BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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IN RE NIASPAN ANTITRUST LITIGATION : MDL NO. ___

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BRIEF IN SUPPORT OF CERTAIN DEFENDANTS' MOTION TO TRANSFER ACTIONS TO THE SOUTHERN DISTRICT OF NEW YORK BEFORE THE HONORABLE VICTOR MARRERO PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED AND/OR CONSOLIDATED PRETRIAL PROCEEDINGS

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Defendants Abbott Laboratories, AbbVie Inc., AbbVie Respiratory LLC (formerly known as Abbott Respiratory LLC), and Kos Pharmaceuticals, Inc. ("Moving Defendants") respectfully submit this brief in support of their motion to transfer, pursuant to 28 U.S.C. § 1407, the actions set forth in the Schedule of Actions for consolidated and/or coordinated pretrial proceedings. Moving Defendants respectfully submit that the most appropriate court for centralization of these actions is in the Southern District of New York before the Honorable Victor Marrero, Senior District Judge. The Panel routinely creates MDL proceedings for antitrust litigation of this sort, arising from Hatch-Waxman patent settlements between brand name and generic pharmaceutical companies. Judge Marrero presided over the Hatch-Waxman patent litigation out of which this antitrust litigation arises and he thus knows the most of any district court judge about facts central to these Actions. The Panel has frequently relied on this same logic in selecting transferee judges in similar situations. *See infra* at 11-12.

I. PRELIMINARY STATEMENT

Various plaintiffs have filed these five Actions in the Eastern District of Pennsylvania and the District New Jersey. The Actions are all being pursued against substantially the same defendants and their affiliates, challenge the same conduct, and assert substantially similar causes of action. Each of the Actions is a putative class action, with overlapping proposed class definitions. The central allegation of each Action is that Hatch-Waxman patent infringement litigation between Kos and Barr[1] regarding

[1] Kos was subsequently acquired as a wholly-owned subsidiary by Abbott Laboratories, which recently separated and transferred its proprietary pharmaceutical business (which included Niaspan) and the Kos subsidiary to a new company, AbbVie Inc. AbbVie Respiratory LLC (formerly Abbott Respiratory LLC) is owned by Kos. Barr was subsequently acquired by Teva Pharmaceuticals Industries, Ltd.

the drug Niaspan should not have been settled on the terms to which the parties agreed, and that Barr would have come to market with its generic pharmaceutical earlier absent the settlement because, for example, it would have prevailed on the merits in the patent litigation. These Actions include claims by both direct and indirect purchasers. The named plaintiffs, putative class members, and defendants, are geographically dispersed throughout the country and do business throughout the country. Counsel to the plaintiffs have brought similar litigation, involving different pharmaceuticals but the same or similar putative plaintiff classes and the same or similar sorts of pharmaceutical companies, in districts throughout the country.

Defendants request that these Actions, and any future related actions, be centralized, and that the centralization be in the Southern District of New York before Judge Marrero, who oversaw the Hatch-Waxman patent litigation between Kos and Barr from which the current antitrust litigation arises. The merits and settlement of that patent litigation are central to the claims asserted in all of the Actions. Judge Marrero is already familiar with Kos's patents for Niaspan and the merits of the patent litigation between Kos and Barr. There is no question that the Actions should be centralized, and centralization before Judge Marrero would be the most efficient option, utilizing Judge Marrero's existing familiarity with the complex patent issues at the core of the claims asserted by the plaintiffs. The Southern District of New York is also a convenient location for all the parties, and it is near the districts in which all of the currently-filed Actions have been commenced.

II. FACTUAL BACKGROUND

All of the Actions subject to this motion were filed in April 2013. The first action was filed on April 4, 2013 in the Eastern District of Pennsylvania. The other actions followed soon thereafter, including three filed in the Eastern District of Pennsylvania and one in the District of New Jersey. These Actions are all in their infancy: no responsive pleadings have been filed, no discovery has been conducted, no motions have been filed, and the district courts have not spent any time, let alone substantial time, considering any issue raised by these Actions.

