BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: ROCK 'N PLAY SLEEPER LITIGATION	MDL No. _____

MEMORANDUM IN SUPPORT OF DEFENDANTS' 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

Fisher-Price, Inc. ("Fisher-Price") and Mattel, Inc. ("Mattel") submit this brief in support of their 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 AND RELEVANT BACKGROUND

Fisher-Price and Mattel (collectively, "Defendants") are defendants in six putative nationwide class actions[1] pending in two different district courts that all relate to Fisher-Price's

[1] The currently filed actions are: (1) *Barton v. Fisher-Price, Inc. & Mattel, Inc.*, Western District of New York Case No. 1:19-cv-00670 (filed initially in the Central District of California, former Central District of California Case No. 2:19-cv-03812) ("*Barton*") (Exs. 18 and 5); (2) *Black v. Mattel, Inc. & Fisher-Price, Inc.*, Central District of California Case No. 2:19-cv-03209 ("*Black*") (Ex. 13); (3) *Drover-Mundy, et al. v. Fisher-Price, Inc., Mattel, Inc., & Amazon.com, Inc.*, Western District of New York Case No. 1:19-cv-00512 (Ex. 14) ("*Drover-Mundy*"); (4) *Mulvey v. Fisher-Price, Inc. & Mattel, Inc.*, Western District of New York Case No. 1:19-cv-00518 ("*Mulvey*") (Ex. 15); (5) *Nabong v. Fisher-Price, Inc. & Mattel, Inc.*, Western District of

Rock 'n Play Sleeper ("RNPS").

All of the Actions assert similar claims, and all allege that Defendants falsely and misleadingly advertised the RNPS as safe for prolonged sleep by infants when it allegedly was not, and failed to warn consumers of other alleged risks relating to use of the RNPS.

Transfer and coordination or consolidation of the Actions for pretrial proceedings is appropriate under 28 U.S.C. § 1407. All of the Actions arise from a common set of facts: the RNPS's design, marketing, and related warnings. Centralization would further judicial economy and the efficient conduct of the actions by coordinating discovery, which will be virtually identical in each of the Actions, and by preventing potentially conflicting rulings, particularly with respect to class certification and jurisdictional issues.

Transfer to the Central District of California (Western Division) in particular is appropriate because an Action is currently pending in the District, the District is in an easily accessible metropolitan area (Los Angeles), and Mattel has its headquarters located within the Central District, where some potential witnesses will be located.[2] The Honorable Virginia A. Phillips, to whom the *Black* action has been assigned (and to whom the *Barton* action was also assigned before it was dismissed and refiled in the Western District of New York), is an experienced trial judge with vast experience handling these type of cases. ***Plaintiff's counsel in***

New York Case No. 1:19-cv-00668 (filed initially in the Northern District of Illinois, former Northern District of Illinois Case No. 1:19-cv-03290) ("*Nabong*") (Exs. 17 and 6); and (6) *Shaffer v. Fisher Price, Inc. & Mattel, Inc.,* Western District of New York Case No. 1:19-cv-00667 ("*Shaffer*") (Ex. 16). A seventh complaint that was filed in the District of New Jersey, *Kimmel v. Fisher-Price, Inc. & Mattel, Inc.*, former District of New Jersey Case No. 3:19-cv-09613) ("*Kimmel*") (Ex. 8) was dismissed after Defendants gave notice of this Motion, but Defendants have been advised that the case will be refiled in the Western District of New York. (*Barton, Black, Drover-Mundy, Kimmel, Mulvey, Nabong,* and *Shaffer* shall collectively be referred to as the "Actions.")

[2] Defendant Fisher-Price is located in Buffalo, New York, where some potential witnesses will also be located.

Black ***consents to centralization of the Actions before Judge Phillips in the Central District of California.***

On the date counsel for Defendants informed plaintiffs' counsel that they intended to file this Motion and seek transfer for pretrial purposes to the Central District of California, six actions were pending in four different jurisdictions, including two within the Central District of California. As discussed in further detail below in Section II.B., after counsel for Defendants reached out to plaintiffs' counsel, several of them began dismissing their actions in different jurisdictions and refiling in the Western District of New York, and filed an *additional* action in the Western District of New York on behalf of a plaintiff residing in Washington State, all in an obvious forum-shopping maneuver.

