

**BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

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IN RE JOHNSON & JOHNSON “BABY)
POWDER” and “SHOWER TO SHOWER”))
MARKETING, SALES PRACTICES AND) MDL Docket No. 2738
PRODUCTS LIABILITY LITIGATION)
_____))

**RESPONSE OF DEFENDANTS JOHNSON & JOHNSON AND JOHNSON & JOHNSON
CONSUMER COMPANIES TO MOTION FOR TRANSFER AND COORDINATION OF
PRETRIAL PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407**

Defendants Johnson & Johnson and Johnson & Johnson Consumer Companies (collectively, “J&J” or “the Company”) respectfully submit this response to the Motion For Transfer that has been filed by movant Tanashiska Lumas.

J&J agrees with movant that there is a group of overlapping cases involving the Company’s talcum powder products (“talc products”) that should be transferred by the Panel to a single district court for coordinated pretrial proceedings. But J&J disagrees with movant’s proposal that the Southern District of Illinois be the transferee forum. Taking account of the factors the Panel ordinarily considers in selecting a transferee forum, J&J believes that the most appropriate location for this multidistrict proceeding is the District of New Jersey (preferably assigned to Judge Freda Wolfson) or, in the alternative, the Western District of Oklahoma (preferably assigned to Judge Timothy DeGiusti). The schedule of actions attached to this memorandum includes a complete list of cases that should be subject to transfer.

BACKGROUND

There are presently at least 18 individual actions pending in federal courts across the country in which the plaintiffs allege that perineal use of cosmetic talc products manufactured and marketed by J&J caused them to suffer ovarian cancer. Based on these allegations, plaintiffs

in these suits seek various forms of relief, including damages for alleged personal injuries and punitive damages.

On July 15, 2015, movant Tanashiska Lumas, whose case is currently pending in the United States District Court for the Southern District of Illinois before Judge Staci M. Yandle, filed a motion with the Panel to transfer the pending federal actions for coordinated pretrial proceedings. (*See* Br. In Supp. Of Pl.’s Mot. For Transfer Of Actions Pursuant To 28 U.S.C. § 1407 (“Pl.’s Br.”), Dkt. No. 1-1.) Movant suggests that the Panel transfer the cases to the Southern District of Illinois before Judge David R. Herndon. (*Id.* at 2.)

In her papers, movant correctly notes that, in a series of actions, various claimants have filed individual suits involving personal injuries allegedly attributable to the talc products. Each case raises overlapping factual allegations about the safety and testing of the talc products and asserts similar causes of action in seeking to recover for alleged personal injuries. *See, e.g., Chakalos v. Johnson & Johnson*, No. 3:14-cv-07079 (D.N.J); *Robb v. Johnson & Johnson*, No. 5:16-cv-00620 (W.D. Okla.); *Bors v. Johnson & Johnson*, No. 2:16-cv-02866 (E.D. Pa.). In all instances, the underlying factual and legal allegations are sufficiently similar to merit coordinated treatment under the Panel’s rules. Defendants thus support movant’s proposal to create a multidistrict litigation proceeding to coordinate pretrial proceedings for all cases involving similar allegations.

ARGUMENT

The actions listed in the motion (along with the additional actions set forth in the attached schedule) involve overlapping factual allegations regarding the alleged risks of the talc products and would thus benefit from coordinated pretrial proceedings. While J&J agrees with the movant on the need for a coordinated proceeding, J&J believes that the District of New Jersey

(preferably before Judge Wolfson) or the Western District of Oklahoma (preferably before Judge DeGiusti) would be more appropriate forums than the Southern District of Illinois for coordinated pretrial proceedings related to the talc products.

A. The District Of New Jersey Is The Most Appropriate Venue For The Talc Product Multidistrict Litigation Proceeding.

The talc product actions are presently pending before district courts in more than a dozen districts that are scattered across the United States, from California to New Jersey (e.g., N.D. Ill., E.D. Cal., N.D. Cal., M.D. Tenn., W.D. Okla., M.D. La.). (*See* Schedule of Actions.) Under the Panel’s traditional selection criteria for determining a forum for multidistrict proceedings, it would be most appropriate to transfer the related actions to the District of New Jersey, for four reasons.

First, Judge Wolfson currently presides over the case at the most advanced stage: *Chakalos v. Johnson & Johnson et al.*, No. 3:14-cv-07079 (D.N.J). The action was removed to federal court on November 11, 2014, and discovery – including depositions – has commenced and is ongoing. Because this action is the most advanced of any of the federal court actions with regard to the amount of discovery that has been conducted, Judge Wolfson is the most familiar with the issues and well-equipped to coordinate discovery among all of the actions. *See, e.g., In re Refined Petrol Prods. Antitrust Litig.*, 528 F. Supp. 2d 1365, 1367 (J.P.M.L. 2007) (observing that the action pending in the transferee district was the “most advanced”).

