In re Route 91 Harvest,* 347 F. Supp. 3d at 1357.

[9] This diversity is notable, given the effort by some Plaintiffs' counsel to convince and cajole every possible case into the WDNY, including some with Plaintiffs who reside on the opposite coast (*e.g.*, Plaintiffs Barton and Shaffer).

("WDNY") are coordinating with one another and should be considered to be managing one Action. (Dkt. No. 37 at 5.) This suggestion is belied, however, by the fact that two of these allegedly coordinating firms filed **separate oppositions** to Defendants' Motion. (*See* Dkt. Nos. 37 and 43.) Further, there are three different sets of counsel in the Actions pending outside of the WDNY who are not coordinating their activities with the WDNY Plaintiffs, or anyone else. Thus, the number of Actions (thirteen) is more than sufficient to justify coordinated or consolidated pretrial proceedings.

b. The Pending 28 U.S.C. § 1404 Motions Filed by WDNY Plaintiffs Will Not Eliminate the Multidistrict Aspect of the Actions.

Several Plaintiffs in the WDNY Actions (*Barton, Drover-Mundy, Kimmel, Mulvey, Nabong,* and *Shaffer* [collectively, "Intervening Plaintiffs"]) recently moved to intervene in the Actions pending in the Central District of California (*Black* and *Flores*) and to transfer these Actions to the WDNY pursuant to 28 U.S.C. § 1404 ("Motions to Intervene"). (*See* Dkt. Nos. 19-20.) The Intervening Plaintiffs attempted to set hearings on the Motions to Intervene just days before the hearing on Defendants' Motion, however the Courts in *Black* and *Flores* took the Motions to Intervene off calendar in deference to the impending decision by the JPML decision on Defendants' Motion and the appropriate forum.[10] (Supp. Marshack Decl., ¶¶ 7-11; Exs. C, F.)

Intervening Plaintiffs argue that their Motions to Intervene in only half of the cases pending outside the WDNY provide a reason to deny centralization under Section 1407 because a "reasonable prospect" exists that these Motions will eliminate the multidistrict aspect of the Actions. (Dkt. No. 37 at 7-8; Dkt. No. 43 at 4-5.) Wrong. First, **transfer of *Black* and *Flores* under Section 1404 is not being sought by a party to those Actions and is *opposed* by all**

[10] Intervening Plaintiffs refused Defendants' request to move the July 22 hearing date, so Defendants and Plaintiff Black were forced to file Oppositions to Intervening Plaintiffs' Motion to Intervene prior to the *Black* court vacating the July 22 hearing. (Supp. Marshack Decl., ¶ 10; Exs. D, E.)

parties to those Actions. It is Plaintiffs in **other** Actions who are seeking to intervene for the sole purpose of transferring the California Actions to the venue of **their** choice, and to deprive the *Black* and *Flores* Plaintiffs of the ability to try their cases in the forum Black and Flores have selected.[11] This is a clear power grab by competing putative class representatives that many district courts have not permitted. *Taylor v. Buth-Na-Bodhaige, Inc.*, No. SA CV 16-0610-DOC (JCG), 2016 WL 10566651, at *2 (C.D. Cal. Sept. 22, 2016) (denying motion to intervene in putative class action, and holding that plaintiff "ha[d] chosen her own counsel and has chosen to file in California" and that allowing proposed intervenor "to transfer this case at this stage would force [plaintiff] to litigate her claims in Florida and change counsel," which "would prejudice" plaintiff); *Travis v. Navient Corp.*, 284 F. Supp. 3d 335, 346-47 (E.D.N.Y. 2018) (holding that "intervention by proposed intervenors would, as a practical matter, delay or prejudice the adjudication of the rights of plaintiff and defendants" where "[p]roposed intervenors [did] not seek to intervene to participate in this case—instead, they [sought] to intervene for the purpose of moving to dismiss, stay, or transfer" and both plaintiff and defendant "wish[ed] to proceed before this Court"); *Glover v. Ferrero USA, Inc.*, Civ. A. No. 11-1086 (FLW), 2011 WL 5007805, at *7 (D.N.J. Oct. 20, 2011) (denying motion to intervene under Rule 24(b) "in light of the Proposed Intervenors' stated interest in only having this action dismissed or transferred, an interest which will clearly prejudice the rights of the existing parties in this action").