The complaints in these Actions entail substantially similar, and often identical, factual allegations: Kos was awarded or assigned numerous patents for its novel formulation of the drug niacin which reduced or avoided various side effects of the drug, while maintaining the drug's ability to reduce so-called "bad" cholesterol and other lipids and increase "good" cholesterol. In 1997, Kos obtained FDA approval for its novel formulation and began to market it in the United States under the brand name Niaspan. Kos's improvements in the formulation for a niacin pharmaceutical led Niaspan to become a widely-prescribed treatment for mixed lipid disorders.

In 2001, Barr sought FDA approval to sell a generic version of Niaspan. Pursuant to the Hatch-Waxman Act procedures, Barr made a so-called Paragraph IV certification that its generic product would not infringe Kos's Niaspan patents. In response, Kos filed patent infringement cases in the Southern District of New York. *See Kos Pharmaceuticals, Inc. v. Barr Laboratories, Inc.*, 02-cv-1683, 02-cv-6409, 02-cv-8995 (S.D.N.Y.).

The patent infringement litigation was assigned to, and then consolidated before, the Honorable Victor Marrero. The litigation continued for more than 3 years. Judge Marrero, along with Magistrate Judge Kevin N. Fox, oversaw extensive discovery during that time. In early 2005, with Barr allegedly threatening a launch of its generic product before the litigation was resolved, Kos filed a motion seeking Judge Marrero's issuance of a preliminary injunction and presenting evidence and argument attempting to satisfy the criteria for such relief, including likelihood of success on the merits of the patent infringement claims, irreparable injury and the like. On March 18, 2005, Judge Marrero heard argument on Kos's motion for a preliminary injunction. At that hearing, Judge Marrero noted the "extensive" nature of the parties' submissions and that the court had "taken the time and trouble to go through it in great detail." 3/18/2005 Tr. at 6:10-13. Shortly after the hearing, and prior to Judge Marrero's issuance of a decision on the preliminary injunction motion, Kos and Barr agreed to settle the litigation. Judge Marrero dismissed the case on April 13, 2005.

In April 2013, plaintiffs filed these Actions as putative class actions in federal courts. Each Action alleges that agreements Kos and Barr made relating to Niaspan violate federal and/or state antitrust or consumer protection laws. They allege that, pursuant to those agreements, Kos made anticompetitive and unlawful payments to Barr in exchange for Barr delaying its generic version of Niaspan. The complaints contend that Kos and Barr's agreements effectively delayed the market entry of any generic version of Niaspan. [2]

[2] The Defendants dispute the factual and legal allegations in the complaints filed in these Actions, and rely on those allegations solely for the purpose of this motion.

All of the actions allege the agreements violate Section 1 of the Sherman Act, 15 U.S.C. § 1; one action also alleges violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; and the actions by indirect purchasers also allege violations of the antitrust and/or consumer protection laws of more than 25 different states. Two of the actions are brought by direct purchasers and allege violations of federal antitrust laws:

- *Professional Drug Company, Inc., on behalf of itself and all others similarly situated, Plaintiff, v. Abbott Laboratories, AbbVie, Inc., Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries, Ltd., Barr Pharmaceuticals, Inc., Duramed Pharmaceuticals, Inc., and Duramed Pharmaceuticals Sales Corp., Defendants*, No. 13-cv-1792, pending in the Eastern District of Pennsylvania before the Honorable Jan E. DuBois (filed Apr. 5, 2013).

- *Rochester Drug Co-Operative, Inc., on behalf of itself and others similarly situated, Plaintiff, v. Abbott Laboratories, Abbott Respiratory LLC, AbbVie, Inc., Barr Pharmaceuticals, LLC, Barr Laboratories, Inc., Kos Pharmaceuticals, Inc., Teva Pharmaceutical Industries, Ltd., Teva Pharmaceuticals USA, Inc., and Teva Women's Health, f/k/a Duramed Pharmaceuticals, Inc., Defendants*, No. 13-cv-1820, pending in the Eastern District of Pennsylvania before the Honorable Jan E. DuBois (filed Apr. 5, 2013).