Second, the District of New Jersey is the most convenient location. Section 1407(a) specifically provides that the “convenience of parties and witnesses” is a relevant consideration in the centralization decision. Defendant Johnson & Johnson is headquartered in New Brunswick, New Jersey, and many of the relevant documents and witnesses are located there. As such, coordinating the actions in the District of New Jersey will facilitate swift and convenient

discovery and allow plaintiffs access to the court and to witnesses in one trip. *See In Re Live Concert Antitrust Litig.*, 429 F. Supp. 2d 1363, 1364 (J.P.M.L. 2006) (noting the location of defendant Clear Channel’s headquarters as a relevant factor in the selection of transferee district); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 528 F. Supp. 2d 1339, 1340-41 (J.P.M.L. 2007) (transferring the centralized cases to a district where the pharmaceutical manufacturer defendant had its principal place of business and where many relevant documents and witnesses would therefore be located); *In re Am. Airlines, Inc., Privacy Litig.*, 342 F. Supp. 2d 1355, 1357 (J.P.M.L. 2004) (“The Panel is persuaded that the Northern District of Texas is an appropriate transferee forum for this docket. We note that . . . this district is more conveniently located for most parties and witnesses than the Eastern District of New York”); *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 293 F. Supp. 2d 1381, 1382 (J.P.M.L. 2003) (noting the proximity of the transferee district to documents and witnesses).

Third, the District of New Jersey has a present caseload that would enable the court to handle a multidistrict litigation proceeding. The district is only the 39th-busiest district court by pending cases per judge. *See* <http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-march-2016>. Moreover, it had one of the fastest median times among all district courts from filing to disposition in civil cases in 2010 – 8.4 months – and only 6.1% of the civil cases currently pending in the district are more than three years old. *Id.* These factors further support transfer to that court. *See In re Tyco Int’l, Ltd. Sec. Litig.*, MDL No. 1335, 2000 U.S. Dist. LEXIS 5551, at *3 (J.P.M.L. Apr. 26, 2000) (coordinating proceedings in district where “the docket [was] significantly less congested than that of the other preferably suggested transferee district”); *In re Am. Family Publishers Bus. Practices Litig.*, MDL No. 1235, 1998 U.S. Dist. LEXIS 12514, at *4-5 (J.P.M.L. Aug. 12, 1998) (“District of New Jersey is the

appropriate transferee forum for this docket . . . [because] the New Jersey court’s docket is less congested than the docket in the Middle District of Florida . . .”).

Fourth, Judge Wolfson has previously presided over three MDL proceedings: *In re Plavix Marketing, Sales Practices and Products Liability Litigation* (MDL-2418), *In re Great Southern Life Insurance Co. Sales Practices Litigation* (MDL-1214), and *In re Fosamax (Alendronate Sodium) Products Liability Litigation* (MDL-2243).¹ Accordingly, Judge Wolfson clearly has the necessary experience to preside over this MDL proceeding. *See In re Blood Reagents Antitrust Litig.*, 652 F. Supp. 2d 1373, 1374 (J.P.M.L. 2009) (“Centralization in this district permits the Panel to effect the Section 1407 assignment to a judge with experience presiding over multidistrict litigation”); *In re Oil Spill by the Oil Rig “DeepWater Horizon” in the Gulf of Mexico, on April 20, 2010*, 731 F. Supp. 2d 1352, 1355 (J.P.M.L. 2010) (“Considering all of the applicable factors, we have asked Judge Carl J. Barbier to serve as transferee judge” because “during his twelve years on the bench, [he] has gained considerable MDL experience”); *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, 746 F. Supp. 2d 1359, 1361 (J.P.M.L. 2010) (sending coordinated proceedings to Judge Rya W. Zobel, who had “a wealth of prior MDL experience” and was “sure to lead [the] litigation on an expeditious course”). While Judge Wolfson is currently presiding over two MDL proceedings, one of those proceedings (MDL 2243, *In re Fosamax*), has only 30 pending actions currently, down from a historical high of 1,208. For these reasons, J&J believes that the District of New Jersey would be the most appropriate forum for the talc product MDL proceeding, preferably assigned to Judge Wolfson.

¹ This MDL proceeding was originally presided over by Judge Joel A. Pisano but was reassigned to Judge Wolfson in June 2015.

B. Alternatively, The Western District of Oklahoma Would Also Be An Appropriate Venue For The Talc Product Multidistrict Litigation Proceeding.

If the Panel elects not to transfer the talc product cases to the District of New Jersey before Judge Wolfson, J&J believes that the Western District of Oklahoma would also be an appropriate forum for the MDL proceeding, preferably before Judge DeGiusti, for four reasons.