In this way, the pending Motions to Intervene (and those that may be filed in the future) brought by **non-parties** are critically different than the Section 1404 motions that the Panel has considered as an alternative to centralization under Section 1407, including in all of the cases relied on by Plaintiffs. (*See* Dkt. No. 37 at 7-8; Dkt. No. 43 at 4.) If the Panel finds such third-

[11] California is also a forum that one of the intervening Plaintiffs, Barton, originally chose.

party intervention and transfer motions to be a legitimate alternative to centralization under Section 1407, it will only encourage gamesmanship by plaintiffs and their counsel in related actions and a battle for control, rather than cooperation that the Panel seeks to encourage.

Second, Intervening Plaintiffs have **not** sought to intervene in or transfer **all** the cases pending outside the WDNY (*i.e.,* the Oklahoma [*Fieker*] or Colorado [*Wray*] Actions). (Supp. Marshack Decl., ¶ 12.) Rather, in an apparent attempt to rule out the Central District of California as a potential transferee forum, the Intervening Plaintiffs focused solely on the Actions pending in that district. Even if the Intervening Plaintiffs are permitted to intervene in and transfer the *Black* and *Flores* matters—which all parties in those Actions oppose—there will still be two Actions outside the WDNY, maintaining the Actions' multidistrict character.[12]

Because there is no reasonable prospect that the Motions to Intervene will eliminate the multidistrict aspect of the Actions, and because those Motions are transparent gamesmanship, the Panel is urged to reject the notion that they obviate the need for Section 1407 centralization.

c. Agreements Between Counsel to Coordinate Discovery Will Not Streamline Procedures.

Plaintiffs suggest that centralization under Section 1407 is not necessary because the parties **could** informally agree to coordinate discovery. (*See* Dkt. No. 34 at 10.) The suggestion of informal coordination, while idealistic in theory, deprives Defendants of any certainty or the ability to enforce coordination. With actions pending before multiple judges in multiple courts, Defendants could face identical discovery motions in multiple jurisdictions, and the potential for inconsistent discovery rulings. This leaves open the potential for great inefficiencies that centralization is intended to prevent. In addition, a multiplicity of pending lawsuits would allow

[12] The *Drover-Mundy* Plaintiffs say they "stand ready" to intervene in and transfer the *Fieker* and *Wray* Actions. (Dkt. No. 43 at 5 fn. 4.) If moving all the Actions to the WDNY were legitimately their aim, they would already have sought to intervene in and transfer those Actions. Moreover, based upon the *Fieker* and *Wray* Plaintiffs' opposition to *pretrial* centralization under Section 1407, they are certain to strenuously oppose centralization for trial under Section 1404.

for a coordinated attack of discovery motions by plaintiffs to raise defense costs in an attempt to gain settlement leverage. Thus, an agreement to coordinate discovery, without a court order requiring it, is not a viable alternative to centralization under Section 1407. *See In re First Nat. Bank, Heavener, Okl. (First Mortg. Revenue Bonds) Sec. Litig.*, 451 F. Supp. 995, 997 (J.P.M.L. 1978) ("While voluntary coordination of discovery efforts among parties and their counsel is always commendable, transfer of these actions to a single district under Section 1407 will ensure the streamlining of discovery and all other pretrial proceedings as well.")

d. Overlap of Counsel Is Not Enough to Warrant Denial of Centralization.

