STATE OF MINNESOTA

IN SUPREME COURT

C6-99-1909

OFFICE OF APPELLATE COURTS

NOV 8 1999

FILED

CASE TITLE:	**Memorandum in Support of Motion to Transfer and Consolidate Multi-District Vitamin Antitrust Class Action Litigation**
In re Minnesota Vitamin Antitrust Litigation	

TO: Chief Justice of the Minnesota Supreme Court

INTRODUCTION

Movants[1] seek transfer and consolidation of the following four cases, all of which allege a conspiracy to fix prices in the vitamins market:

> Denise DeNardi v. F. Hoffmann La Roche, Ltd., et al., Hennepin County, No. 99-3132 (filed March 3, 1999). (Affidavit of Andrew S. Hansen ["Hansen Aff."] Exhibit ["Exh."] A).
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> Thomas Murr v. F. Hoffmann La Roche, Ltd., et al., Dakota County, No. 19-C9-99-9673 (served originally on or about May 20, 1999, Amended Complaint filed September 29, 1999) (Hansen Aff. Exh. B).
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> Custom Nutrition, Inc. and Brinton Veterinary Supply, Inc. v. F. Hoffmann La Roche, Ltd., et al., Kandiyohi County, No. 34-C4-99-01274(DMS) (filed September 13, 1999) (Hansen Aff. Exh. C).
>
> Big Valley Milling, Inc. v. F. Hoffmann La Roche, Ltd., et al., Chippewa County, No. C1-99-405 (filed September 13, 1999) (Hansen Aff. Exh. D).

Movants are companies that manufacture and sell vitamins and vitamin products. In the United States, Movants have at least 107 separate actions pending against them, including state

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[1] Hoffmann-La Roche Inc., Roche Vitamins Inc., Rhone Poulenc Ag Company, Inc., Rhone Poulenc Animal Nutrition, Inc., BASF Corporation, Lonza Inc., Chinook Group Inc., DuCoa L.P., and DCV, Inc. Several defendants are yet to be served or are not subject to personal jurisdiction in Minnesota, and therefore, do not join in this motion.

actions in 18 different states and the District of Columbia. Many of the suits brought against Movants are class actions seeking to recover the same damages, based on the same alleged conspiracy, on behalf of the same or substantially the same classes of vitamins purchasers. The plaintiffs in these suits generally allege that Movants conspired to fix prices and to engage in other anti-competitive conduct in violation of state and federal antitrust law.

In Minnesota, Movants are presently facing four such lawsuits, one each in Hennepin, Dakota, Kandiyohi, and Chippewa Counties. The Minnesota cases brought to date are all class actions on behalf of identical or substantially overlapping plaintiffs' classes. All of the actions include indirect purchaser claims, meaning they were brought on behalf of those who allegedly purchased Movants' vitamins or vitamin products indirectly, from distributors or others more than one step removed from Movants in the chain of distribution. All four actions are based upon the same alleged conspiracy, raise identical factual and legal questions, and seek recovery under the same provisions of the Minnesota Antitrust Act. Finally, plaintiffs in each action attempt to circumvent the statute of limitations by claiming that Movants fraudulently concealed their alleged conspiracy. Movants may face additional direct or indirect purchaser suits in Minnesota in the future.

Movants respectfully request that this Court exercise its supervisory jurisdiction and order the transfer and/or consolidation of the four vitamins antitrust cases currently pending in the district courts of this State. Under the circumstances, these cases should be consolidated in

Hennepin County before Judge Deborah Hedlund, who is presiding over the earliest-filed Minnesota action.[2] In addition, Movants request an order requiring that any such cases filed against Movants in the future also be transferred and consolidated with the earlier-filed cases. Transfer and consolidation of these cases will help avoid duplicative recovery against Movants, a goal specifically contemplated by the Legislature when it amended the antitrust statutes to allow indirect purchasers to sue for damages. See Minn. Stat. § 325D.57 (1998) ("[i]n any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant"). Transfer and consolidation will also promote judicial economy and conserve the resources of all litigants, and will help avoid inconsistent factual and legal determinations arising out of the same conduct by the same defendants.