In contrast to the Central District of California, the Western District of New York is not an ideal forum to transfer the actions for coordinated or consolidated proceedings, primarily because of the overcrowded dockets of the judges in the district, which are over double those of the judges in the Central District of California. Indeed, four of the five cases presently filed in the Western District of New York are assigned to the Honorable Geoffrey Crawford of the District of Vermont. Based on information and belief, Judge Crawford is sitting in the Western District of New York by designation and assignment pursuant to 28 U.S.C. § 292(d) because of "necessity," given the already unusually heavy case load in that District.[3] The median time to trial in the Western District of New York is nearly three times the median time to trial in the Central District of California. Finally, the Western District of New York only appears to have

[3] 28 U.S.C. § 292(d) states:

> The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

handled one MDL action in the past 10 years (in 2009), whereas the Central District of California appears to have extensive experience handling these complex actions.

Consequently, Defendants Fisher-Price and Mattel seek transfer and coordination or consolidation of the Actions, and any similar tag-along actions that may be filed, to the Central District of California (Western Division), before the Honorable Virginia A. Phillips, Chief Judge of the Central District of California.

II. ARGUMENT

The "basic purpose" of multidistrict litigation is to secure the "just, speedy and inexpensive determination of every action." *In re National Student Marketing Litigation*, 368 F. Supp. 1311, 1316 (J.P.M.L. 1972). Where multiple actions share common issues of fact, and where transfer for coordinated or consolidated pretrial proceedings would "promote the just and efficient conduct" of the actions and would be "for the convenience of parties and witnesses," transfer to a single district court for coordinated and consolidated proceedings is appropriate. 28 U.S.C. § 1407(a). Transfer for pretrial coordination or consolidation to the Central District of California (Western Division), before the Honorable Virginia A. Phillips, is appropriate here.[4]

A. Transfer for Pretrial Consolidation or Coordination of All Actions Is Appropriate Under 28 U.S.C. § 1407

1. The Actions Share Common Issues of Fact

The RNPS is a product designed for use by infants until the time they are able to roll over or achieve other developmental milestones. Infants lay in the RNPS at a slight incline—approximately a 30-degree angle. Multiple warnings are provided with the product, including a

[4] This is underscored by the fact that, until plaintiffs engaged in obvious forum shopping by dismissing and refiling cases in the Western District of New York, the only district courts with more than one case filed were the Central District of California and the Western District of New York, which each had two cases. Plaintiff in the *Black* matter consents to centralization in the Central District of California.

warning not to use the product once the infant is able to roll over, and to always place the infant in the restraint system provided with the product. Fisher-Price began selling the RNPS in 2009, and it has been an extremely popular product with parents and caregivers for a decade with over 4.7 million units sold.

On April 12, 2019, in conjunction with the Consumer Product Safety Commission ("CPSC"), Fisher-Price decided to voluntarily recall all of its RNPS units and to cease selling the product. The joint press release announcing the recall issued by Fisher-Price and the CPSC noted that over 30 infant fatalities had occurred in the RNPS after the infants rolled from their back to their stomach or side while unrestrained, or under other circumstances. The loss of any infant's life is a tragedy. However, Fisher-Price's decision to recall the RNPS was not due to any alleged defect in the product. Rather, given the reported incidents in which the product was used contrary to safety warnings and instructions, Fisher-Price decided, in partnership with the CPSC, that a voluntary recall was the best course of action.

The use of the RNPS in a manner inconsistent with product warnings and other circumstances resulting in infant deaths unrelated to the product will be material issues of fact in all of the Actions. There are a multitude of other issues common to all of the Actions. For example, all Actions commonly allege that the RNPS is inherently unsafe because, among other reasons:

(i) the design of the RNPS is allegedly contrary to the opinions of some who believe that infants should be placed on a flat surface to sleep rather than at an incline (*see, e.g., Barton* Complaint at ¶¶ 2, 38-75; *Black* Complaint at ¶¶ 20-34; *Drover-Mundy*

Complaint at ¶¶ 23, 32-48, 56-58; *Kimmel* Complaint at ¶¶ 2, 18-39[5]; *Mulvey* Complaint at ¶¶ 2, 37-74; *Nabong* Complaint at ¶¶ 2, 37-74; *Shaffer* Complaint at ¶¶ 2, 37-75);

(ii) the angle of the RNPS allegedly increases the risk that infants will suffer from positional asphyxia (*see, e.g., Barton* Complaint at ¶¶ 2, 71; *Black* Complaint at ¶¶ 2, 29; *Drover-Mundy* Complaint at ¶¶ 6, 36, 40; *Kimmel* Complaint at ¶ 24; *Mulvey* Complaint at ¶¶ 2, 70; *Nabong* Complaint at ¶¶ 2, 70; *Shaffer* Complaint at ¶¶ 2, 71); and

(iii) the RNPS allegedly increases the risk of developing plagiocephaly/brachycephaly ("flat head") and torticollis ("twisted neck") (*see, e.g., Barton* Complaint at ¶¶ 2, 71; *Black* Complaint at ¶¶ 2, 29; *Drover-Mundy* Complaint at ¶¶ 6, 49-51; *Kimmel* Complaint at ¶ 29; *Mulvey* Complaint at ¶¶ 2, 70; *Nabong* Complaint at ¶¶ 2, 70; *Shaffer* Complaint at ¶¶ 2, 71).