As mentioned above, there are seven separate sets of lead counsel in the Actions. (Supp. Marshack Decl., ¶ 5.) Plaintiffs argue that the overlap of counsel weighs against centralization. (Dkt. No. 37 at 6-7; Dkt. No. 43 at 5.) However, the fact that there is some overlapping counsel, in and of itself, does not justify denying centralization.[13] Moreover, cooperation among all the seven sets of attorneys is purely hypothetical. Plaintiffs state that lead counsel in the WDNY cases are cooperating, but they say nothing of the other three sets of counsel. Given the attempt by several of the WDNY Plaintiffs to intervene in the two California Actions, and their

[13] In the cases cited by Plaintiffs, all of which are inapposite, the fact of a significant overlap of counsel was one of many reasons the Panel did not think centralization was necessary—it was never the determining factor. (Dkt. No. 37 at 6-7; Dkt. No. 43 at 5.) For example, *In re Sirius XM Radio, Inc. Tel. Consumer Prot. Act (TCPA) Litig.*, 118 F. Supp. 3d 1376 (J.P.M.L. 2015), involved five class actions, one of which was "significantly advanced" (discovery had been completed), while the other four actions had just begun. *Id.* at 1376. The Panel denied centralization given the "procedural disparity among the cases," and the fact that the cases were "already being managed in an orderly and efficient manner." *Id*. *In re Linear Gadolinium-Based Contrast Agents Prods. Liab. Litig.*, 341 F. Supp. 3d 1381 (J.P.M.L. 2018), is also distinguishable. It involved twenty-one products liability actions with defendants opposing centralization. The Panel denied centralization finding that each case was going to be "highly plaintiff-specific" without sufficiently common facts. One case was significantly more advanced than the others, so the fact that "plaintiffs in most actions are represented by a single law firm" was just one of many reasons centralization was not warranted. *Id.* at 1382. Finally, *In re Uber Tech, Inc., Wage & Hour Employment Pract.*, 158 F. Supp. 3d 1372 (J.P.M.L. 2016), involved seven actions. Centralization was denied because the legal issue in each action required state-specific legal **and factual** inquiries, most of the cases involved non-overlapping classes, and there were only two sets of plaintiffs' counsel. *Id*. at 1373.

announcement that they "stand ready" to intervene in the Oklahoma and Colorado Actions (Dkt. No. 43 at 5, fn. 4), Plaintiffs are making themselves adverse to one another, reducing the likelihood of future cooperation. Further undercutting the concept of friendly cooperation is the WDNY Plaintiffs' questioning of other Plaintiffs as adequate representatives. Specifically, Plaintiffs in the *Barton, Drover-Mundy, Kimmel, Mulvey, Nabong,* and *Shaffer* Actions have claimed that Plaintiffs in the *Black* and *Flores* Actions do "not adequately protect the[ir] interests" because they did not consent to transfer their Actions to the WDNY, "and instead [have] consented to centralization of all of the actions in the Central District of California." (Dkt. No. 20-1 at 17:16-23 (*Black*); Dkt. No. 19-1 at 17:8-17.) These same Plaintiffs have expressed that they "are concerned that Ms. Black's cooperation with Defendants with respect to the stay indicates that she may not advocate as zealously for the Class as the Intervenors will."[14] (Dkt. No. 20-1 at 15:14-16.) Plaintiff Black, understandably, took serious issue with this suggestion in Black's Opposition to the Motion to Intervene, calling it "ridiculous." (*See* Ex. E to Supp. Marshack Decl. at 1:14-20, 2:10-4:12.)

For these reasons, the fact that some of the Actions involve overlapping counsel does not weigh against centralization. If anything, the fact that some counsel and their clients have made themselves openly adverse to other counsel and their clients suggests that coordination between counsel is less likely here than in the typical case.

e. State-Specific Legal Claims Do Not Warrant Denial of Centralization.

Plaintiffs also argue that centralization should be denied because the Actions assert claims primarily based on state law, and therefore, the risk of inconsistent rulings is low. (Dkt. No. 37 at 8-9; Dkt. No. 34 at 11.) Significantly, Plaintiffs ignore that **all but two** of the Actions

[14] The Plaintiff in *Flores* also agreed to a stay of the Action pending resolution of this Motion after the Motion to Intervene was filed. (Supp. Marshack Decl., ¶ 9.) WDNY Plaintiffs logically, then, would have the same "concern" about Plaintiff Flores' zealous advocacy.

seek to certify overlapping nationwide classes, which, as demonstrated in Defendants' Motion, "presents one of the strongest reasons for transferring such related actions to a single district for coordinated pretrial proceedings." *In re Plumbing Fixtures*, 308 F. Supp. 242, 244 (J.P.M.L. 1970).[15] (*See* Dkt. No. 11 at 10-11.) Defendants also identified jurisdictional issues for which there could be inconsistent rulings absent centralization. (Dkt. No. 11 at 10-11.)