JURISDICTION

This Court has supervisory jurisdiction over all courts of the State under Section 2 of Article VI of the Minnesota State Constitution. This jurisdiction confers upon the Court the power and authority to regulate procedural, evidentiary and other matters in the lower courts. In addition, the Chief Justice has supervisory power over the district courts pursuant to Minn. Stat. § 2.724.

THE MINNESOTA VITAMINS LITIGATION

As described in the Introduction, there are presently four indirect purchaser antitrust class actions pending in the district courts of this state. Each of these actions seeks damages based

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[2] Judge Hedlund has already stayed the action pending before her so that certain parties to the action could participate in Alternative Dispute Resolution proceedings ordered by the District of Columbia Superior Court, which is overseeing a similar case involving many of the same parties. Judge Hedlund further ordered that the parties in the action before her use their best efforts to coordinate the action with other related cases for the purpose of minimizing the burden on the courts and avoiding duplicative expenditures of time, effort and money by the parties and the courts.

upon an alleged conspiracy by Movants to fix vitamins prices and allocate markets over an approximately ten-year period.

The plaintiff(s) in each of these class actions claim to represent either identical or overlapping plaintiffs' classes. The complaints describe the alleged classes as follows:

DeNardi[3]: [A]ll persons or entities who indirectly purchased vitamins, vitamin premixes, and/or other vitamin products from any of the defendants of [sic] their co-conspirators from January 1, 1989 to the present, for use within the State of Minnesota and not for resale. Excluded from the class are all governmental entities, defendants, other manufacturers of vitamins, vitamin premixes and other vitamin products, and their respective subsidiaries and affiliates.

(Hansen Aff. Exh. A)(emphasis added).

Murr: All individuals or entities in the State of Minnesota who purchased vitamins (i.e., natural and synthetic, dry and oil, raw and bulk vitamin products, including, but not limited to, vitamins A, B, C, D, E and H, and vitamin premixes) from distributors for resale and/or other commercial purposes in circumstances where the distributors purchased the vitamins directly from any of the defendants, including any parents, subsidiaries or affiliates thereof, or their co-conspirators, during the period from January 1, 1989 through the present.

(Hansen Aff. Exh. B) (emphasis added).

Custom Nutrition: All persons or entities (excluding all governmental entities, Defendants and their subsidiaries and affiliates) who purchased one or more of the Class Vitamins sold by Defendants in the State of Minnesota from January 1, 1988 to September 29, 1998.

(Hansen Aff. Exh. C)(emphasis added).

Big Valley Milling: All persons or entities (excluding all governmental entities, Defendants and their subsidiaries and affiliates) who purchased one or more of the Class Vitamins sold by defendants in the State of Minnesota from January 1, 1988 to September 29, 1998.

(Hansen Aff. Exh. D)(emphasis added).

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[3] The full case name and venue of each action appears on page 1 of this petition.

In addition to presenting substantially similar claims on behalf of substantially similar putative classes, the four class actions pending in this state involve nearly all of the same defendants. Of the Movants herein, 12 are named as defendants in each of the cases, one is named as a defendant in three cases, one is named in two cases, and several individuals are named as defendants in the first-filed DeNardi action. Plaintiffs have not yet served all of the defendants in all of the actions.

It is also possible that more litigation will be filed in Minnesota as a result of the alleged conspiracy to fix prices in the vitamins market. There may be individual actions filed against Movants, either by those who elect to opt out of an alleged class of plaintiffs, or by others claiming to have been injured by the alleged price-fixing conspiracy. In addition, there may be still more putative class actions filed around the state, especially considering that at least two of the presently pending cases (those in Chippewa and Kandiyohi Counties) appear to have been brought by the same law firm on behalf of identical classes in different counties.

