

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE: GROUPON MARKETING AND) MDL No. _____
 SALES PRACTICES LITIGATION)
 _____) CLASS ACTION

**BRIEF IN SUPPORT OF THE MOTION OF PLAINTIFFS ANTHONY FERREIRA AND
 SARAH GOSLING TO TRANSFER ACTIONS TO THE NORTHERN DISTRICT
 OF CALIFORNIA PURSUANT TO 28 U.S.C §1407 FOR
 CONSOLIDATED PRETRIAL PROCEEDINGS**

I. INTRODUCTION

Plaintiffs Anthony Ferreira (“Ferreira”) and Sarah Gosling (“Gosling”) (collectively, “Moving Plaintiffs”) hereby request that the Judicial Panel on Multidistrict Litigation (the “Panel”) establish an MDL proceeding to centralize and coordinate the growing number of federal class actions filed against Groupon, Inc. (“Groupon”) for the marketing and sale of gift certificates with allegedly illegal and deceptive terms.

Ferreira is the named plaintiff in the *first-filed* Groupon federal class action lawsuit, *Ferreira v. Groupon, Inc.*, No. 11-CV-0132-DMS(POR) (S.D. Cal.), filed in the Southern District of California on January 21, 2011. Since the filing of the *Ferreira* action, at least eight other federal class actions have been filed against Groupon, including the action filed by Gosling, *Gosling v. Groupon, Inc.*, No. 3:11-cv-01038-CRB (N.D. Cal. filed Mar. 4, 2011). The other subsequent federal Groupon actions include: *Christensen v. Groupon, Inc.*, No. 11-cv-00501-MJD-JSM (D. Minn. filed Feb. 28, 2011); *Eidenmuller v. Groupon, Inc.*, No. 11-cv-00984-SBA (N.D. Cal. filed Mar. 2, 2011); *Cohen v. Groupon, Inc.*, No. 11-cv-80149-KLR (S.D. Fla. filed Feb. 4, 2011); *Zard v. Groupon, Inc.*, No. 11-cv-00605-PAM(FLN) (D. Minn. filed Mar. 8, 2011); *Kimel v. Groupon, Inc.*, No. 11-cv-00488 (N.D. Ohio filed Mar. 9, 2011); *Johnson v. Groupon, Inc.*, No. 11-cv-01426 (N.D. Ill. filed Mar. 1, 2011); and *Vazquez v. Groupon, Inc.*, No. 11-cv-00495-EGS (D.D.C. filed Mar. 8, 2011) (collectively, “Groupon Actions”). See Declaration of Rachel L. Jensen in Support of the Motion of Plaintiffs Anthony Ferreira and Sarah Gosling to Transfer Actions to the Northern District of California Pursuant to 28 U.S.C. §1407 for Consolidated Pretrial Proceedings (“Jensen Decl.”), ¶¶2-3; see also Schedule of Actions, filed concurrently.

The Moving Plaintiffs respectfully request that all pending federal Groupon Actions be consolidated and transferred to the Northern District of California before the Honorable Charles R. Breyer (“Judge Breyer”), who currently presides over the *Gosling* action. Jensen Decl., ¶4. First,

consolidation of all of the actions in an MDL proceeding is appropriate under 28 U.S.C. §1407. All nine actions allege that Groupon marketed and sold gift certificates, known as “groupon,” bearing expiration dates that are prohibited under both federal and state laws. Jensen Decl., ¶5. All nine actions involve overlapping nationwide classes comprised of millions of consumers who purchased the “groupon” gift certificates. And, all of the complaints allege violations of the federal Credit Card Accountability Responsibility and Disclosure Act (“CARD Act”) and the Electronic Funds Transfer Act (“EFTA”), 15 U.S.C. §1693 *et seq.*, as well as state consumer protection laws. The disposition of the claims of all plaintiffs and the putative class members will, therefore, turn on the adjudication of similar issues and similar alleged conduct. Consolidation is necessary to promote the just and efficient management of these actions and will enhance the convenience of all parties and the judiciary. *See* 28 U.S.C. §1407(a).

