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November 22, 1999

VIA MESSENGER

Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

OFFICE OF
APPELLATE COURTS

NOV 22 1999

FILED

Re: S.C. Case No. C6-99-1909

Dear Clerk of Court:

Enclosed herewith for filing please find the original and three copies of each of the following documents:

1. Reply Memorandum in Support of Movants' Motion to Transfer and Consolidate; and
2. Affidavit of Service.

Courtesy copies of these documents were sent to the judge or administrator presiding over each of the above-referenced cases.

Very truly yours,


William L. Sippel

WLS:prl
Enclosures

cc: All Counsel of Record (w/o encls.), see attached Service List

STATE OF MINNESOTA

IN SUPREME COURT

CASE NO. C6-99-1909

OFFICE OF APPELLATE COURTS

NOV 22 1999

FILED

CASE TITLE:)
)
<u>In re Minnesota Vitamin Antitrust</u>)
<u>Litigation</u>)
)

REPLY MEMORANDUM
IN SUPPORT OF MOVANTS'
MOTION TO TRANSFER
AND CONSOLIDATE

TO: Chief Justice Of The Minnesota Supreme Court

Movants¹ submit the following reply in support of their Motion to Transfer and Consolidate.

Plaintiffs in each of the four actions that Movants are seeking to consolidate *agree* that the actions should be consolidated before one court. Plaintiffs part company with Movants only on a single point: rather than consolidate all four actions before Judge Deborah Hedlund, who is already overseeing the first-filed *DeNardi* action in Hennepin County, plaintiffs suggest that this Court should consolidate the cases under the supervision of the Chief Judge of either the Fourth Judicial District (according to plaintiffs in the *DeNardi* and *Murr* actions), or under the supervision of the Chief Judge of "one of the Counties in which cases have been filed" (according to the plaintiffs in the *Custom Nutrition* and *Big Valley* cases). Response of Plaintiffs Custom Nutrition, Brinton Veterinary Supply, and Big Valley Milling, at 2. According to plaintiffs, the Chief Judge can then "consolidate and organize these cases at his or her discretion." *Id.* While the plaintiffs maintain – without any supporting authority -- that it would not be "warranted or proper" for this Court to assign these cases directly to Judge Hedlund,

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. As noted in Movants' Memorandum in Support of The Motion to Transfer and Consolidate, several defendants are yet to be served or are not subject to personal jurisdiction in Minnesota, and, therefore, do not join in this motion.

pursuant to Minn. Stat. §§ 480.16 and 2.724 this Court clearly has the power to do exactly that. For the sake of efficiency and consistency, these cases – which are all based upon the same alleged conspiracy, raise identical factual and legal questions, and seek recovery under the same provisions of the Minnesota Antitrust Act -- must be litigated and tried before the same judge. That judge should be Deborah Hedlund, who has overseen the first-filed *DeNardi* action for the last eight months, and whose prior experience with the infant formula indirect purchaser antitrust litigation makes her especially qualified to handle the consolidated vitamin cases.

I. THIS COURT HAS THE POWER TO CONSOLIDATE THESE CASES BEFORE A SPECIFIC JUDGE.

Minnesota Statutes §§ 480.16 and 2.724 give the Chief Justice of this Court the authority to make specific assignments of judges. Section 480.16 states that the Chief Justice has discretionary authority to direct judges to particular assignments. Section 2.724 provides that the Chief Justice “shall supervise and coordinate the work of the courts of the state,” and “shall exercise general supervisory powers over the courts in the state.” The Supreme Court has exercised these powers in assigning consolidated cases to a *specific* judge. For example, in the L-Tryptophan Litigation, this Court assigned all consolidated cases to Judge Robert Carolan of the First Judicial District to hear and decide all pretrial and trial matters. Similarly, in Minnesota Personal Injury Asbestos Cases v. Keene, 410 N.W.2d 24 (Minn. 1992), this Court issued an order assigning all asbestos cases to Judge Jack A. Mitchell of the First Judicial District. Finally, in In re: Minnesota Silicone Breast Implant Litigation, 503 N.W.2d 472 (Minn. 1993), this Court, replying upon the authority in Minn. Stat. § 480.16 and §2.724, assigned the consolidated cases to Judge Gordon Schumaker of the Second Judicial District for all pretrial and trial proceedings. Clearly, the Chief Justice has discretionary authority to direct *any* judge whose calendar permits, to handle a specific case.