ARGUMENT

In 1984, the Minnesota legislature amended the Minnesota Antitrust Law of 1971, Minn. Stat. §§ 325D.49 to 325D.66, to allow lawsuits by those who purchase products indirectly from alleged antitrust violators. The legislature accomplished this significant change in Minnesota antitrust jurisprudence by amending Minn. Stat. § 325D.57, which authorizes private suits (and the recovery of treble damages and attorneys' fees) for the violation of state antitrust law. Prior to 1984, § 325D.57 had authorized suit by "[a]ny person . . . injured by a violation of" state antitrust law. This was consistent with federal antitrust law, which bars indirect purchasers from suing for damages in antitrust. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). In 1984, however, in response to Illinois Brick, the legislature amended § 325D.57 to allow for suit by "[a]ny person . . . injured *directly or indirectly* by a violation of" Minnesota antitrust law.

State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490, 497 (Minn. 1996). This Court has stated that by the 1984 amendment, "Minnesota acted to change its law to allow anyone to sue in antitrust." Id. The legislature, however, was also careful to add language to § 325D.57 to help protect antitrust defendants from multiple lawsuits and duplicative recovery arising from the same allegedly anticompetitve conduct. Thus, even while providing a remedy to indirect purchasers (such as those seeking recovery from Movants in this matter), the legislature added another sentence stating that "[i]n any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant." Minn. Stat. § 325.D.57 (1998). Without intervention by this Court, every indirect purchaser in Minnesota will essentially have four separate opportunities to participate in a class action lawsuit and recover damages, because the indirect purchasers in Minnesota are likely to be potential class members in each separate case.

Allowing the lawsuits described above to proceed independently of each other will create a significant risk of duplicative recovery against Movants, as indirect purchasers from all levels in a complex chain of distribution contend, in four different lawsuits, that they were harmed in the same way by the alleged conspiracy. In addition, allowing these four actions to proceed in different counties will waste judicial resources and cause unwarranted duplication of effort by counsel and the parties. Accordingly, the Court should consolidate all four of these actions in Hennepin County, the venue of the earliest-filed action, in order to avoid the risk of duplicative recovery and inconsistent outcomes. This Court has taken similar action in the past to manage litigation pending in various district courts of the State, and other courts around the country have taken a similar approach to managing the litigation over the alleged conspiracy to fix vitamins prices. See cases cited infra Part C.

A. Intervention By This Court Is Necessary To Avoid Duplicative Recovery And Conserve Judicial Resources, And Can Be Accomplished Without Prejudice to Plaintiffs.

This Court should transfer and consolidate the antitrust actions that are pending against Movants for several practical reasons. First, the Court will further an important goal of the Minnesota Antitrust Law by entrusting these cases to the hands of a single district court judge and, thus, avoiding the potential for duplicative recovery. Second, intervention will conserve judicial resources and significantly reduce the time and expense incurred by the parties. Third, because these actions are duplicative and at an early stage of the proceedings, plaintiffs will not be prejudiced.

1. Consolidation of the Four Pending Actions Is Consistent With Minnesota Antitrust Law In Avoiding the Potential for Duplicative Recovery and Contradictory Litigation Outcomes.

As an initial matter, intervention by this Court in the vitamins antitrust litigation will fulfill the legislative goal of avoiding duplicative recovery against a defendant. Allowing multiple indirect purchaser class actions to proceed in four different counties could well result in duplicative recovery and inconsistent litigation outcomes based on the same alleged anticompetitive conduct. Each separate action may result in incompatible or duplicative findings as to each of the 14 defendants' liability and damages owed, even though all of the actions involve the same alleged conspiracy and its alleged effect on the same class of plaintiffs. Accordingly, the Court's intervention to consolidate these actions is necessary in order to provide consistency and to reduce the potential for duplicative recovery as contemplated by Minn. Stat. § 325D.57, which provides that "the court may take any steps necessary to avoid duplicative recovery against a defendant."

2. Consolidation is Appropriate Under The Minnesota and Federal Rules When Multiple Actions Present Common Questions of Law and Fact And Will Conserve Judicial Resources.

Even without the explicit instruction in Minn. Stat. § 325D.57 that the court may act to avoid duplicative recovery against an antitrust defendant, the substantial factual and legal overlap between the four class actions at issue here would warrant consolidation under the Minnesota Rules of Civil Procedure, if the four actions were pending before the same court. Rule 42.01 provides that:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Minn. R. Civ. P. 42.01.

