BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE QUAKER OATS MAPLE &	**)**	
BROWN SUGAR INSTANT	**)**	**MDL No. 2718**
OATMEAL MARKETING AND	**)**	
SALES PRACTICES LITIGATION	**)**	

PLAINTIFF EISENLORD'S RESPONSE TO MOTION FOR COORDINATION OR CONSOLIDATION AND TRANSFER PURSUANT TO 28 U.S.C. § 1407

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Plaintiff Eisenlord (the "Plaintiff"), by and through his counsel, respectfully submits this response to Plaintiff Aliano's ("Aliano") motion to the Judicial Panel on Multidistrict Litigation (the "Panel"). For the reasons discussed below, Plaintiff Eisenlord seeks an order transferring the four putative class actions pending against The Quaker Oats Company ("Quaker" or "Defendant") and any tag-along actions to the Honorable Philip S. Gutierrez of the Central District of California for pre-trial coordination.

INTRODUCTION

There are currently four similar actions pending in three federal district courts across the country. The first-filed case is pending in the U.S. District Court for the Central District of California, captioned *Eisenlord v. The Quaker Oats Company, et. al*, Case No. 16-cv-1442 (C.D. Cal.) (filed March 1, 2016) (hereafter "*Eisenlord*"). Eisenlord alleges that The Quaker Oats Company mislabeled its Quaker Oats Maple and Brown Sugar Instant Oatmeal line of products as containing maple and brown sugar when these products do not contain these ingredients and is therefore misbranded under the Federal Food Drug and Cosmetic Act and violative of state consumer fraud statutes.

The second-filed case, which copied verbatim large swaths of the *Eisenlord* action, is pending in the U.S. District Court for the Northern District of Illinois, captioned *Aliano v. The Quaker Oats Company*, Case No. 16-cv-03087 (N.D. Ill.) (filed March 11, 2016) (hereafter "*Aliano*"). The third-filed case, which also copied verbatim large parts of the *Eisenlord* action, is pending in the U.S. District Court for the District of New Jersey, captioned *Gates v. The Quaker Oats Company,* Case No. 1:16-cv-1944 (D.N.J.)(filed April 8, 2016) (hereafter "*Gates*"). The fourth-filed case, which also copied verbatim large parts of the *Eisenlord* action, is pending in the U.S. District Court for the Northern District of Illinois, captioned *Drey v. The Quaker Oats Company*, Case No. 16-cv-04293 (N.D. Ill.) (filed April 13, 2016) (hereafter "*Drey*").

Given the virtually identical allegations in all four complaints and the agreement amongst plaintiffs and Defendant that centralization would be beneficial, centralization is obviously warranted here.

Plaintiff Eisenlord supports transfer to the Central District of California where the first-filed case is pending. Two of the plaintiffs in the four cases reside in California and the Defendant supports transfer to that district. The procedural gamesmanship of plaintiffs' counsel in the copycat actions should not be rewarded by transfer to a court of their choice.

For the foregoing reasons, Plaintiff Eisenlord respectfully requests that the four actions and all potential tag-along actions be transferred to and consolidated before the Honorable Philip S. Gutierrez of the Central District of California.

ARGUMENT

I. Transfer And Centralization Are Warranted Under 28 U.S.C. § 1407

Pursuant to 28 U.S.C. § 1407(a), when "civil actions involving one or more common questions of fact are pending in different districts," this Panel may transfer the actions to a single district for centralized pretrial proceedings if it determines that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." All of these criteria are met here.

A. Given that All of the Actions After *Eisenlord* Copy Most of Eisenlord's Allegations, the Actions Involve Virtually Identical Allegations and Overlapping Classes

The four actions allege that Defendant mislabels its Quaker Oats Maple and Brown Sugar Instant Oatmeal line of products as containing maple and brown sugar when these products do not contain these ingredients.