First, like Judge Wolfson, Judge DeGiusti is already overseeing a talc product case – the *Robb* action. The Panel often considers courts with pending cases for potential transfer. *See In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, MDL Nos. 2705, 2707 & 2708, 2016 U.S. Dist. LEXIS 71766, at *9 (J.P.M.L. June 2, 2016) (“Finally, centralization in this district allows us to assign this litigation to Judge Gary Feinerman, an able and experienced jurist who has not had the opportunity to preside over an MDL. Judge Feinerman currently presides over one potential tag-along action involving Kraft, Target, and SuperValu. We are confident that he will steer this litigation on a prudent course.”); *see also In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 110 F. Supp. 3d 1358, 1360 (J.P.M.L. 2015) (centralizing in the District of Oregon despite only one action pending there, and the other actions all pending in the same district); *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 148 F. Supp. 3d 1383, 1386 (J.P.M.L. 2015) (centralizing in the District of Minnesota, despite more mature cases pending in the District of Kansas and Southern District of Texas).

Second, the Western District of Oklahoma also has a present caseload that would enable the district to handle a multidistrict litigation proceeding. The district is only the 86th-busiest district court in the country (out of 94) by pending cases per judge. *See* <http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-march-2016>. In addition, filings have declined in the Western District every year since 2011, and the District is

only the 69th-busiest in the country by civil filings per judge. Moreover, there are currently only two MDL proceedings pending in the Western District of Oklahoma: *In re Cox Enterprises, Inc., Set-Top Cable Television Box Antitrust Litigation* (MDL 2048) and *In re Transdata, Inc. Smart Meters Patent Litigation* (MDL 2309). Both proceedings, neither of which is assigned to Judge DeGiusti, involve only a very small number of cases (MDL 2048 has only two active pending cases and MDL 2309 has only five). Accordingly, the District has resources available to devote to management of a talc MDL proceeding. *See In re Am. Airlines, Inc.*, 342 F. Supp. 2d at 1357 (sending proceedings to the Northern District of Texas because “the Texas district has the resources available to manage this litigation”).

Third, Judge DeGiusti is not presently overseeing an MDL proceeding, and would therefore likely have significant time to devote to the talc product litigation. *See* http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2016.pdf. Moreover, Judge DeGiusti is an experienced jurist who has served on the bench since 2007 but has not yet had the opportunity to preside over an MDL proceeding, giving him both the “time and experience” to oversee the litigation. *See, e.g., In re Cheerios Mktg. & Sales Practices Litig.*, 655 F. Supp. 2d 1368, 1369 (J.P.M.L. 2009) (assigning first MDL proceeding to Judge Sheridan; “One of the five constituent actions is already pending in that district, and Judge Peter G. Sheridan, who is presiding over that action, has the time and experience to steer this litigation on a prudent course.”); *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, 717 F. Supp. 2d 1376, 1378 (J.P.M.L. 2010) (assigning first MDL proceeding to Judge Wigenton; “We conclude that the District of New Jersey is an appropriate transferee district for pretrial proceedings in this litigation. A substantial majority of the constituent actions are pending in

that district, and Judge Susan D. Wigenton has the time and experience to steer this MDL on a prudent course.”).

Finally, the *Robb* action is pending in Oklahoma City, Oklahoma, which has a large airport with nonstop air service from many cities around the country, including Atlanta, Chicago, Dallas, Denver, Houston, Las Vegas, Newark, Phoenix, St. Louis, and Washington, D.C. Oklahoma City is also centrally located, which mitigates travel burdens. Thus, while it is not as convenient a location for the parties as the District of New Jersey, it is still readily accessible from airports throughout the country.

For these reasons, J&J believes that the Western District of Oklahoma would also be an appropriate forum for the talc products MDL proceeding, preferably assigned to Judge DeGiusti.

C. The Southern District Of Illinois Is An Inappropriate Transferee Venue.

Movant seeks coordination in the Southern District of Illinois because it allegedly “possesses unique characteristics” that are particularly well-suited for this litigation. However, none of the reasons given by movant is unique to the Southern District of Illinois.