There are more. Issues of standing will be present in many, if not all, of the Actions. There will also be choice of law issues to be decided, which will be helpful to have decided by one court applying a single choice of law standard. The issue of whether Mattel is a proper party to the Actions is one where inconsistent rulings will be prevented by centralization. Because these Actions will involve expert discovery, centralization will also eliminate potentially conflicting *Daubert* rulings. *In re FCA*, 214 F. Supp. 3d at 1356 (potential for inconsistent rulings on class certification and *Daubert* motions favored centralization).

The presence of separate state law claims in the Actions is no impediment to centralization, because it is common issues of *fact*, not *law*, that warrant centralization. *See* 28 U.S.C. § 1407. Moreover, the claims for relief asserted by the Plaintiffs in each of the Actions are nearly identical and include, for example, breaches of express and implied warranty, unjust

[15] Plaintiffs erroneously accuse Defendants of saying that centralization "is required" because the Actions are class actions and cite cases where class actions were not centralized. (Dkt. No. 37 at 8.) First, Plaintiffs misstate Defendants' argument, which is not that centralization "is required," but rather, that it is warranted, including because overlapping classes are asserted. Second, the cases relied on by Plaintiffs are inapposite, because they: (1) all involved fewer class actions than are involved here (*In re Frye Festival Litig.*, 273 F. Supp. 3d 1355 (J.P.M.L. 2017) [six actions and defendants defaulted in all of them]; *In re Alteryx, Inc.*, 291 F. Supp. 3d 1377 (J.P.M.L. 2018) [three actions]); (2) involved pending Section 1404 motions filed by the Defendants, not third parties (*In re Gerber Probiotic Products Mktg. & Sales Practices Litig.*, 899 F. Supp. 2d 1378 (J.P.M.L. 2012) [Defendants in ten actions filed Section 1404 motions in all actions, one of which had already been granted]; *In re Customized Promotional Prods. Antitrust Litig.*, 289 F. Supp. 3d 1342 (J.P.M.L. 2018) [four actions, and a pending Section 1404 motion that was unopposed]); or (3) involved only state-specific, and not overlapping, classes (*In re Enhanced Recovery Company, LLC, Fair Debt Collection Practices Act (FDCPA) Litigation*, 363 F. Supp. 3d 1375 (J.P.M.L. 2019) and *In re Adderall XR (Amphetamine/Dextroamphetamine) Marketing, Sales Practices and Antitrust Litig.,* 968 F. Supp. 2d 1343 (JPML 2013)).

enrichment, negligence, fraud, and violation of the Magnuson-Moss Warranty Act. Though there may be variations in state laws with respect to Plaintiffs' claims (for which a choice of law analysis will be required), the parties would benefit from a single jurist deciding, in a consistent manner, whether the Plaintiffs have adequately stated claims under Rule 12(b)(6), or, on a motion for summary judgment, whether the **same facts** demonstrate liability as a matter of law. Thus, centralization will advance the just and efficient conduct of the Actions.

3. Pretrial Centralization Will Serve the Convenience of the Parties and Witnesses

As demonstrated in Defendants' Motion, centralization will serve the convenience of the parties and the witnesses. (Dkt. No. 11 at 11-13.) Plaintiffs do not address Defendants' arguments, nor do the Plaintiffs meaningfully dispute that centralization would provide a significant conservation of resources.