Second, the Northern District of California before Judge Breyer is the most appropriate forum for the MDL proceedings. Transfer of all Groupon Actions to the Northern District of California is appropriate because: (i) the first-filed plaintiff, Ferreira, as well as Gosling, support transfer to the Northern District; (ii) multiple Groupon Actions are currently pending in the Northern District; (iii) Groupon has headquarters in Palo Alto, California and conducts substantial business within California, particularly within the Northern District; (iv) Groupon has retained California-based counsel; (v) the Northern District is easily accessible and conveniently located; and (vi) Judge Breyer is a well-qualified jurist with substantial experience in handling MDL litigation.

II. FACTUAL BACKGROUND

All of the Groupon Actions focus on Groupon’s systematic practice of selling “groupon” gift certificates with expiration dates that are illegal and deceptive under both federal and state laws. For example, as alleged in the first-filed action, Groupon promoted a Nordstrom Rack “Daily Deal” on or about November 21, 2010, whereby it offered to sell Nordstrom Rack “groupon” gift certificates

to Ferreira and thousands of other consumers. Ferreira subsequently paid \$25.00 to Groupon in exchange for a “groupon” gift certificate redeemable for \$50.00 worth of retail products at Nordstrom Rack. However, Ferreira’s groupon expired little more than a month later on December 31, 2010. Ex. 3,¹ *Ferreira* Complaint, ¶¶31-36. Groupon’s sale of gift certificates with expiration terms, particularly its imposition of relatively short expiration periods, is illegal under the federal CARD Act, which prohibits the use of expiration terms of less than five years, as well as California gift certificate laws, which prohibits the use of *any* expiration dates on gift certificates. The eight other Groupon Actions feature very similar and, in some cases, identical, factual allegations and assert the same legal claims.

The *Ferreira* action was filed on January 21, 2011 in the Southern District of California. Two weeks later on February 4, 2011, *Cohen* was filed in the Southern District of Florida. *Eidenmuller* and *Gosling* were filed in the Northern District of California on March 2 and 4, 2011, respectively. *Christensen*, *Zard*, *Kimel*, *Johnson* and *Vasquez* were also filed in March 2011 in the District of Minnesota, Northern District of Ohio, Northern District of Illinois, and the District of Columbia, respectively. See Schedule of Actions, filed concurrently. All of the Groupon Actions feature overlapping nationwide classes and allege that Groupon violated the federal CARD Act and the EFTA, as well as the consumer protections laws of the states and/or districts where the actions were filed. All of the actions are in their infancy, as responsive pleadings have not been filed by defendants in any of actions.

The Moving Plaintiffs request that the Groupon Actions be consolidated and transferred to the Northern District of California, where the *Eidenmuller* and *Gosling* actions were filed. The Groupon Actions should be assigned to Judge Breyer, the District Court Judge presiding over *Gosling*.

¹ All “Ex.” and “Exs.” references are to the Jensen Decl.

III. THE Groupon ACTIONS SHOULD BE CONSOLIDATED AND TRANSFERRED TO JUDGE BREYER OF THE NORTHERN DISTRICT OF CALIFORNIA

A. Consolidation of the Groupon Actions Is Appropriate Under §1407

The Panel may transfer and coordinate two or more civil cases for pretrial proceedings upon a showing that the cases: (i) “involv[e] one or more common questions of fact”; (ii) consolidation would further “the convenience of parties and the witnesses”; and (iii) consolidation would “promote the just and efficient conduct of [the] actions.” 28 U.S.C. §1407(a). The purpose of §1407 is “to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation costs, and save the time and effort of the parties, the attorneys, the witnesses, and the courts.” Manual for Complex Litigation (Fourth) §20.131 (2004) (citing *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.L. 1968)).