Plaintiffs claim that “if multiple cases *within* the same judicial district would be consolidated, the cases would be consolidated under the supervision of the Chief Judge for that judicial district.” Response of *Murr* Plaintiffs to Motion to Transfer and Consolidate, at 1 (emphasis in original). Plaintiffs have not cited any authority in support of their claim, nor are Movants aware of any such authority. Moreover, in

each of the “first-filed” cases cited by the plaintiffs, the judge who handled the first-filed case continued to preside over the matter after consolidation. From a purely practical and economic point of view, it simply would not make any sense to assign these cases to a different judge when Judge Hedlund has been overseeing the *DeNardi* case for the last eight months.

II. JUDGE HEDLUND SHOULD BE ASSIGNED TO OVERSEE THE CONSOLIDATED VITAMIN CASES.

The *DeNardi* plaintiffs correctly note that the first-filed rule favors the consolidation of these actions with the court that first acquires jurisdiction of identical or duplicative actions. See State ex. rel. Minnesota Nat’l Bank of Duluth v. District Court, Fourth Judicial District, 195 Minn. 169, 173 (1935); see also Minnesota Mutual Life Ins. v. Anderson, 410 N.W.2d 80, 81-82 (Minn. Ct. App. 1987). Also, under the auspices of the *Giral* ADR process, the *DeNardi* plaintiffs and certain defendants have been working together for the last several months in an attempt to resolve this litigation quickly and efficiently. In contrast, the other cases remain at the earliest of stages, with numerous defendants yet to be served, answers yet to be filed and no scheduling agreements in place.² Accordingly, because the *DeNardi* case was filed first, and because Judge Hedlund is already familiar with the case and its complex issues, Judge Hedlund is in the best position to preside over the consolidated actions.

Plaintiffs agree that these cases should be consolidated, but not before Judge Hedlund. Movants respectfully suggest that this Court should not remove Judge Hedlund from the *DeNardi* case, just so that the Chief Judge can “consolidat[e] and organize these cases at his discretion.” In light of Judge Hedlund’s experience with the *DeNardi* case to date, her prior experience with the infant formula indirect purchaser antitrust litigation, and in keeping with the Minnesota rule favoring consolidation in the

² In an apparent attempt to make it seem as if there has been some activity in the more recently-filed cases, plaintiffs in the *Custom Nutrition* and *Big Valley* cases served informational statements by facsimile on November 15, 1999. Significantly, neither informational statement makes reference to the other action, even though the claims asserted are identical and were brought on the same day by the same firm.

court of the first-filed case, Movants believe that Judge Hedlund is the appropriate judge to supervise and try the consolidated cases. Antitrust litigation involving claims by indirect purchasers is extremely complex. The complexity is even greater when the industry involved is also extremely complex, such as the vitamin industry, which has numerous product forms and chains of distribution. Therefore, Movants respectfully submit that it is particularly important for the judge assigned to this litigation to have experience with indirect purchaser litigation.

III. CONSOLIDATION FOR ALL PURPOSES WILL FURTHER THE GOALS OF THE MINNESOTA ANTITRUST ACT.

Plaintiffs in all four actions agree that basic principles of fairness and efficiency will be promoted by the consolidation of these actions. In agreeing to consolidation, plaintiffs obviously recognize the benefits that would accrue to the parties and the courts, including the avoidance of inconsistent verdicts and duplicative recovery. In fact, the specific goals of the Minnesota Antitrust Act will be advanced by consolidating these actions for all purposes, including trial. As noted in Movants' Memorandum in Support of the Motion to Transfer and Consolidate, Minn. Stat. § 325D.57 provides protection for defendants in indirect purchaser actions by instructing 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." In addition to reducing the risk of duplicative recovery, consolidation for all purposes will also help avoid the risk of inconsistent outcomes. Accordingly, in order to promote efficiency and fairness, and to promote the remedial goals of the Antitrust Act, these four actions should be consolidated for all purposes before Judge Hedlund.

Respectfully submitted,

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

Dated: November 19, 1999

By: 

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STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

**AFFIDAVIT OF SERVICE VIA
PERSONAL SERVICE**

Linda M. Stone, being first duly sworn on oath, says that on the 22nd day of November, 1999, she served the following:

**REPLY MEMORANDUM IN SUPPORT OF MOVANTS' MOTION
TO TRANSFER AND CONSOLIDATE**

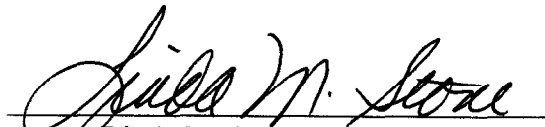
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by causing to be personally served true and correct copies thereof on the above-designated parties at their addresses so listed.


Linda M. Stone

Subscribed and sworn to before
me this 22nd day of November, 1999.


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