The Actions rely on the same or similar purported "evidence" as a basis for their allegations that the RNPS was inherently dangerous. (*See, e.g., Barton* Complaint at ¶¶ 6-16, 38-92; *Black* Complaint at ¶¶ 3-9, 20, 25-34; *Drover-Mundy* Complaint at ¶¶ 3-4, 35-58; *Kimmel* Complaint at ¶¶ 3-7, 18-39; *Mulvey* Complaint at ¶¶ 3-16, 37-87; *Nabong* Complaint at ¶¶ 3-15, 37-88; *Shaffer* Complaint at ¶¶ 5-15, 37-89.)

All of the Actions allege that Fisher-Price and Mattel were aware of the allegedly inherently dangerous nature of the RNPS, yet purportedly failed to take remedial measures or properly warn consumers about the alleged risks. (*See, e.g., Barton* Complaint at ¶¶ 3, 38-92; *Black* Complaint at ¶¶ 20-34; *Drover-Mundy* Complaint at ¶¶ 23, 32-48, 56-58; *Kimmel*

[5] References to the *Kimmel* Complaint are to the complaint that was dismissed. (*See* Ex. 8.) References to the *Kimmel* Complaint are included because Defendants' counsel has been informed that it will be refiled in the Western District of New York, and because it shares common issues with the other Actions. (Ex. 2 [Declaration of Craig J. de Recat ("de Recat Decl.")] at ¶¶ 11-12; Ex. 7.)

Complaint at ¶¶ 2, 18-39; *Mulvey* Complaint at ¶¶ 2, 37-74; *Nabong* Complaint at ¶¶ 3, 37-74; *Shaffer* Complaint at ¶¶ 3, 31, 35-89.)

All of the Actions also allege that, because the RNPS was allegedly inherently dangerous and not suitable for prolonged sleep, the advertising and marketing for the RNPS was false and misleading, and that Fisher-Price and Mattel breached various duties to the putative classes as well as express and implied warranties. (*See, e.g., Barton* Complaint at ¶¶ 98-143; *Black* Complaint at ¶¶ 1-2, 39-51; *Drover-Mundy* Complaint at ¶¶ 24-31; *Kimmel* Complaint at ¶¶ 40-50; *Mulvey* Complaint at ¶¶ 93-135; *Nabong* Complaint at ¶¶ 94-139; *Shaffer* Complaint at ¶¶ 95-140.)

Further, nearly all the Actions allege that the statute of limitations on all the causes of action should be tolled based on various legal theories, all premised on Fisher-Price's and Mattel's purported knowledge, alleged active concealment of the RNPS's purported dangers, and consumers' inability to discover the true facts about the product. (*See, e.g., Barton* Complaint at ¶¶ 144-159; *Kimmel* Complaint at ¶¶ 51-66; *Mulvey* Complaint at ¶¶ 136-151; *Nabong* Complaint at ¶¶ 140-155; *Shaffer* Complaint at ¶¶ 141-156.)

All of the Actions that were filed after Fisher-Price's recall of the RNPS challenge the sufficiency of the recall. (*See, e.g., Barton* Complaint at ¶¶ 4, 93-97; *Black* Complaint at ¶¶ 35-38; *Drover-Mundy* Complaint at ¶¶ 69-76; *Mulvey* Complaint at ¶¶ 88-92; *Nabong* Complaint at ¶¶ 89-93; *Shaffer* Complaint at ¶¶ 90-94.)

Finally, all of the Actions seek to certify, *inter alia*, nationwide classes of consumers who purchased the RNPS.[6] (*See, e.g., Barton* Complaint at ¶ 160; *Black* Complaint at ¶ 52; *Drover-Mundy* Complaint at ¶ 77; *Kimmel* Complaint at ¶ 67; *Mulvey* Complaint at ¶ 152; *Nabong*

[6] The majority of the Actions seek to certify, in the alternative, state-specific classes. One action, *Drover-Mundy* also seeks to certify a nationwide injury class.

Complaint at ¶ 156; *Shaffer* Complaint at ¶ 157.)

