July 6, 2021

VIA ELECTRONIC FILING CM/ECF

The Honorable William H. Orrick
United States District Court, N.D. California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *In re: Juul Labs Inc., Marketing, Sales Practices, and Products Liability Litigation*, 19-md-02913-WHO

Dear Judge Orrick:

Pursuant to Court's instructions during the Case Management Conference on June 22, 2021, the PSC respectfully submits the following for the Court's consideration regarding multi-plaintiff personal injury bellwether trials.

INTRODUCTION

Plaintiffs assert that all six bellwether cases under consideration—*Bain, Westfaul, Fish, Pesce, Widergren, Willis*—satisfy the Rule 42(a) standard and should be tried together. Alternatively, if the Court prefers smaller multi-plaintiff trials, Plaintiffs propose two alternatives: (1) dividing the bellwether plaintiffs based on those pursuing common law claims (*Fish, Pesce, Widergren, Willis*) and those pursuing consolidated statutory claims (*Bain* and *Westfaul*); ***or*** (2) conduct a single jurisdiction, multi-plaintiff trial with Plaintiffs *Widergen* and *Willis*, who are both Florida residents, followed by separate consolidated trials for *Bain* and *Westfaul* and then *Fish and Pesce* or whichever order the Court prefers..

ARGUMENT

Federal Rule of Civil Procedure 42(a) empowers courts to consolidate for trial all actions before it that "involve a common question of law or fact." "District courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases." *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018). In deciding whether to consolidate, a court "weighs the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause." *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984).

Consolidation is intended to mitigate the burden, expense and delay of repetitive trials presenting largely the same evidence and resolving largely the same issues. *See, e.g., In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2021 WL 773018, at *1 (N.D. Fla. Jan. 5, 2021). For this reason, consolidation is generally favored. *Perez–Funez v. Dist. Dir., I.N.S.*, 611 F.Supp. 990, 994 (C.D.Cal.1984) ("While a district court does have broad discretion in determining whether consolidation is appropriate, typically, consolidation is favored.").

Courts overseeing multi-district tort litigations routinely consolidate trials under Rule

42(a).[1] Indeed, in cases where multiple plaintiffs allege an identical form of injury arising from the same conduct, consolidation is standard practice. *See* 19A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2384 (3d ed. 2020) ("Actions by different plaintiffs arising out of the same tort, such as a single accident or disaster or the use of a common product that is alleged to be defective in some respect, frequently are ordered consolidated under Rule 42(a)."); *see also, e.g.*, *In re Genetically Modified Rice Litig.*, 2010 WL 2926207, at *1 (E.D. Mo. July 20, 2010) ("Courts have routinely consolidated multiple plaintiffs for joint trial because the benefits of consolidation outweigh any prejudice that a defendant may incur."); *Fisher v. Ciba Specialty Chemicals Corp.*, 245 F.R.D. 539, 544 (S.D. Ala. 2007) ("In short, the Court finds that defendants have failed to make a showing of prejudice sufficient to justify the heavy burden that would be visited on the litigants and this Court alike by virtue of the proposed fragmentation of the plaintiffs' claims into five overlapping trials.").

I. The Court Should Consolidate the Bellwether Actions for Trial.

Each of the plaintiffs in the bellwether pool has a near identical complaint, alleging the same form of injury resulting from the same conduct, perpetrated by the same defendants. Common questions of fact and law pervade these proceedings and a consolidated trial will save the court, parties and the witnesses from the tremendous burden of presenting the same evidence in multiple trials. In what is a testament to the efficacy of the bellwether selection process, Plaintiffs submit that all six bellwether cases under consideration—*Bain*, *Westfaul*, *Fish*, *Pesce*, *Widergren*, *Willis*—satisfy the Rule 42(a) standard and should be tried together.

A. The Bellwether Actions Involve Common Questions of Fact.

A core basis for instituting this proceeding was the Judicial Panel on Multidistrict Litigation's determination that these "actions share multiple factual issues concerning the development, manufacture, labeling, and marketing of JUUL products, and the alleged risks posed by use of those products." Dkt. No 144 at 2. Naturally, the bellwether plaintiffs share all the foundational factual questions that justified centralizing these cases for efficient pre-trial proceedings. At trial, this same constellation of conduct—the design, danger, marketing, and sale of the JUUL—will be at issue.