The Groupon Actions are well-suited for centralized coordination under §1407. Each of the nine actions are directed at the same defendant, Groupon, and based on the same core factual allegations and theories of liability. Indeed, plaintiffs in all of the Groupon Actions seek to address the very same deceptive and unlawful conduct committed by Groupon – its marketing and sale of “groupon” gift certificates with expiration terms that are illegal and deceptive under federal and state laws. Discovery has not commenced in any of the actions, no substantive motions have been heard, and no scheduling orders have been entered. Centralization is therefore necessary to prevent the duplication of discovery and inconsistent pretrial rulings. *In re Ryder Truck Lines, Inc.*, 405 F. Supp. 308, 309 (J.P.M.L. 1975). Importantly, the fact that plaintiffs in all of the actions seek certification of overlapping classes renders the need for consolidation particularly acute. *See In re Washington Pub. Power Supply Sys. Sec. Litig.*, 568 F. Supp. 1250, 1251 (J.P.M.L. 1983) (centralization where overlapping class certifications sought in all relevant actions in multidistrict litigation); *In re Resource Exploration, Inc., Sec. Litig.*, 483 F. Supp. 817, 821 (J.P.M.L. 1980) (“An

additional justification for transfer is the fact that most of the actions before us have been brought on behalf of similar or overlapping classes of purchasers . . .”).

As the Groupon Actions involve similar and overlapping legal and factual issues, their coordination through a MDL proceeding will enhance the convenience of the parties and promote the efficient and just resolution of the actions. The requirements of §1407 for consolidation are certainly met here.

B. The Northern District of California Is the Most Appropriate Forum

The Northern District of California, where the *Gosling* and *Eidenmuller* actions were filed, is the most appropriate transferee district for the Groupon Actions. Indeed, California should be considered the “center of gravity” for this litigation. *See In re Temporomandibular(TMJ) Implants Prods. Liab. Litig.*, 844 F. Supp. 1553, 1554 (J.P.M.L. 1994).

First, the Panel has held “it is appropriate to give the ‘first-filed criterion some weight in selecting a transferee district.’” *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, MDL No. 2208, 2011 U.S. Dist. LEXIS 11048, at *3-*4 (J.P.M.L. Feb. 4, 2011) (citation omitted); *In re Halftone Color Separations (‘809) Patent Litig.*, 547 F. Supp. 2d 1383, 1384 (J.P.M.L. 2008) (“we’ve expressly given ‘the first-filed criterion some weight in selecting a transferee district’”); *In re Land Rover LR3 Tire Wear Prods. Liab. Litig.*, MDL No. 2008, 2009 WL 467572 (J.P.M.L. Feb. 23, 2009) (transferring to Central District of California for coordination “because the first-filed and most procedurally advanced actions are pending there”). The first-filed plaintiff, Ferriera, as well as *Gosling*, support the transfer of the actions to the Northern District of California where *Gosling*’s case was filed.

Second, transfer to the Northern District of California is appropriate because multiple cases have been filed there. *See In re Packaged Ice Antitrust Litig.*, 560 F. Supp. 2d 1359, 1361 (J.P.M.L. 2008) (transferring actions to the district for coordination where “[m]ore pending actions and

potential tag-along actions have been filed in the Eastern District of Michigan than in any other district”); *In re Multi-Piece Rim Products Liab. Litig.*, 464 F. Supp. 969, 975 (J.P.M.L. 1979) (noting that “more actions are pending in [the transferee] district than in any other federal district”). Both *Gosling* and *Eidenmuller* are currently pending in the Northern District of California. As such, the Northern District of California should be considered the focal point of the litigation. Notably, the first-filed plaintiff, Ferreira, filed his case in the nearby Southern District of California and consents to transfer to the Northern District.

Third, the MDL proceeding should be in the Northern District of California because Groupon transacts substantial business in California, particularly within the Northern District. *In re IKO Roofing Shingle Prods. Liab. Litig.*, 659 F. Supp. 2d 1364, 1366 (J.P.M.L. 2009) (transferring to district where “[c]ertain [of defendant’s] facilities are located . . . so relevant documents and witnesses are likely found there”). While formal discovery has not yet commenced, Moving Plaintiffs believe, based on their independent investigation, that Groupon has sold hundreds of thousands of “groupon” gift certificates to consumers in California, many of whom reside in the Northern District. Jensen Decl., ¶6. Groupon has therefore generated millions of dollars in revenues from the sale of gift certificates in the Northern District. *Id.* Moreover, Groupon recently established its California headquarters in Palo Alto. Jensen Decl., ¶7. Accordingly, Groupon’s physical presence in the Northern District of California will facilitate discovery, particularly the production of documents and corporate witnesses. Groupon’s ongoing and substantial business activity in the Northern District of California, as well as its physical proximity in the District, compel the transfer of the cases there.