The Actions all seek similar relief, including actual damages, statutory damages (if available), punitive damages, injunctive relief, declaratory relief, and attorneys' fees and costs. (*See* all Prayers for Relief.)

Consequently, the requirement of Section 1407(a) that the cases sought to be transferred share common issues of fact is readily satisfied. *See, e.g., In re Tyson Foods, Inc. Chicken Raised Without Antibiotics Consumer Litigation*, 582 F. Supp. 1378, 1379 (J.P.M.L. 2008) (consolidating nine putative false advertising class actions challenging allegedly improper marketing of chicken).

2. Transfer Would Advance the Just and Efficient Conduct of the Actions

Tantamount to securing the "just, speedy and inexpensive determination of every action" is centralizing cases with common facts (and nearly identical legal issues) before a single court for pretrial proceedings in order to "eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary." *In re Generic Digoxin & Doxycycline Antitrust Litigation*, 222 F. Supp. 3d 1341, 1344 (J.P.M.L. 2017); *see also In re Vioxx Product Liability Litigation*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005).

a. Transfer for Coordination or Consolidation Will Prevent Duplicative Discovery

As a result of the common allegations and issues of fact among the Actions discussed above in Section II.A.1., the Actions will necessarily involve duplicative discovery, including discovery likely relating to, among other things:

1. The design of the RNPS and whether it unreasonably increases the risk of positional asphyxiation, plagiocephaly/brachycephaly, and/or torticollis in infants when used as directed;

2. The suitability of the RNPS for prolonged sleep by infants;
3. Research and testing conducted by Mattel and/or Fisher-Price relating to the safety of the RNPS;
4. The advertising and marketing for the RNPS;
5. The instructions and product warnings for the RNPS;
6. Changes to advertising, warnings, and use instructions for the RNPS over time, and the reasons for the changes;
7. American Society of Testing and Materials ("ASTM") standard setting and Juvenile Products Manufacturers Association ("JPMA") certification related to the inclined sleeper product category;
8. Safety of the RNPS relative to other infant sleep environments, such as cribs;
9. Consumers' use of the RNPS;
10. Sales of the RNPS;
11. Information about other "incline sleeper" products;
12. Expert opinions regarding the safety of the RNPS;
13. Expert opinions regarding whether the RNPS was the proximate cause of any alleged injury to an infant; and
14. The alleged damages of putative class members.[7]

To date, no discovery has been conducted in any of the Actions. Centralization of the Actions before a single court will allow a seasoned federal judge experienced in complex litigation to formulate a pretrial discovery program to avoid unnecessary duplication of discovery

[7] Fisher-Price and Mattel do not concede the relevance, discoverability, or admissibility of any discovery categories listed, and expressly reserve all rights with respect thereto. Thus, to the extent that issues arise relating to the discoverability of any of the categories listed, centralization for pretrial purposes will avoid inconsistent discovery rulings.

efforts. *See In re Vioxx*, 360 F. Supp. 2d at 1354. This will conserve the resources of: (i) the Plaintiffs who will not each need to serve their own sets of discovery for each individual action (counsel can work together); (ii) Defendants, who will not have to respond to multiple duplicative sets of discovery and have their witnesses deposed multiple times; (iii) the parties' counsel; and (iv) the judiciary, who will not be burdened with multiple duplicative discovery motions, risking inconsistent results.

b. Transfer for Pretrial Coordination or Consolidation Would Prevent Inconsistent Rulings, Particularly on Class Certification

Section 1407's "remedial aim is to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491-93 (J.P.M.L. 1968). "It is in the field of class action determinations in related multidistrict civil actions that the potential for conflicting, disorderly, chaotic judicial action is the greatest." *Id.* at 493. *See also In re Tyson Foods, Inc.*, 582 F. Supp. at 1379 (consolidating nine putative class actions, saying doing so would, among other things, "prevent inconsistent pretrial rulings (particularly with respect to class certification)"); *In re Plumbing Fixtures*, 308 F. Supp. 242, 244 (J.P.M.L. 1970) (transferring four putative class actions to a single judge, stating "a potential for conflicting or overlapping class actions presents one of the strongest reasons for transferring such related actions to a single district for coordinated pretrial proceedings which will include an early resolution of such potential conflicts").

Here, where all the Actions seek to certify the same class—a nationwide class of purchasers of the RNPS—failure to coordinate the Actions before a single judge "would make possible, and perhaps probable, pretrial chaos in conflicting class action determinations which Section 1407 was designed to make impossible." *In re Plumbing Fixture Cases*, 298 F. Supp. at

492-93.