The other three actions are brought by indirect purchasers and allege violations of federal antitrust laws and state antitrust and/or consumer protection laws:

- *United Food & Commercial Workers Union and Midwest Health Benefits Fund, on its own behalf and all others similarly situated, Plaintiff, v. AbbVie, Inc., a Delaware corporation, Abbott Laboratories, an Illinois corporation, Barr Pharmaceuticals Inc., a Delaware corporation, Duramed Pharmaceuticals Inc. (now known as Teva Women's Health Inc.), a Delaware corporation, Duramed Pharmaceuticals Sales Corp., a Delaware corporation, Teva Pharmaceuticals USA, Inc., a Delaware corporation, and Teva Pharmaceutical Industries Limited, an Israeli corporation, Defendants*, No. 13-cv-1747, pending in the Eastern District of Pennsylvania before the Honorable Jan E. DuBois (filed Apr. 4, 2013).

- *A.F. of L. - A.G.C. Building Trades Welfare Plan, on its own behalf and on behalf of all other similarly situated, Plaintiff, v. AbbVie, Inc., a Delaware corporation, Abbott Laboratories, an Illinois corporation, Barr Pharmaceuticals Inc., a Delaware corporation, Duramed Pharmaceuticals Inc. (now known as Teva Women's Health Inc.), a Delaware corporation, Duramed Pharmaceuticals Sales Corp., a Delaware corporation, Teva Pharmaceuticals USA, Inc., a Delaware corporation, and Teva Pharmaceutical Industries Limited, an Israeli corporation,*

Defendants, No. 13-cv-2189, pending in the District of New Jersey before the Honorable Stanley R. Chesler (filed Apr. 8, 2013).

- *United Food and Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff, v. Abbott Laboratories, Abbott Respiratory LLC, AbbVie, Inc., Barr Pharmaceuticals, LLC, Barr Laboratories, Inc., Kos Pharmaceuticals, Inc., Teva Pharmaceutical Industries, Ltd., Teva Pharmaceuticals USA, Inc., and Teva Women's Health, f/k/a Duramed Pharmaceuticals, Inc., Defendants*, No. 13-cv-1977, pending in the Eastern District of Pennsylvania before the Honorable Jan E. DuBois (filed Apr. 15, 2013).

Thus, four of the actions have been filed in the Eastern District of Pennsylvania and one action in the District of New Jersey.

III. ARGUMENT

A. The Niaspan Antitrust Actions, and any future related actions, should be centralized in one district pursuant to 28 U.S.C. § 1407.

Under 28 U.S.C. § 1407, civil actions pending in multiple federal districts may be transferred and centralized in one district if they involve (1) "one or more common questions of fact," (2) transfer would be "for the convenience of parties and witnesses," and (3) transfer would "promote the just and efficient conduct of such actions." The purpose of centralizing multiple actions in one district under Section 1407 is to "eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save time and effort of the parties, the attorneys, the witnesses, and the courts." *See* Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION § 20.131 (2010).

Here, there can be no dispute that all of the Actions raise at least one identical issue of fact with respect to liability, and at least one substantially similar issue of fact with respect to class certification and damages. The Actions all are brought against substantially the same defendants, challenge the same conduct, assert identical or

substantially similar causes of action, and seek similar relief. Each of these Actions will require nearly identical discovery regarding, *inter alia*, the patent litigation between Kos and Barr, the settlement of that litigation by Kos and Barr, the market for Niaspan, and the effect of the settlement agreement on competition in the market for Niaspan.