As with a product liability litigation, proving general liability for the JUUL product will significantly outweigh the individual variations as to causation and damages. Across all trials, general liability will turn on the same core questions of fact concerning, for example:

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[1] *See, e.g.*, *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2021 WL 773018, at *1 (consolidating five cases for trial); *In re Stand 'N Seal Prods. Liab. Litig.*, 2009 WL 2224185, at *2 (N.D. Ga. July 21, 2009) (consolidating seven cases); *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, 2016 WL 10719395, at *2 (N.D. Tex. Jan. 8, 2016) (consolidating five cases for trial); *In re Mentor Corp Obtape Transobturator Sling Prods. Liab. Litig.*, 2010 WL 797273, at *4 (M.D. Ga. Mar. 3, 2010) (consolidating four cases for trial); *In re Syngenta AG MIR 162 Corn Litig.*, 2017 WL 2876767, at *2 (D. Kan. July 6, 2017) (consolidating actions from different states); *In re N.Y. City Asbestos Litig.*, 99 A.D.3d 410, 411 (N.Y. App. Div. 1st Dep't 2012) (affirming consolidation of claims by plaintiffs from three states); *Campbell v. Bos. Sci. Corp.*, 882 F.3d 70, 74-76 (4th Cir. 2018) (affirming consolidated trial of four mesh cases because they shared "many common questions of law and fact").

- The nature and effect of JLI's marketing;
- The design and function of the JUUL product;
- Nicotine's addictive properties;
- The lack of and/or inadequacy of JUUL's warnings;
- The knowledge of the individual defendants.

Plaintiffs will rely on the same witnesses and documentary evidence to prove their case as to each of these questions. But even beyond the common factual questions underlying general liability, the bellwether plaintiffs share consistent profiles:

Plaintiff's Name	Firm	State	JUUL Initiation	Age at Initiation	Current Age	Primary Injury
B. Bain	Beasley Allen	TN	Fall 2017	12	15	Addiction
Clark Fish	Beasley Allen	KY	09/2017	17	21	Addiction
Roberto Pesce	Morgan & Morgan	RI	04/2016	17	22	Addiction
Jayme Westfaul	Beasley Allen	MS	01/2018	17	20	Addiction
Cameron Widergren	Morgan & Morgan	FL	09/2016	16	20	Addiction
Lucas Willis	Morgan & Morgan	FL	10/2017	14	19	Addiction

Thus, each bellwether plaintiff started JUUL as a minor before JUUL packaging contained nicotine addiction warnings and allege addiction to nicotine as their primary injury. Additionally, each bellwether plaintiff:

- Was exposed to JLI's advertisements before and during their JUUL use;
- Was attracted to and primarily used JUUL's kid-friendly flavors (mint, mango, fruit medley, cucumber, crème brûlée);
- Used 1-2 JUUL pods per day at the height of usage;
- Remains addicted to nicotine and are currently using JUUL e-cigarettes and/or other e-cigarettes to satisfy their addiction.

Given these commonalities, each bellwether plaintiff will present common (and, if not consolidated, duplicative) expert testimony regarding, for example, e-cigarette design, flavorings, nicotine formulation, tobacco and regulatory history, marketing (specific to tobacco and in general), addiction (youth oriented and in general), warning adequacy or the lack thereof. Although causation and damages will involve some case-specific testimony, the vast majority of the evidence will go toward common issues and the limited evidence on individual issues will be straightforward. Courts have held that consolidation is appropriate on this basis alone.[2]

[2] *See e.g. Ghogomu v. Delta Airlines Glob. Servs. LLC*, 2014 WL 2481879, at *2 (N.D. Okla. June 3, 2014) (consolidating despite "the application of different laws and provisions" because "[e]ven if that were true, Rule 42(a) requires only that there be common questions of fact *or* law, and the common issues of fact raised by the two cases are unavoidably similar."); see also 9A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2382 (3d ed. 2020) ("existence of a common question by itself is enough to permit consolidation under Rule 42(a)").

Moreover, the existence of factual distinctions between the bellwether plaintiffs (*e.g.* ages at JUUL initiation, history of drug use, treatment for addiction, type of JUUL advertising exposure) also supports multi-plaintiff trials as it will yield more information. J. Eldon E. Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 Tulane Law Review 2323, 2332 (2008) ("The ultimate purpose of holding bellwether trials in those settings was not to resolve the thousands of related cases pending in either MDL in one 'representative' proceeding, but instead to provide meaningful information and experience to everyone involved in the litigations."); *see, e.g.*, Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 697 (2006) ("[E]ven without preclusive effect, [bellwether trials] offer an accurate picture of how different juries would view different cases across the spectrum of weak and strong cases that are aggregated.").

Trying multiple plaintiffs with factual distinctions will provide the Parties with data points for evaluating those same distinctions in plaintiff profiles on a go forward basis and be informative for any potential settlement program, one of the goals of bellwether trials.[3]