First, movant contends that the Southern District is geographically convenient, but New Jersey and Oklahoma are at least equally geographically convenient, and all are served by a major airport with convenient nonstop flights from around the country. Although plaintiff argues that the state court actions in St. Louis, Missouri should be a factor because the proximity of Southern Illinois to St. Louis will purportedly aid in convenient discovery, there are similar actions pending in state courts throughout the country, including a coordinated action in New Jersey, that are currently being prepared for trial. As of July 26, J&J had been served in 182 pending cases in New Jersey state court. Two of those cases are fully worked up, and the parties have submitted dispositive motions and briefing on exclusions of expert testimony. One of those cases – *Carl v. Johnson & Johnson*, No. ATL-L-6546-14 (N.J. Super. Law Div. Atlantic County)

– is set for trial beginning in October 2016, and the second case – *Balderrama v. Johnson & Johnson*, No. ATL-L-6540-14 (N.J. Super. Law Div. Atlantic County) – is set for trial beginning in January 2017. In short, if the presence of pending or coordinated state court cases counsels in favor of assignment of the MDL proceeding to any particular federal district, that district is New Jersey.

Second, movant touts the Southern District of Illinois as uniquely capable of “provid[ing] an efficient disposition of these” cases, but that court is already over-burdened as the **seventh-busiest** district court in the country by pending civil cases per judge.

<http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-march-2016>. It is also ranked 93rd of 94 – **second to last** – in terms of time from filing to resolution of civil cases. *Id.*²

While movant supports her argument for transfer to the Southern District of Illinois by arguing that “civil cases proceeded to trial in 19 months” there (Mot. at 12), this statistic is unhelpful because the sample size is so small (just 16 cases in the Southern District of Illinois proceeded to trial during that period, out of the thousands of cases resolved in the same time period), and because the central task of an MDL judge is not to try cases but to manage pretrial proceedings. The more relevant statistic is the median time to disposition of cases by any means, which reflects a court’s efficiency in handling the broad range of issues that can arise in the course of managing a large number of cases (including the vast majority of cases that are

² Defendants understand that the district is about to be even busier. On July 6, 2016, Judge Rosenstengel entered an order in the *In re Depakote* consolidated proceeding stating that she intends to “ensure that the majority, if not all, of the cases pending in this district are tried by the end of 2017.” See Order at 1-2, *In re Depakote*, No. 3:12-cv-00052 (S.D. Ill. Filed July 6, 2016) (attached as Ex. 1). That docket includes approximately 129 cases involving approximately 691 plaintiffs. *Id.* at 1. According to Judge Rosenstengel, “it appears that” her trial plan will be “a massive undertaking involving all of this district’s resources.” *Id.*

resolved without trial). And by that measure, both the District of New Jersey (*7.5 months* median time of disposition) and the Western District of Oklahoma (*8.5 months* median time of disposition) were far speedier than the Southern District of Illinois (*18.7 months*) in 2014. *See* <http://www.uscourts.gov/statistics/table/c-5/federal-judicial-caseload-statistics/2014/03/31> (cited in Mot. at 12).

Third, movant also identifies Judge Herndon as uniquely capable of overseeing MDL litigation, but Judge Herndon is currently presiding over two MDL proceedings. While MDL 2385, *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, currently has only four pending cases, MDL 2100, *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, still has more than 1,600 pending cases.

http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2016.pdf.

For all of these reasons, the Southern District of Illinois is an inappropriate transferee district for the talc products MDL proceeding.³

³ One group of plaintiffs also requests, in the alternative, that the Panel transfer the cases to the Southern District of Mississippi before Judge Sul Ozerden in Gulfport, Mississippi. (*See* Pl.’s Resp. Br. In Supp. Of Mot. For Consolidation & Transfer Pursuant To 28 U.S.C. § 1407 ¶ 14, ECF No. 28 (J.P.M.L. filed Aug. 3, 2016).) But that venue will be extremely inconvenient for the counsel and parties to this litigation. The Gulfport-Biloxi airport is a small, regional airport that only services a few cities in the Southern United States. Even the plaintiffs who offer Gulfport as an alternative MDL forum implicitly concede its inconvenience, by noting that the closest convenient airports are in Mobile, Alabama, and New Orleans, Louisiana. (*Id.*) Those cities are 75 and 80 miles away, respectively, from Gulfport, making it an ill-suited locale for litigation that involves parties scattered throughout the United States. *See In re Jamster Mktg. Litig.*, 427 F. Supp. 2d 1366, 1368 (J.P.M.L. 2006) (denying plaintiff’s preference for the Eastern District of Arkansas and transferring to the Southern District of California, which “provides an accessible metropolitan location that is equipped with the resources that this docket is likely to require”); *In re Educ. Testing Serv. Plt 7-12 Test Scoring Litig.*, 350 F. Supp. 2d 1363, 1365 (J.P.M.L. 2004) (transferring to “an accessible, metropolitan location” “[g]iven the range of locations of parties and putative class members in this docket and the geographic dispersal of current and anticipated constituent actions”).

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Panel transfer the actions identified on the attached schedule either to the District of New Jersey (preferably before Judge Wolfson) or the Western District of Oklahoma (preferably before Judge DeGiusti) for coordinated pretrial proceedings.

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Respectfully submitted,

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