The only requirement for consolidation under this rule is the existence of a common question of law or fact. Because the four pending class actions here involve the same facts, the same plaintiffs, and the same defendants, litigating them separately will entail a tremendous waste of judicial resources, including the duplication of discovery and the repetitive resolution of the same issues of fact and the same questions of law.

When faced with multiple actions with common questions of law and fact, both federal and Minnesota courts have found consolidation proper.[4] See e.g., Minnesota Personal Injury Cases v. Keene Corp., 481 N.W.2d 24, 26 (Minn. 1992) (where each case required some similar findings of fact and conclusions of law, consolidation was within discretion of trial court); State of Ohio v. Louis Trauth Dairy, Inc., et. al., 163 F.R.D. 500, 503 (S.D. Ohio 1995) (consolidation of multiple antitrust price fixing actions was proper because of numerous common questions of

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[4] The Minnesota rule is identical to the federal rule regarding consolidation. See Fed. R. Civ. P. 42(a). Therefore, federal case law also provides some guidance concerning the advisability of consolidating complex litigation such as the vitamins antitrust actions.

law); Sherleigh Associates v. Windmere-Durable Holdings, 184 F.R.D. 688, 691 (S.D. Fla. 1999) (seven class actions involving common issues of law and fact were properly consolidated). Accordingly, in light of the express language of Minn. R. Civ. P. 42.01 and the precedent established by Minnesota and federal law the duplicative nature of the four vitamins antitrust actions filed to date dictates that the vitamins actions should be consolidated for all purposes.

The Minnesota Rules of Civil Procedure do not explicitly provide for the transfer and consolidation of actions pending in multiple districts. See Herr and Kindel, Minnesota Practice: General Rules Annotated, § 113.4 (1999 ed.). Instead, the Supreme Court has indicated that litigants should ask the Court to intervene directly to transfer and consolidate related litigation from different districts. See id. In the federal courts, such a mechanism for transfer and consolidation exists under the auspices of the Judicial Panel on Multidistrict Litigation. See 28 U.S.C. § 1407. Similarly, some states have adopted rules allowing for the transfer and consolidation of cases across judicial district lines. See e.g., Cal. Civ. Proc. Code § 404. In fact, as discussed below, many of the other cases filed in state and federal courts around the country as a result of the alleged conspiracy to fix vitamins prices have been transferred or consolidated in the manner Movants request.

Finally, the slight differences in the complaints in the four cases at issue do not preclude consolidation under Minnesota and federal law. "The fact that the dimensions of the separate actions may not be in all respects the same does not prevent consolidation if there exists between them 'common questions of law or fact.'" Shacter v. Richter, 271 Minn. 87, 135 N.W.2d 66, 69 (1965). Even though the various complaints describe the putative class or the class period in slightly different terms, consolidation of the actions best promotes efficiency, manageability and consistency. See e.g., In re Cendant Corp. Litigation, 182 F.R.D. 476, 478 (D.N.J. 1998)

(consolidation does not require that the actions be identical); In re Olsten Corp. Securities Litigation, 3 F.Supp. 2d 286, 293 (E.D.N.Y. 1998) (common issues of law and fact justify consolidation despite differing class periods). "When cases bearing similar class allegations and similar causes of action are pending in different courts, rarely should the same class be certified on the same cause of action before more than one court, in the absence of special circumstances." See 2 Newberg on Class Actions, § 7.31 (3d ed. 1992). Therefore, intervention by this Court is necessary in order to avoid the problems created by the existence of multiple plaintiff classes seeking recovery in multiple districts based on the same conduct by the same defendants.

3. Consolidation Will Not Prejudice Plaintiffs In Any Of The Four Pending Actions

No prejudice will result to any party if the Court transfers and consolidates these cases. All of the named plaintiffs are likely to be members of the same plaintiff class, if any such class is certifiable. Moreover, each action is at an early stage, and plaintiffs have not even served all of the named defendants yet. Accordingly, transfer and consolidation of this litigation before a single judge poses none of the problems associated with attempts to consolidate cases at a later stage of the proceedings.