All actions allege virtually identical facts regarding consumer preferences and expectations regarding maple and the consumer deception that occurred through Defendant's

mislabeling of the front packaging of the products. Each complaint alleges that the image of a glass pitcher of syrup on the label of the products at issue and the products' name are misleading to consumers. *Eisenlord* Compl. ¶ 22; *Aliano* Am. Compl. ¶ 19; *Gates* Compl. ¶ 15; *Drey* Compl. ¶ 12. All cases also assert that maple syrup and maple sugar are "premium ingredients." *Eisenlord* Compl. ¶ 13; *Aliano* Am. Compl. ¶ 11; *Gates* Compl. ¶ 11; *Drey* Compl. ¶ 10. All cases also refer to the February 15, 2016 Letter from the Vermont Maple Sugar Makers' Association to the Food & Drug Administration. *Eisenlord* Compl. ¶ 27; *Aliano* Am. Compl. ¶ 24; *Gates* Compl. ¶ 24; *Drey* Compl. ¶ 26. All cases allege that maple syrup is "a source of beneficial antioxidants" shown to have health benefits. *Eisenlord* Compl. ¶ 15; *Aliano* Am. Compl. ¶ 12; *Gates* Compl. ¶ 12; *Drey* Compl. ¶ 10.

All cases allege that consumers nationwide were harmed because they paid for the products as issue. All cases allege that these practices violate state consumer protection laws, and that the products are misbranded under the federal Food Drug and Cosmetic Act. *Eisenlord* Compl. ¶ 2; *Aliano* Am. Compl. ¶ 2; *Gates* Compl. ¶ 2; *Drey* Compl. ¶ 2. All cases seek injunctive relief and monetary damages on behalf of a nationwide class of individuals who purchased one or more of the six variations of the Quaker Maple and Brown Sugar Instant Oatmeal products.

B. Centralization Will Prevent Duplicative Discovery And Inconsistent Pre-Trial Rulings And Will Promote Efficient Conduct Of The Litigation

All of the cases are in their infancy. Defendant has not answered the complaints in any of the four cases. Nor has any discovery been served on the Defendant. Centralization will prevent duplication of briefing on any motion to dismiss and will prevent potentially inconsistent rulings from various district courts on motion practice related to the pleadings.

The same is true for any class certification motion brought under Rule 23 of the Federal Rules of Civil Procedure. The Panel has held the existence of and the need to eliminate the

possibility of inconsistent class determinations is a highly persuasive reason favoring transfer under Section 1407. *In re Roadway Exp., Inc. Employment Practices Litig.*, 384 F. Supp. 612, 613 (J.P.M.L. 1974). Here, the overlapping class definitions contained in the four complaints (i.e., nationwide classes and California subclasses and other state subclasses) create the possibility for inconsistent class determinations by courts of coordinate jurisdiction. This factor strongly favors centralization. *See In re Pharmacy Benefit Managers Antitrust Litig.*, 452 F. Supp. 2d 1352, 1353 (J.P.M.L. 2006) (emphasizing the need to prevent conflicting pretrial rulings, "especially on the issue of class certification").

Finally, given that the factual allegations are virtually identical in all the four actions, Plaintiffs will likely seek the exact same discovery from the Defendant. Therefore, all parties will greatly benefit from centralization before a single court that can devise a discovery plan and schedule to govern all the cases.

II. Transfer To The Central District of California Would Be the Most Appropriate Ruling by the Court

A. Transfer To The Central District Is Appropriate Because That Is Where *Eisenlord*, The First Filed Lawsuit, Was Filed

Transfer to the Central District of California, where the first filed case is pending, would be the most appropriate transferee court. *See e.g.*, *Midwest Motor Exp., Inc. v. Central States Southeast*, 70 F.3d 1014, 1017 (8th Cir. 1995) (the "first-filed" rule "give[s] priority for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction."); *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir. 1993) (courts may dismiss or transfer a later-filed duplicative federal suit under the first-filed rule "for reasons of wise judicial administration") (quotation omitted); *Church of Scientology of Cal. v. U.S. Dept. of the Army*, 611 F.2d 738, 750 (9th Cir. 1979) ("[T]he 'first to file' rule normally serves the purpose of promoting efficiency well and

should not be disregarded lightly.").