Plaintiffs in *Fieker* and *Wray* acknowledge that "coordinated discovery protocols" would be convenient for the parties (*see* Dkt. No. 34 at 15), but largely argue against centralization out of due process concerns and the fear that they may "be forced to turn over the cases to New York and California lawyers they did not choose." (*Id.* at 14.) Their concerns highlight why centralization under 28 U.S.C. § 1407 is in this instance superior to transfer for all purposes under 28 U.S.C. § 1404: Even with coordinated pretrial proceedings, Plaintiffs will be able to try their cases in the venue of their choice with counsel of their choice. With centralization under Section 1407, the concerns of Fieker and Wray that they will "have to travel to either New York or California" are eliminated. (*Id.* at 14.)

4. The Court Has Supplemental Jurisdiction Over the *Fieker* and *Wray* Actions and Should Exercise Its Jurisdiction for Pretrial Purposes to Advance the Purposes of Section 1407.

Plaintiffs in the Oklahoma (*Fieker*) and Colorado (*Wray*) Actions argue that their cases should not be included within any centralization because, just **one day** after Defendants amended

their Motion to include the *Fieker* and *Wray* Actions, those Plaintiffs amended their complaints to drop the nationwide class and their federal cause of action, in an apparent attempt to deprive federal courts of jurisdiction and avoid pretrial consolidation or coordination. (Dkt. No. 34 at 17; Dkt. Nos. 34-1, 34-2; Supp. Marshack Decl., ¶ 3; Exs. A-B.) This maneuver should be ignored, and the *Fieker* and *Wray* Actions should be included in centralized pretrial proceedings.

The *Fieker* and *Wray* Actions share significant common issues of fact with the other Actions—something the Plaintiffs do not contest. The dismissal of the nationwide class and the only federal claim does not change this, nor does it change that duplicative discovery and the risk of inconsistent decisions will be minimized if these Actions are included in centralized pretrial proceedings. *See In re Dealer Management Systems Antitrust Litig.*, 291 F. Supp. 3d 1367, 1369 (J.P.M.L. 2018) (denying request of certain plaintiffs to exclude their actions from the MDL where the "factual overlap" in the actions was "undeniable" and inclusion would serve the interests of centralization). Because the purposes of 28 U.S.C. § 1407 are best served keeping *Fieker* and *Wray* as part of the pretrial centralization, supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) would be properly exercised for the purposes of coordinated pretrial proceedings. *See Carlsbad Technology, Inc.*, 556 U.S. 635, 639-40 (2009) (a district court has the discretion to exercise jurisdiction over supplemental state law claims under 28 U.S.C. § 1367 even where it has dismissed all claims over which it would have had original jurisdiction); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 357 (1988) ("If the plaintiff has attempted to manipulate the forum, the court should take this behavior into account in determining whether the balance of factors to be considered under the pendent jurisdiction doctrine support a remand of the case.").

B. <u>The Central District of California Is Preferable to the WDNY as a Transferee Forum</u>

As demonstrated in Defendants' Motion, the Panel takes numerous factors into account when determining the most appropriate transferee forum, including, perhaps most significantly

for practical purposes, the caseload of the transferee district, whether the district is in an accessible and convenient metropolitan location, and the experience in management of class actions and complex litigation of the transferee district. (*See* Dkt. No. 11 at 13-14.) In terms of the locations of the Defendants—the Central District of California (Mattel) and the WDNY (Fisher-Price)—the Central District of California remains the more favorable forum.

1. Docket Conditions Favor the Central District of California Over the WDNY

The docket conditions in the WDNY have not improved since Defendants' filed their Motion. In fact, more recent metrics that were released in the interim show that the congestion in the WDNY continues to worsen, while the metrics in the Central District of California remain virtually the same. Specifically, the Federal Court Management Statistics from March 2019[16] (Supp. Marshack Decl., ¶ 13; Ex. G) reflect that since December 2018 (Dkt. No. 1-12 [Dec. 2018 Statistics]; Dkt. No. 11 at 17), the median time from filing to disposition for civil cases in the WDNY has increased from 9.7 months to 14 months, the median time to trial has increased from 62.4 months to 67 months, and the judges' caseloads in the WDNY have increased from 1,077 to 1,090 cases per judge. By contrast, those same median times have stayed almost identical in the Central District of California (5.1 months to 5.2 months from filing to disposition and 21.5 months to 21.8 months to trial), and the judges' caseloads in the Central District of California have actually **decreased** (from 510 to 505 cases).