In addition, consolidation before a single court for pretrial purposes will prevent potentially conflicting pretrial rulings on other significant matters, including whether the non-California courts have personal jurisdiction over the claims of non-California residents against Mattel under *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), and its progeny, and similarly, whether non-New York courts have personal jurisdiction over the claims of non-New York residents against Fisher-Price. *See, e.g., In re Maytag Corp. Neptune Washer Products Liability Litigation*, 333 F. Supp. 2d 1382, 1383 (J.P.M.L. 2004) (ordering centralization of three putative class actions by persons seeking to recover damages for alleged product defects, finding that centralization was "necessary" in order to, among other things, "prevent inconsistent pretrial rulings (especially with respect to jurisdictional and class certification matters)").

For these additional reasons, transfer would advance the just and efficient conduct of the Actions.

3. Transfer Would Serve the Convenience of the Parties and Witnesses

Finally, transfer will serve the convenience of the parties and the witnesses. As stated above in Section II.A.1., the elimination of duplicative discovery serves the parties' and witnesses' interests. Further, one of the Actions is currently pending within the Central District of California (and that plaintiff consents to centralization in that District). Regardless of where Defendants' witnesses are geographically located, and they will likely be located on both coasts and locations in-between, the witnesses will need to be deposed where they are geographically located, so this is a neutral consideration. To the extent any of the relevant witnesses or documents may come from Mattel, they would be in Los Angeles, California, within the Central

District, where Mattel has its headquarters.[8]

In addition, because of the advent of electronic discovery, many courts have determined that the physical location of relevant documents is a neutral factor in the transfer analysis. *See, e.g., Weintraub v. Advanced Correctional Healthcare, Inc.*, 161 F. Supp. 3d 1272, 1283 (N.D. Ga. 2015) (finding that the physical location of documents was "neutral" and recognizing that "[s]ince the predominance of electronic discovery in the modern era, most courts have recognized that the physical location of relevant documents is no longer a significant factor in the transfer inquiry") (citing cases); *Hawley v. Accor North America, Inc.*, 552 F. Supp. 2d 256, 259 (D. Conn. 2008) ("Although the location of relevant documents is entitled to some weight, modern photocopying technology and electronic storage often deprive this issue of practical or legal weight."). Defendants would make any discoverable and admissible documents available during discovery and for trial in accordance with their obligations under the Federal Rules, notwithstanding the jurisdiction of pretrial proceedings.

The named plaintiffs may argue that it would be burdensome to litigate in California, but this is a non-issue. First, Defendants Fisher-Price and Mattel will take plaintiffs' depositions near their residences (Arizona, Delaware, Illinois, New Jersey, New York, Pennsylvania, Texas, and Washington), making travel to California unnecessary. Second, the cases will be remanded for trial to the districts in which the plaintiffs elected to bring their respective actions, so they will not have to travel to the Central District of California, unless they already agreed to do so by filing their actions in that district in the first instance. Further, because discovery will almost certainly be done electronically, the location of pretrial proceedings should not matter to the

[8] As alleged in the Complaints, Fisher-Price's corporate headquarters are located in East Aurora, New York, in the Western District of New York. As addressed in Section II.B. below, Defendants believe that the Central District of California is a better-suited transferee forum than the Western District of New York.

plaintiffs.

All of the Actions are at the same procedural juncture (no responses to the complaints have been filed and no discovery has begun). So any consideration typically given to the location of the "first-filed" case is irrelevant here, because no case is more advanced than any other. Additionally, counsel for the parties is identical in several of the actions. Specifically, Plaintiffs' counsel in the *Barton*, *Mulvey*, *Nabong*, and *Shaffer* actions are the same.[9] Co-counsel in the *Mulvey* case is also co-counsel in an Action that was pending in the District of New Jersey (*Kimmel*) and that was recently dismissed.[10] Counsel for Fisher-Price and Mattel, Manatt, Phelps & Phillips, LLP, is the same in all Actions.[11] Thus, coordination or consolidation of the Actions would provide a significant conservation of resources not only for the parties, but also their counsel.

Because the Actions share common issues of fact, and transfer for coordinated or consolidated pretrial proceedings would "promote the just and efficient conduct" of the Actions and serve "the convenience of parties and witnesses," transfer of the Actions to a single district court for coordinated and consolidated proceedings is appropriate. 28 U.S.C. § 1407(a).

---

[9] Counsel in each of these actions are attorneys with Wolf Haldenstein Adler Freeman & Herz LLP, which has offices in San Diego, California, Chicago, Illinois, and New York, New York, and Connors LLP, located in Buffalo, New York. Connors LLP was added as co-counsel in the *Barton* and *Nabong* actions only after those actions were dismissed in their original jurisdictions and refiled in the Western District of New York.