B. This Court Has Granted Similar Relief In The Past.

This Court has successfully intervened in litigation pending in multiple judicial districts on at least three occasions within the last 12 years. See, Minnesota Personal Injury Asbestos Cases v. Keene, 481 N.W.2d 24 (Minn. 1992); In re Minnesota Silicone Breast Implant Litigation, 503 N.W.2d 472 (Minn. 1993); (Hansen Aff. Exh. F ["L-tryptophan Order of the Supreme Court"]). On the first such occasion, this Court placed all asbestos litigation filed in Minnesota under the control of a single judge. (Hansen Aff. E). The actions were subsequently

transferred to and consolidated in Hennepin County. See Minnesota Personal Injury Asbestos Cases, 481 N.W.2d 24

The Court's Order in the asbestos litigation noted that intervention was necessary because, in addition to there being a number of asbestos-related actions involving essentially the same defendants, "these actions will involve, in numerous instances, similar questions of law and fact, problems in discovery, theories of recovery and defense . . ." (Hansen Aff. Exh. E).

The L-tryptophan complex litigation provided the Court with a second opportunity to intervene and manage multiple actions. ("L-tryptophan Order of the Supreme Court"). The Court relied on the same factors as in the asbestos litigation to justify consolidating all related actions under the control of a single judge. (Id.). Those justifying factors included the convenience of all parties and the court, conservation of resources, and resolution of common issues of law and fact. (Id.)

The Court again exercised its control over the docket of the lower courts in response to a petition in the breast implant litigation. See In re Minnesota Silicone Breast Implant Litigation, 503 Minn. 472. As with the asbestos and L-tryptophan litigation, the Court transferred all actions to the control of a single judge for the same reasons of judicial economy and the interests of the parties. See id.

The asbestos, L-tryptophan and breast implant litigation presented this Court with essentially the same situation as the vitamins antitrust litigation: cases filed around the state involving numerous common questions of law and fact and the existence of a core group of defendants involved in each of the cases. In the antitrust context, however, the existence of the statutory direction allowing a court to takes any steps necessary to avoid duplicative recovery against a defendant provides an even more compelling reason to transfer and consolidate these

cases. Management of these actions by a single Minnesota court will conserve judicial resources as well as avoid inconsistent judicial rulings, lead to a more efficient discovery process and, if necessary, a more efficient trial. Movants request that the Court once again exercise its supervisory jurisdiction to manage the Minnesota vitamins antitrust litigation.

C. Other Jurisdictions Have Transferred And Consolidated Litigation Arising From The Same Alleged Conspiracy.

This Court should also look to the manner in which other jurisdictions have handled the problems posed by the existence of multiple actions seeking recovery by the same alleged plaintiff classes based on the same alleged conspiracy involving the same defendants. As noted above, many of the federal cases were consolidated with the United States District Court for the District of Columbia through the Judicial Panel on Multidistrict Litigation. (Hansen Aff. Exh. G). In addition, there are presently at least 73 vitamins cases pending in state courts throughout the country and the District of Columbia.

Vitamins antitrust class actions have been consolidated in California, Wisconsin, New Mexico and New York. The Supreme Court of New Mexico recently intervened in the vitamins litigation pending in that state by exercising its supervisory power over the lower courts. The New Mexico Supreme Court transferred and consolidated five vitamins class action lawsuits pending in several districts involving essentially the same facts, legal arguments, defendants, and plaintiff classes. (Hansen Aff. Exh. H). It is significant to note that the New Mexico actions are essentially identical to the actions pending in Minnesota state courts.

RELIEF REQUESTED

For the foregoing reasons, Movants respectfully request that this Court issue an order transferring and consolidating before Judge Deborah Hedlund of the Fourth Judicial District all actions currently pending and subsequently brought that involve the alleged conspiracy to fix

prices, allocate markets, and otherwise violate the Minnesota Antitrust Act in the market for vitamins.

ON BEHALF OF ALL DEFENDANTS LISTED BELOW FOR PURPOSES OF THIS MEMORANDUM

Dated: November 8, 1999.

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