Plaintiffs claim that these statistics are "misleading" because the numbers include all types of cases. (*See* Dkt. No. 37 at 18.) Regardless of whether the cases are simple or complex, criminal or civil, the statistics show that the judges in the WDNY are heavily burdened, and that cases generally take significantly longer to be resolved in that district than in the Central District

[16] Available at: *https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison0331.2019.pdf*.

of California. The cases relied on by Plaintiffs to suggest that the WDNY's docket congestion should not be an issue are inapposite. (*See* Dkt. 43 at 17.) First, the majority of cases on which Plaintiffs rely were **not** MDL cases, but rather, cases considering transfer of a single action under 28 U.S.C. § 1404.[17] In the JPML cases cited by Plaintiffs (Dkt. No. 43 at 17-18), (1) the time to trial was taken into account by the Panel, which selected the least congested forum,[18] (2) the forum was selected because it was the "situs of the crash"—the presumed forum—and it was in 1976 before the advent of electronic discovery,[19] or (3) there was no discussion of the congestion of the transferee forum at all.[20]

2. The Central District of California Is Convenient for Travel by All Lead Counsel

Relying on *In re San Juan, Puerto Rico Air Crash Disaster,* 316 F. Supp. 981 (J.P.M.L. 1970), Plaintiffs also argue that the congestion of the WDNY can be mitigated by assignment to a judge outside the district, such as Judge Geoffrey Crawford of the District of Vermont. But in *In re San Juan,*, the JPML actually designated a judge in a forum that was **more convenient** for counsel than the transferee forum, noting that it is "sometimes appropriate for the transferee judge to conduct certain proceedings in his own district," and that it "might be useful in this litigation" to hold hearings in the location of the designated judge rather than the transferee forum. *Id.* at 982 n. 3 (designating a judge from the Southern District of New York to serve in

[17] Plaintiffs rely on *Miller v. Regency Mar. Corp.*, 824 F. Supp. 200 (N.D. Fla. 1992) (transfer to overcrowded district was proper because the parties had a forum-selection clause mandating that district)*; Dimplex N. Am. Ltd. v.Twin-Star Int'l Inc.,* No. 13-CV-14415, 2014 WL 3558174 (E.D. Mich. July 18, 2014) (recognizing that "time-to-trial statistics might provide some weight in a transfer motion in another case"); *SEC v. Christian Stanley, Inc.,* No. CV 11-7147-GHK (MANx), 2012 WL 13012496 (C.D. Cal. April 4, 2012) (docket congestion and time to trial in two districts were comparable).

[18] *In re Library Editions of Children's Books,* 297 F. Supp. 385 (J.P.M.L. 1968).

[19] *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975,* 407 F. Supp. 244 (J.P.M.L. 1976).

[20] *In re IntraMTA Switched Access Charges Litigation,* 67 F. Supp. 3d 1378 (J.P.M.L. 2014).

the District of Puerto Rico, where the two assigned judges had heavy dockets and requested not to be involved in order to avoid any potential conflict of interest).

The District of Vermont is even less convenient to travel into and out of than the WDNY, as there are very few nonstop flights to and from Vermont for the counsel who would be involved in the MDL. (Supp. Marshack Decl., ¶ 14 [flight chart].) Specifically, there are **no** nonstop flights between Vermont and the home airports of lead counsel for Defendants and for the Plaintiffs in *Black, Flores, Fieker,* and *Wray.* Travel to the WDNY for these counsel is only marginally better, as there is **one** nonstop flight per day between Los Angeles International Airport ("LAX") and Buffalo Niagara International Airport ("BUF"), but **none** between BUF and the home airports of lead counsel for *Black, Fieker,* and *Wray*.[21] (*Id.*) By contrast, **every** jurisdiction from which lead counsel would be traveling (New York City, San Francisco, Tulsa, and Philadelphia) has **at least two**, and in most instances significantly more, nonstop flights to LAX per day (not including the many airports surrounding LAX), making the Central District of California a more convenient forum than the WDNY (or the District of Vermont).[22] (*Id.*)