"Antitrust actions present a category of actions that the Panel almost inevitably orders transferred if there are multiple actions pending in different districts." David F. Herr, MULTIDISTRICT LITIGATION MANUAL § 5:14, p. 127 (2012). The only substantive difference among the Actions is that some are brought by direct purchasers and others are brought by indirect purchasers. But the Panel frequently centralizes direct purchaser and indirect purchaser antitrust actions: "The Panel has frequently centralized antitrust cases involving direct and indirect purchaser claims that arise from common factual allegation, particularly where multiple related actions are pending." *In re Skelaxin Antitrust Litig.*, 856 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012)

The Panel has also repeatedly centralized analogous antitrust matters that challenge the Hatch-Waxman settlement of patent infringement litigation, or other types of conduct, that is alleged to have delayed entry of a generic pharmaceutical drug. *See, e.g.*, *Skelaxin*, 856 F. Supp. 2d at 1351; *In re Nexium Antitrust Litig.*, ___ F. Supp. 2d ___, 2012 WL 6062555, at *1 (J.P.M.L. 2012); *In re Androgel Antitrust Litig.*, 655 F. Supp. 2d 1351, 1351-52 (J.P.M.L. 2009); *In re Oxycontin Antitrust Litig.*, 314 F. Supp. 2d 1388, 1390 (J.P.M.L. 2004); *In re Ciproflaxacin Hydrochloride Antitrust Litig.*, No. 1383, 2001 WL 253240, at *1 (J.P.M.L. Jan. 10, 2001); *In re Terazosin Hydrochloride Antitrust Litig.*, MDL-1317, 2000 WL 33951466, at *1 (J.P.M.L. Jan. 10, 2000); *In re Cardizem CD Antitrust Litig.*, MDL-1278 (J.P.M.L. June 11, 1999). For example, the

Panel recently centralized direct and indirect purchaser actions challenging conduct alleged to have delayed entry of generic versions of Skelaxin: "These actions present nearly identical factual allegations that defendants delayed the entry of generic equivalents of Skelaxin into the market, which will likely require duplicative discovery and motion practice. Centralizing these actions under Section 1407 will ensure streamlined resolution of this litigation to the overall benefit of the parties and the judiciary." *Skelaxin*, 856 F. Supp. 2d at 1351-52. The Panel has also recognized that "actions involving the validity of complex pharmaceutical patents and the entry of generic versions of the patent holder's drugs are particularly well-suited for transfer under Section 1407." *In re Brimonidine Patent Litig.*, 507 F. Supp. 2d 1381, 1382 (J.P.M.L. 2007).

As is typically the situation with antitrust litigation arising out of Hatch-Waxman patent settlements, all of these Actions purport to be on behalf of a nationwide class of either direct or indirect purchasers. Absent centralization there would be a real risk of inconsistent rulings regarding class certification, thus the "Panel has regularly ordered transfer of class actions involving potentially overlapping or conflicting class definitions." MULTIDISTRICT LITIGATION MANUAL § 5:14. The Panel previously explained that it has "consistently held that transfer of actions under Section 1407 is appropriate, *if not necessary*, where the possibility of inconsistent class determinations exists." *In re Sugar Industry Antitrust Litig.*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975) (emphasis added).

Currently, there are 5 actions pending in 2 different districts. Centralization pursuant to Section 1407 will ensure that these actions, and any future related actions, are

subject to a single set of uniform pretrial rulings regarding motions to dismiss, discovery, motions for class certification, and motions for summary judgment. This Panel does not require the existence of a greater number of actions or districts in which they are pending before it orders centralization. *See, e.g.*, *Skelaxin*, 856 F. Supp. 2d at 1351 (centralizing actions where "only three actions were included on the motion for centralization" and six potential tag-along cases had been filed); *In re Lipitor Antitrust Litig.*, 856 F. Supp. 2d 1355, 1356 (J.P.M.L. 2012) (centralizing four actions that were pending in three different district courts). Here, four actions followed almost immediately after the first action was filed on April 4, 2013, and, if history is any guide, tag-along actions will be forthcoming.

B. The actions should be centralized in the Southern District of New York before the Honorable Victor Marrero, who presided over the closely-related patent litigation.