B. The Bellwether Actions Involve Common Questions of Law.

The six bellwether plaintiffs under consideration are bringing claims under the laws of five states—Tennessee, Mississippi, Rhode Island, Kentucky, and Florida. While there is some variation, the core legal questions underlying the plaintiffs' claims are the same across each jurisdiction. Under the laws of Rhode Island, Kentucky and Florida, the bellwether plaintiffs assert the strict liability claims[4], negligence-based claims[5] and fraud claims. The legal questions underlying these strict liability claims are the same, as each of these jurisdictions has adopted Section 402A of the Restatement (Second) of Torts. *See Porter v. Rosenberg*, 650 So. 2d 79, 81 (Fla. Dist. Ct. App. 1995); *Williams v. Fulmer*, 695 S.W. 2d 411, 413 (Ky. 1985); *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775 (R.I. 1988). These jurisdictions also share the same substantive elements of fraud.[6] *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010); *Women's Dev. Corp. v. City of Central Falls*, 764 A.2d 151, 158 (R.I. 2001); *Denzik v. Denzik*, 197 S.W.3d 108, 110 (Ky. 2006). As to the negligence-based claims, these claims all turn on the same question of whether there was duty to the plaintiff, which all three jurisdictions determine by weighing policy factors, with varying degrees of emphasis on the foreseeability of harm. *See Alderman v. Bradley*, 957 S.W.2d 264, 267 (Ky. App., 1997) (duty "is essentially a policy determination"); *Volpe v. Gallagher*, 821 A.2d 699, 705 (R.I. 2003) (duty is determined weighing "all relevant factors"); *Smith v. Fla. Power and Light Co.*, 857 So.2d 224, 229 (Fla. App. 2003) (duty attaches where conduct "creates a foreseeable zone of risk").

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[3] Defendants' real underlying objection to the bellwether pool is dissatisfaction that there are no adults nor smokers in the mix. If the court efficiently consolidates this pool of cases, it frees up resources to address defendant's concern, by perhaps ordering the parties to work on a schedule to have a second bellwether pool selected that is comprised of plaintiffs who commenced as adults and or were prior smokers, to gain insight into a jury's reception to those cases which represent a minority of the cases in the MDL.

[4] Design defect, manufacturing defect, and failure to warn.

[5] Negligent design, negligent failure to warn, negligent manufacturing, negligence.

[6] (1) a knowing material misrepresentation or omission; (2) duty to disclose; (3) intent to induce reliance; (4) reliance; and (5) damages.

In Tennessee and Mississippi, plaintiffs will proceed on a consolidated cause of action under the product liability statute in each state.[7] The elements of these statutory causes of action are identical.[8] Further, both statutory causes of action embrace the elements underlying common law negligence and strict liability theories. *See Knoth v. Apollo Endosurgery US, Inc.*, 425 F.Supp.3d 678 (S.D. Miss. 2019) (explaining that negligence and strict liability theories are evaluated under the MPLA framework); *Smith v. ZOLL Med. Corp.*, 2020 WL 7233366, at *5 (W.D. Tenn. Dec. 8, 2020) (same for TPLA). Thus, the legal questions underlying the claims in Mississippi and Tennessee—such as the defectiveness of the JUUL product or whether the JUUL product proximately caused plaintiff's injury—will entirely overlap with one another and largely overlap with the questions underlying the negligence and strict liability claims in Rhode Island, Kentucky, and Florida.

Courts have determined that varying state law claims—with similar elements—present common questions of law under Rule 42(a). *Cadena v. Am. Honda Motor Co.*, No. CV 20-511-MWF (PJWX), 2020 WL 3107798, at *2 (C.D. Cal. June 9, 2020) (consolidating five actions, noting that the consumer claims brought under differing states presented "common questions of law"). And courts have consistently held that state law variations between claims should not preclude consolidated trials where there is otherwise overlapping evidence and common questions. *See e.g.*, *In re Syngenta AG MIR 162 Corn Litig.*, 2017 WL 2876767, at *2 ("[T]he Court is confident that differences in the state law may be addressed by appropriate instructions to the jury.").

Here, to the extent that consolidation risks jury confusion or prejudice, courts have held that appropriate trial management, verdict forms, and jury instructions can ameliorate such risk. *See e.g. Campbell v. Bos. Sci. Corp.*, 882 F.3d 70, 75 (4th Cir. 2018) (affirming district court's consolidation of four product liability trials and rejecting defendant's arguments of prejudice, noting that the district court had provided careful instruction that the jury was to consider evidence "as if each have been tried by itself"); *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2021 WL 773018, at *1 ("To the extent any risk of prejudice or juror confusion remains, it will be ameliorated through prudent trial management and the use of carefully crafted jury instructions."); *In re Air Crash Disaster*, 720 F. Supp. 1455, 1460 (D. Colo. 1988) ("The presentation of two representative cases for trial of common issues in multidistrict litigation does not present problems

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[7] Plaintiffs assert this based on the guidance provided in the Court's tentative order on the motions to dismiss the bellwether complaints. Dkt. No. 1997.

[8] *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 228 (5th Cir. 2007) (listing the elements of a MPLA claim as "(1) the [product] was defective at the time it left the control of the manufacturer or seller; (2) the defective condition rendered the product unreasonably dangerous to the consumer; and (3) the defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.");

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compare with Smith v. ZOLL Med. Corp., 2020 WL 7233366, at *5 (W.D. Tenn. Dec. 8, 2020) ("(1) the product was defective and/or unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer's control, and (3) the plaintiff's injury was proximately caused by the defective product.").

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