[10] Co-counsel in the *Kimmel* and *Mulvey* case is Forchelli Deegan Terrana LLP (Elbert F. Nassis). Counsel for Defendants has been informed that *Kimmel* will be refiled in the Western District of New York, but as of the date of this Motion, it has not yet been refiled. (Ex. 2 [de Recat Decl.], ¶¶ 11-12; Exs. 7-8.)

[11] Manatt has offices in, among other locations, Los Angeles, California, Chicago, Illinois, and New York, New York.

B. The Central District of California (Western Division) Is the Most Appropriate Forum for Transfer for Pretrial Consolidation or Coordination of the Actions

The Panel takes numerous factors into consideration when determining the most appropriate transferee forum. Factors considered include the number of cases pending in the jurisdiction, whether the district is in an accessible metropolitan location, the caseload of the transferee district, and the experience in management of class actions and complex litigation. *See, e.g., In re Bayer Healthcare LLC, Merial Limited Flea Control Products Marketing & Sales Practices Litigation*, 844 F. Supp. 2d 1369, 1370 (2012) (noting the "experience of [the assigned judge] to guide this litigation to a prudent course" as a factor in assignment); *In re Viagra Products Liability Litigation*, 414 F. Supp. 2d 1357, 1358 (2006) (in deciding among several potential transferee districts, the Panel selected a district with "a jurist experienced in complex multidistrict litigation" and "with the capacity to handle this litigation"); *In re Jamster Marketing Litigation*, 427 F. Supp. 2d 1366, 1367 (2006) (transferring to district that offered "an accessible metropolitan location"); *In re Insurance Brokerage Antitrust Litigation*, 360 F. Supp. 2d 1371, 1373 (2005) (same); *In re Preferential Drug Products Pricing Antitrust Litigation*, 429 F. Supp. 1027, 1029 (1977) (considering the caseload of potential transferee districts and transferring to the district with the shorter median time from filing to disposition). In light of these factors, the Central District of California is best suited as the transferee district for the Actions.

When Defendants gave notice of this Motion to plaintiffs' counsel and their intention to seek MDL status and centralization in the Central District of California, two actions were pending in the Central District of California (*Barton* and *Black*), two were pending in the Western District of New York (*Drover-Mundy* and *Mulvey*), one was pending in the District of New Jersey (*Kimmel*), and the sixth action was pending in the Northern District of Illinois (*Nabong*). (*See* Ex. 2 [Declaration of Craig de Recat ("de Recat Decl.")], ¶¶ 1-2, 5-8; Exs. 3-4.)

Counsel for *Barton, Mulvey,* and *Nabong* stated a preference for consolidation in the Western District of New York, and after receiving notice of Defendant's intent to bring this Motion, they began their attempt to tip the balance of actions away from the Central District of California toward the Western District of New York. Three out of the four actions that were pending outside of the Western District of New York were dismissed, and two have already been refiled in the Western District of New York.[12] Counsel for *Barton, Mulvey,* and *Nabong* then filed a new action in the Western District of New York on behalf of a plaintiff residing in Washington State, *Shaffer*. (*See* Ex. 2 [de Recat Decl.], ¶¶ 3-12; Exs. 5-8.) Plaintiffs' clear attempt to forum shop has resulted in five cases pending in the Western District of New York. The remaining case pending outside of that District (*Black*), is in the Central District of California.

The number of Actions pending in the Western District of New York is the *only* factor in that district's favor, and that factor is not dispositive. *See also In re: Pella Corp. Architect and Designer Series Windows Marketing, Sales Practices and Products Liability Litig.*, 996 F. Supp. 2d 1380 (J.P.M.L. 2014) (transferring cases to a district in which no action was pending); *In re: Subway Footlong Sandwich Marketing and Sales Practices Litig.*, 949 F. Supp. 2d 1369, 1370 (J.P.M.L. 2013) (same). Given Plaintiffs' forum shopping, the number of cases pending in the Western District of New York should be a neutral factor at most. *See, e.g., The Learning Network, Inc. v. Discovery Communications, Inc.,* 11 Fed. Appx. 297, 301 (4th Cir. 2001) ("It has long been established that courts look with disfavor upon races to the courthouse and forum shopping."); *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 793 F. Supp. 1098, 1101

[12] As of the filing of this Motion, *Kimmel* has not refiled her complaint, but counsel for Defendants has been informed that she intends to refile in the Western District of New York. (See Ex. 2 [de Recat Decl.], ¶¶ 11-12; Exs. 7-8.) The plaintiff in *Kimmel* is represented by an attorney who is co-counsel in the *Mulvey* case (thus, co-counsel with the attorneys for *Barton, Nabong,* and *Shaffer*).