As set forth above, the need for centralization of these Actions is clear and well-established under the Panel's precedents. The principal question is where the Panel should centralize these Actions. In deciding where to centralize a matter, the Panel often considers: (1) the transferee judge's familiarity with the case; (2) the efficiency of the docket in the transferee district; (3) the preference of the parties; (4) the convenience of the transferee district; (5) where there is a geographical focal point ("center of gravity") for the litigation; and (6) the progress of the actions sought to be centralized. *See, e.g.*, Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 Fordham L. Rev. 311, 331 (2009). Here, these factors strongly point to centralization in the Southern District of New York before Judge Marrero: Judge Marrero is the only judge who is familiar with the underlying patent litigation; Judge Marrero has extensive experience handling other MDLs; and the Southern District of New York is a convenient location for all of the parties. On the other

side of the coin, no other district or district judge has undertaken any substantive activities relevant to the Actions and there is not a geographical focal point relevant to this litigation.

The core operative facts alleged in each of these Actions directly involve the patent infringement suit filed by Kos against Barr in 2002, litigated before Judge Marrero for three years, and then settled by Kos and Barr in 2005. In the context of considering Kos's motion for a preliminary injunction in that litigation, Judge Marrero spent considerable time understanding Kos's relevant patents for Niaspan and the other facts relevant to its infringement suit against Barr. Judge Marrero also has considerable experience handling MDLs, as this Panel has previously centralized other litigation before Judge Marrero. *See, e.g.*, *In re Mun. Derivatives Antitrust Litig.*, MDL-1950; *In re Fairfield Greenwich Group Sec. Litig.*, MDL-2088; *In re MF Global Holdings Ltd. Inv. Litig.*, MDL-2338.[3]

It is difficult to fathom a scenario where, if the Actions were to proceed past the pleadings, the merits of the patent litigation previously considered by Judge Marrero would not be a central issue in these Actions. In *FTC v. Actavis*, No. 12-416, which was argued on March 25, 2013, the United States Supreme Court is considering the appropriate antitrust standard for antitrust evaluation of Hatch-Waxman patent settlements that, like the settlement here, allegedly include a so-called "reverse payment" by the brand name drug company. Under the test advocated by the petitioner and its

[3] According to the report of "Pending MDLs as of March 5, 2013" on the Panel's website, Judge Marrero's three MDL proceedings are relatively small: there is only one constituent action in *In re Mun. Derivatives Antitrust Litig.* (MDL No. 1950), eight in *In re Fairfield Greenwich Group Sec. Litig.* (MDL No. 2088), and two in *In re MF Global Holdings Ltd. Inv. Litig.* (MDL No. 2338). From the docket sheets, they also do not appear to be calling heavily on the court's time.

amici who include plaintiff groups in the Actions that are subject to this motion, the antitrust analysis would require the district court to evaluate the merits of the underlying patent litigation at least where -- as here -- the antitrust plaintiffs are private parties.

The Panel need look no further than the complaints in the Actions to see this. For example, the *Professional Drug Company* complaint alleges: "In light of the substantial possibility that Kos's Niaspan patents would be invalidated and/or that the generics' products would be adjudged non-infringing [in the patent litigation] . . . Kos agreed to share its monopoly rents with Barr . . . ." Professional Drug Company, Complaint, ¶ 11. Indeed, each of the Actions is premised on the theory that Kos's patents for Niaspan would have been judicially invalidated or found not to be infringed by one or more generic versions of Niaspan, and that in turn would have led to earlier generic competition.

The Honorable John G. Heyburn II, current chairman of this Panel, has explained that the "ideal transferee judge is one with some existing knowledge of one of the cases to be centralized and who may already have some experience with complex cases, if the new docket appears to require it." John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2240 (2008). This Panel often has noted the efficiency of centralizing a matter before a district judge who is already familiar with the patent issues likely to arise in the actions being centralized. *See, e.g.*, *In re Katz Interactive Call Processing Patent Litig.*, 481 F. Supp. 2d 1353, 1355-56 (J.P.M.L. 2007) ("we are persuaded that this litigation should be centralized . . . before Judge Klausner, who has prior judicial experience with some of the patents involved in this docket and is thus already familiar with the technology underlying these patents"). Given Judge

Marrero's familiarity with the patent litigation, centralization of these Actions before Judge Marrero would be efficient and would avoid the need for another district judge to start from scratch in understanding the events and merits of the prior patent litigation.