B. The Central District Of California Is Both Speedy And Well Qualified

Judge Gutierrez of the Central District of California, who is currently presiding over the *Eisenlord* action, is a distinguished judge clearly able to manage a multidistrict litigation involving deceptive marketing and sales practices. He has handled multiple multi-district litigations, including: *In re 5 Hour Energy Marketing & Sales Practices Litigation*, MDL No. 2438; *In re WellPoint, Inc., Out-of-Network "UCR" Rates Litigation*, MDL No. 2074 and *In re Epogen & Aranesp Off-Label Marketing & Sales Practices Litigation*, MDL No. 1934.

The Panel should also consider the potential speed to resolution in the proposed districts. The speed to resolution is important here because plaintiffs have alleged that the mislabeling of the Quaker Maple and Brown Sugar line of products is ongoing and plaintiffs seek an order enjoining the deceptive practices. As Defendant has proffered, in terms of average speed to resolution, the Central District of California is generally faster than the Northern District of Illinois and the District of New Jersey. Dkt. 13, at pg. 16 (citing Federal Court Management Statistics, December 2015, United States District Courts—Nat'l Judicial Caseload Profile, at 15 (New Jersey), 47 (Illinois Northern), 68 (California Central), *available at* http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-december-2015 (last visited Apr. 29, 2016)).

C. Transfer to a Location Other Than the Central District of California Would Reward Procedural Gamesmanship

Finally, in selecting the transferee court, the Panel should take into consideration the procedural posturing of plaintiffs' counsel in what can most accurately be described as the "copycat actions" and the incentive it would create for future transfer motions based on improper motives. *See In re CVS Caremark Corp. Wage and Hour Employment Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010) ("Where a Section 1407 motion appears intended

to further the interests of particular counsel more than those of the statute, we would certainly find less favor with it.").

Transfer to the Northern District of Illinois, as the *Aliano* and *Gates* plaintiffs have proposed, would reward procedural gamesmanship by a group of plaintiffs' counsel who clearly appear to have colluded to file cases across the nation in order to create a need for multidistrict litigation and to ultimately position themselves for an opportunity to obtain leadership and control of a case in the transferee court of their choice.

Plaintiffs' counsel's gamesmanship is demonstrated by the fact that the *Aliano, Gates*, and *Drey* actions are virtual copies of *Eisenlord*, the first-filed case. In addition, the *Gates* brief in response to the motion to transfer is nearly identical to the moving brief filed by the *Aliano* plaintiff. Compare Dkt. 1-1 with Dkt. 11. The *Drey* action—brought on behalf of a California plaintiff filing in Chicago on behalf of a nationwide class and a California subclass—was clearly a strategic decision to file over the first-filed case that was also brought on behalf of a nationwide class and a California subclass of consumers.

D. Convenience Of The Parties Supports the Central District of California

Here, the Central District of California would be a convenient forum for the parties. Plaintiff Eisenlord resides in that district as does plaintiff Drey (despite filing suit in Illinois).

In addition, Defendant supports transfer to that district. Dkt. 13. Defendant's counsel is located there. Dkt. 13 at 15. Defendant has indicated that would not be burdened or otherwise prejudiced by having to respond to discovery in California. Dkt. 13 at 16-17. In fact, Defendant has demonstrated that the district is convenient as it has efficiently litigated consolidated litigation in California challenging labeling on its products in the past. *See In re Quaker Oats Labeling Litigation*, No. 10-cv-0502 RS (N.D. Cal.).

CONCLUSION

Plaintiff Eisenlord respectfully requests that this Panel enter an order transferring the *Eisenlord*, *Aliano*, *Gates* and *Drey* actions and potential tag-along actions to the Central District of California pursuant to 28 U.S.C. § 1407(a) for centralized proceedings.

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Respectfully submitted,

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