3. The Location of Witnesses and Number of Actions Do Not Tip the Balance to WDNY

The WDNY Plaintiffs advocate that any centralized proceedings should be held in the WDNY because, they argue, the majority of witnesses, evidence, and pending Actions are

[21] Plaintiffs' references to the number of delays at LAX and the fact that BUF is "best in class" for medium-sized airports are red herrings. Naturally there will be more delays if there is a large volume of flights (and LAX was better than most in its class). Also, customer satisfaction is more likely when an airport has less traffic. (*See* Dkt. 37-19-20; Dkt. No. 43 at 19.)

[22] Plaintiffs' proffer that Judge Crawford sometimes holds hearings by videoconference is consistent with what counsel for Defendants were told except that Defendants were told that the parties would still be in Buffalo, and Judge Crawford would be in Vermont. (*See* Dkt. No. 1-4 at ¶ 18.) Additionally, Defendants' counsel was informed that longer hearings would be conducted in person in Vermont. (*Id.*) Plaintiffs do not contradict this, and it is consistent with the Panel's understanding in *In re San Juan*, 316 F. Supp. at 982. Even if Judge Crawford would allow all counsel to attend hearings by videoconference, it is likely that many counsel, including Defendants' counsel, would prefer to attend hearings—particularly important ones—in person.

located there. (Dkt. No. 37 at 10-17; Dkt. No. 43 at 6-17.) The locations of witnesses and evidence are factors to be considered but are not dispositive. *In re IBM*, 302 F. Supp. 796, 800 (J.P.M.L. 1969) (declining to transfer to district where the majority of the witnesses and evidence were located in light of other factors, saying that the location of evidence was "not here controlling"). *See also* Herr, David. F., MULTIDISTRICT LITIGATION MANUAL (May 2019 Update) § 6.5 (noting that the location of evidence is "not . . . a controlling factor," and that the location of evidence is "not as compelling as it once was" due to the advent of electronic discovery, and also noting that "[t]he location of evidence, and particularly witnesses, has probably become less important as the Panel realizes that discovery can effectively be conducted anywhere in the country regardless of the venue of the action. . . . Because cases are expected to be tried where filed, if trial is needed, location of evidence has less bearing on the forum-selection issue for pretrial matters.").

Plaintiffs' lengthy recitation of potential Fisher-Price witnesses ignores several critical points. First, although many of the currently-employed Fisher-Price witnesses are in the WDNY, any Mattel witnesses will be in Los Angeles. Second, Plaintiffs completely ignore the location of the Plaintiffs—all of whom are located outside the WDNY. Indeed, Plaintiffs are scattered in twelve different states from coast to coast, and points in between (Arizona, California, Colorado, Delaware, Illinois, Massachusetts, New Jersey, New York [Nassau County], Oklahoma, Pennsylvania, Texas, and Washington), which, of course, counterbalances Plaintiffs' singular focus on the location of Fisher-Price witnesses. (Dkt. No. 11 at 19; Supp. Marshack Decl., ¶ 2.) Third, the location of third-party witnesses has yet to be determined, including the location of witnesses relating to the infant deaths on which Plaintiffs rely so heavily in their complaints. Finally, and perhaps most significantly, the location of the transferee district does not affect

parties' abilities to obtain depositions, because all federal courts have subpoena power throughout the United States, and depositions must take place within 100 miles of the deponent's residence or place of work.[23] *See* Fed. R. Civ. P. 45(c). Thus, witnesses will not be required to travel a significant distance, regardless of where the transferee district is located. Plaintiffs will not need to travel to the transferee district at all since their cases will be remanded for trial, so their proximity to the transferee district is completely irrelevant.