(J.P.M.L. 1992) (rejecting forum preferences of the parties where there appeared to be forum shopping, and assigning to "neutral" district); *Gupta v. Perez*, No. 5:14-CV-01102 HRL, 2014 WL 2879743, at *3 (N.D. Cal. June 24, 2014) ("Plaintiff's choice of forum is also given less weight or disregarded where there is evidence of forum shopping" in deciding to transfer actions under 28 U.S.C. § 1404); *Foster v. Nationwide Mut. Ins. Co.*, No. C 07-04928 SI, 2007 WL 4410408, at *2 (N.D. Cal. Dec. 14, 2007) (noting that in transfer analysis, "[w]here forum-shopping is evident," "courts should disregard plaintiff's choice of forum"); *Flye v. Astrazeneca Pharm., L.P.*, No. -06-0679 MHP, 2006 WL 2092063, at *1 (N.D. Cal. July 26, 2006) (refusing to grant plaintiffs' motion to voluntarily dismiss their actions after defendant filed a motion to transfer under 28 U.S.C. § 1407, because "it is clear that this maneuvering is blatant forum shopping. The court declines to approve this conduct or grant the motion" to dismiss); *Mikkilineni v. Gibson-Thomas Eng'g Co.*, No. CIV.A. 02-1118(RMU), 2003 WL 1846047, at *2 (D.D.C. Mar. 31, 2003) (noting in its consideration for transfer under 28 U.S.C. § 1404 that "the court gives less weight to the plaintiff's choice of forum in this instance because the plaintiff is forum shopping").

The Panel also looks to a transferee forum "with the capacity and experience to steer [the] litigation on a prudent course" in order to effectuate the purpose of Section 1407. *See, e.g., In re Janus Mutual Funds Investment Litigation*, 310 F. Supp. 2d 1359, 1361-62 (2004) (making a determination of the transferee forum and judges not based on where actions were pending, but after "search[ing] a transferee district with the capacity and experience to steer this litigation on a prudent course"); *In re CenturyLink Residential Customer Billing Disputes Litigation*, 280 F. Supp. 3d 1383, 1385 (J.P.M.L. 2017) (transferring cases to a jurisdiction in which only one action was pending, saying centralization in that district "enables us to assign the litigation to . . .

an able and experienced jurist who has skillfully handled a number of other MDLs. We are confident that the judge will steer this litigation on a prudent course"); *In re: Biomet M2a Magnum Hip Implant Products Liability Litigation*, 896 F. Supp. 2d 1339, 1340-41 (J.P.M.L. 2012) (selecting transferee district in which no actions were filed, because the district enjoyed "favorable docket conditions" and had an "experienced transferee judge who is well-versed in the nuances of complex, multidistrict litigation"). "Favorable docket conditions" and the experience of the potential transferee judges weigh sharply in favor of centralization in the Central District of California, where one of the Defendants has its headquarters.

Perhaps most critically, the Central District of California has more experience in multi-district litigation than the Western District of New York does, and the Central District of California has significantly greater capacity to handle the coordinated or consolidated Actions than does the Western District of New York.

The Federal Court Management Statistics from December 2018[13] (*see* Ex. 10) reflect the following metrics:

	C.D. Cal.	W.D.N.Y.
Median time from filing to disposition (civil)	5.1 months	9.7 months
Median time from filing to trial (civil)	21.5 months	62.4 months
Number of Judgeships	28	4
Pending cases per Judgeship	510	1,077

As established by these metrics, the judges in the Western District of New York have more than double the caseload of judges in the Central District of California. The median time to trial in the Central District of California is nearly one third of the median time to trial in the

[13] Available at *https://www.uscourts.gov/sites/default/files/fcms_na_distcomparison1231.2018.pdf*.

Western District of New York. The issue of time to trial is significant, because, the more time that passes, the greater the likelihood that memories fail, and that witnesses with knowledge about the development of the RNPS and its marketing, testing, etc., may become unavailable for trial due to retirement, job changes, and other life events. **All** parties have an interest in an expeditious resolution of the Actions, and it appears that the Central District of California is in a much better position to prepare the cases for trial in considerably less time than the Western District of New York.