This Panel has centralized multiple, analogous antitrust matters with the district judge who oversaw the underlying patent litigation. In *In re Androgel*, for example, this Panel found that centralization in the Northern District of Georgia, where the underlying patent litigation had been pending, "permits assignment to a judge with extensive experience in multidistrict litigation who is already familiar with the patent litigation underlying the antirust claims in these actions." 655 F. Supp. 2d at 1352. Similarly, in *In re Oxycontin Antitrust Litig.*, this Panel transferred the antitrust litigation to the Southern District of New York where "the transferee judge has already gained considerable experience with the issues present in this docket as a result of presiding over the patent infringement litigation upon which the MDL-1603 plaintiffs predicate their antitrust claims." 314 F. Supp. 2d at 1390; *see also In re Neurontin Antitrust Litig.*, 217 F. Supp. 2d 1380, 1381 (J.P.M.L. 2002) (transferring multiple antitrust actions to Judge Lifland because he "already gained considerable experience with the issues present in this docket as a result of presiding over . . . the pending patent infringement actions that form the bulk of the allegedly 'sham' litigation on which the MDL-1479 plaintiffs are predicating their antitrust claims").

There are no countervailing reasons against centralization before Judge Marrero. The Southern District of New York should be as convenient as any other district for the parties and potential witnesses. There are many non-stop airline flights to New York City, more than to Philadelphia where four of the Actions were filed. At least one of the

three major New York metropolitan airports also serves the District of New Jersey, where the fifth Action was filed.

There is no basis for favoring either the District of New Jersey or the Eastern District of Pennsylvania here.[4] The plaintiffs and defendants in this litigation are geographically dispersed throughout the country. Only one of the named plaintiffs is alleged to be located in either Pennsylvania or New Jersey: Plaintiff Local 1776 is alleged to have its principal place of business in Plymouth Meeting, Pennsylvania. All of the other named plaintiffs are located far from the district where it filed its action: Plaintiff A.F. of L. has its principal place of business in Mobile, Alabama; Plaintiff UFCW is located in Cook County, Illinois; Plaintiff Professional Drug Company has its principal place of business in Biloxi, Mississippi; and Plaintiff Rochester Drug Co-Operative has its principal place of business in Rochester, New York. Furthermore, when a plaintiff purports to represent a nationwide class, that plaintiff's choice of forum "deserves considerably less weight," *see Wiley v. Gerber Prods. Co.*, 667 F. Supp. 2d 171, 174 (D. Mass. 2009); *see also Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) ("[W]here there are hundreds of potential plaintiffs . . . the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened."), and this is particularly true where, as in four of the five Actions here, the named plaintiff selected a forum far away from its own location and with little connection to the facts alleged in the complaint.

[4] Because, as noted above, the Supreme Court is currently considering the appropriate legal standard to be applied in cases like this, there is no issue of forum shopping among the circuits based upon their existing antitrust precedents. By the Supreme Court's summer recess at the end of June, the Court is expected to decide the appropriate legal standard, and resolve the current conflict in the circuits.

AbbVie Inc. and Abbott Laboratories have their principal places of business near Chicago, Illinois (in the Northern District of Illinois, the same judicial district in which plaintiff A.F. of L. is located). Teva Pharmaceuticals is located in Israel; its subsidiaries and affiliates named as defendants in these actions do have their principal places of business in Pennsylvania and New Jersey, but this will be relevant only with respect to the potential default venue for depositions which would be unaffected by where the litigation is centralized.

Further, no judge in either the Eastern District of Pennsylvania or the District of New Jersey has spent substantial time on any of the Actions. Each of these Actions is recently-filed and in its infancy. Thus, this is not a situation in which preference should be given to a district in which one actions is "procedurally advanced." *See In re Bank of America Credit Prot. Mktg. & Sales Practices Litig.*, 804 F. Supp. 2d 1372, 1373 (J.P.M.L. 2011).

IV. CONCLUSION

For the foregoing reasons, Moving Defendants respectfully request that these Actions, and all future related actions, be consolidated and/or coordinated for pretrial proceedings, and that the centralization of the Actions be in the Southern District of New York before Judge Marrero.

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