The number of these Actions pending in the WDNY also should not be given much, if any, credence, due in significant part to the forum-shopping by many of the Plaintiffs, as described in Defendants' Motion. (*See* Dkt. No. 11 at 14-16.) Plaintiffs' denial of forum-shopping and contention that the Plaintiffs who originally filed their Actions outside of the WDNY (Barton, Kimmel, and Nabong) "believe[d] their cases belong there," having been filed "before the full extent of the factual nexus to New York was known" is unavailing and belied by the clear facts. (*See* Dkt. No. 37 at 16.) Notably, counsel for the Plaintiffs in *Barton* and *Nabong* filed those Actions outside of the WDNY **after** they filed *Mulvey* in the WDNY despite the fact that Plaintiff Mulvey did not live within the WDNY. Further, the *Barton, Kimmel,* and *Nabong* complaints all alleged that Fisher-Price was located in East Aurora, New York, and that Mattel was located in Los Angeles, California. Certainly they could not have believed that the "center of gravity" was in Illinois, where *Nabong* was filed, or New Jersey, where *Kimmel* was filed. But at least those plaintiffs filed in the states where they lived. *Barton* was originally filed in the Central District of California (where Mattel is located), yet Barton is an Arizona resident.

Further, and in contradiction to their assertion that the WDNY "has the greatest factual connection to the litigation and the highest concentration of witnesses and evidence," lead

[23] "If requested, the Panel may appoint deposition judges to supervise depositions taken in districts other than the transferee district." *In re IBM*, 302 F. Supp. at 799 n.5.

counsel in the *Barton, Cuddy, Mulvey, Nabong,* and *Shaffer* Actions recently (on June 12, 2019) filed a products-liability lawsuit on behalf of four non-California plaintiffs against Defendants in the Superior Court of the State of California, County of Los Angeles—the same geographic location as the Central District of California—relating to the RNPS.[24] (Supp. Marshack Decl., ¶ 15; Ex. H.) Many of the defense witnesses identified in opposition to this Motion will also likely be witnesses in the products-liability lawsuit. (*See, e.g.,* Dkt. No. 37 at 10-17.) If, as counsel advocates, the WDNY is the only logical forum for litigation relating to the safety and design of the RNPS, query, then, why counsel would file a lawsuit about the RNPS outside the WDNY, in a jurisdiction where none of the plaintiffs lives, that is the **same** geographic location counsel now resists.[25] Counsel's lack of consistency regarding the proper jurisdiction for cases relating to the RNPS underscores their forum shopping motivation in these Actions.

III. CONCLUSION

Defendants Fisher-Price and Mattel respectfully request that the Panel transfer the Actions for coordinated or consolidated pretrial proceedings to Judge Virginia A. Phillips in the Central District of California.

[24] Daniel Tepper, and his law firm Wolf Haldenstein Adler Freeman & Herz LLP, are counsel in the recently-filed personal injury action relating to the RNPS as well as for the plaintiffs in the *Barton*, *Cuddy*, *Mulvey*, *Nabong*, and *Shaffer* Actions. (Supp. Marshack Decl., ¶¶ 15-16, 18; Exs. I, J; Ex. H at p. 78 [*Butler* Complaint]; Dkt. Nos. 1-17 at 70 [*Mulvey*]; 1-18 at 71 [*Shaffer*]; 1-19 at 72 [*Nabong*]; 1-20 at 71 [*Barton*]; and 17-3 at 80 [*Cuddy*].)

[25] Plaintiffs in the products-liability action live in New York, Alabama, and Nevada. (Ex. H to Supp. Marshack Decl. at ¶¶ 8-14.) They allege that jurisdiction and venue of their action relating to the allegedly defective design of the RNPS are proper in Los Angeles, California because "Mattel's principal place of business is in the County of Los Angeles," "Mattel shares overall responsibility for the safety of Fisher-Price products, including the Rock 'n Play Sleeper," and "a substantial portion of the acts and omissions that are the subject of this lawsuit [relating to the development and marketing of the RNPS] occurred within the County of Los Angeles." (*Id.* at ¶¶ 20, 22-23.) Nearly identical allegations were made in the *Barton* complaint that was originally filed in the Central District of California. (*See* Dkt. No. 1-7 at ¶ 30.)

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Respectfully submitted,

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