In addition to the caseload of the judges in the Western District of New York being more than double that of the judges in the Central District of California, counsel for Defendants was able to identify only one MDL case in the Western District of New York in the past 10 years (*In re Air Crash Near Clarence Center, New York, on February 12, 2009*, W.D.N.Y. Case. No. 09-md-2085). That MDL was before the Honorable William M. Skretny, who is not assigned to any of the Actions currently pending in the Western District of New York. (Ex. 2 [de Recat Decl.] at ¶ 16.)

By contrast, the Central District of California is currently handling several MDL cases, and in the last ten years has handled at least a dozen such cases, demonstrating that the jurists within the District are experienced in complex multidistrict litigation and that the Central District of California has the capacity to handle complex litigation. (*See* Ex. 11 [MDL Statistics Report—Distribution of Pending MDL Dockets by District][14] at p. 1.) Judge Virginia A. Phillips has been assigned to the *Black* case pending in the Central District, and was also assigned to the second case in the Central District (*Barton*) before it was dismissed. Judge Phillips is an

[14] Available at *https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-May-15-2019.pdf*.

experienced jurist with over 20 years on the federal bench[15] and is well-suited to handle the centralized Actions.[16] It does not appear that Judge Phillips is currently handling any other multidistrict litigation matters, and she has handled dozens of class action matters. (*See* Ex. 11 [MDL Statistics Report—Distribution of Pending MDL Dockets by District]; Ex. 2 [de Recat Decl.] at ¶ 17; Ex. 12.)

Further, the Central District of California, Western Division, in Los Angeles is an easily accessible metropolitan location, particularly as compared to the Western District of New York, located in Buffalo (let alone Vermont, where, based on information and belief, the Judge assigned to the *Barton, Mulvey, Nabong,* and *Shaffer* actions is located and may hold hearings). (*See* Ex. 2 [de Recat Decl.] at ¶ 18.)

Finally, none of the plaintiffs in any of the Actions are located within the Western District of New York.[17] The majority of the plaintiffs have apparently only selected the Western

[15] Judge Phillips received her commission as a United States District Court Judge on November 15, 1999. Prior to becoming a District Court Judge, Judge Phillips served as a Magistrate Judge in the Central District of California beginning in 1995.

[16] The judges currently assigned to the cases pending in the Western District of New York have each been on the federal bench for less than five years. The judge currently assigned to the majority of the cases, Judge Crawford, is a judge from the District of Vermont, sitting by assignment and designation in the Western District of New York. Counsel for Defendants was advised by Judge Crawford's clerk that Judge Crawford may hold longer, more substantive hearings in the District of Vermont. (Ex. 2 [de Recat Decl.] at ¶ 18.) It would be highly inconvenient for the parties' counsel to travel to Vermont for hearings, as it is a state where none of the parties' counsel of record has an office. (*See* Ex. 2 [de Recat Decl.] at ¶ 18.)

[17] The plaintiffs in the Actions are spread out all over the country. Specifically, the location of the plaintiffs breaks down as follows:

Action	**Plaintiffs' State of Residence**	**Complaint ¶ Identifying Plaintiffs' Residence**
Barton	Arizona	¶ 19 (Ex. 18)
Black	Texas	¶ 12 (Ex. 13)
Drover-Mundy	Delaware Pennsylvania	¶¶ 8-9 (Ex. 14)
Kimmel	New Jersey	¶ 15 (Ex. 8)

District of New York as a forum in response to Defendants' notice of this Motion. (Ex. 2 [de Recat Decl.], ¶¶ 3-12; Exs. 3-8.) Consequently, and as stated above, the plaintiffs' purported choice of forum should be, at most, a neutral factor here. Further, the only plaintiff that has consented to centralization through the MDL procedure—the plaintiff in *Black*—has consented to centralization in the Central District of California. (Ex. 2 [de Recat Decl.], ¶ 13; Ex. 9.)

For the foregoing reasons, Defendants respectfully suggest that the Central District of California is the forum best suited for centralization of the 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.

Dated: May 28, 2019

By: */s/ Adrianne E. Marshack*
Adrianne E. Marshack

MANATT, PHELPS & PHILLIPS, LLP
CRAIG J. DE RECAT (Bar No. CA 105567)
Email: *cderecat@manatt.com*
MATTHEW P. KANNY (Bar No. CA 167118)
Email: *mkanny@manatt.com*
ADRIANNE E. MARSHACK (Bar No. CA 253682)
Email: *amarshack@manatt.com*
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000
Facsimile: (310) 312-4224

Attorneys for Defendants
FISHER-PRICE, INC. and MATTEL, INC.

323801246

Mulvey	New York (Nassau County)	¶ 18 (Ex. 15)
Nabong	Illinois	¶ 18 (Ex. 17)
Shaffer	Washington	¶ 18 (Ex. 16)