Fourth, the Northern District of California will provide a convenient location for the litigants and their counsel. *See, e.g., In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 435 F. Supp. 2d 1338, 1340 (J.P.M.L. 2006) (“the [transferee] district is an accessible location that will be

geographically convenient for litigants, witnesses and counsel”); *In re Air Crash Disaster near Chicago*, 476 F. Supp. 445 n.4 (J.P.M.L. 1979) (“Convenience of counsel often coincides with convenience of the parties they represent and is a factor to be considered under Section 1407.”). Gosling resides in San Francisco, within the Northern District of California, and the harm for which she complains arose from her purchase of “groupon” gift certificates in the District. *Ex. 2, Gosling Complaint*, ¶¶15, 35-42. Plaintiff Eidenmuller also seeks to have his case heard in the Northern District of California. *See generally Ex. 1, Eidenmuller Complaint*. Also, in the *Ferreira* action, Groupon has retained as its counsel the law firm of DLA Piper, which has offices throughout California, including in the Northern District. *Jensen Decl.*, ¶8; *In re Intel Corp. Microprocessor Antitrust Litig.*, 403 F. Supp. 2d 1356, 1357 (J.P.M.L. 2005) (in concluding that District of Delaware of appropriate forum, observing that the district was convenient for counsel); *Multidistrict Litigation Manual* §5:16 (2010) (listing “[c]onvenience of counsel” as factor that Panel considers in determining transferee district). Moreover, counsel for the Moving Parties have offices in the Northern District of California, and attorneys for plaintiffs in *Eidenmuller*, *Zard*, *Kimel*, *Johnson* and *Vazquez* are located in California as well. The Northern District of California is the most convenient forum for the MDL proceedings.

Fifth, the Northern District of California is an “easily accessible, metropolitan location” within miles of two major airports in San Francisco and Oakland. *In re Compression Labs, Inc., Patent Litig.*, 360 F. Supp. 2d 1367, 1369 (J.P.M.L. 2005); *In re Circular Thermostat Antitrust Litig.*, 370 F. Supp. 2d 1355, 1357 (J.P.M.L. 2005) (same). The Northern District of California is certainly well-equipped and has the resources to preside over complex, multidistrict litigation like the Groupon Actions. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 228 F. Supp. 2d 1379, 1381 (J.P.M.L. 2002) (noting that transferee court, the Northern District of California, was an “accessible and convenient location”).

Sixth, Judge Breyer, who is currently assigned to the *Gosling* action, is well-qualified and has ample experience in handling MDL litigation. Judge Beyer currently presides over *In re Bextra and Celebrex Marketing, Sales Practices and Products Liab. Litig.* No. 05-md-1699 CRB (N.D. Cal.); *In re Transpacific Passenger Air Transportation Antitrust Litig.*, No. 08-md-01913 CRB (N.D. Cal); *In re Air Crash over the Mid-Atlantic on June 1, 2009*, No. 10-md-2144-CRB (N.D. Cal.); and *In re AutoZone, Inc., Wage and Hour Employment Practices Litig.*, No. 10-2159 (N.D. Cal.). In addition, since being appointed to the bench in 1997, Judge Breyer has presided over a number of complex, consolidated class actions including, for example, *In re KLA-Tencor Corp. Sec. Litig.*, No. 06-cv-04065 (N.D. Cal.), *In re Magma Design Automation, Inc. Sec. Litig.*, No. C05-2394 (N.D. Cal.), and *Luque v. AT&T Corp.*, No. C09-5885 (N.D. Cal.).

Accordingly, the Northern District of California before Judge Breyer is the most appropriate transferee district.

IV. CONCLUSION

For the foregoing reasons, Moving Plaintiffs respectfully request the Panel to enter an order consolidating all of the Groupon Actions, as set forth in the Schedule of Actions, together with any other similar subsequently filed actions, and transfer all such cases to the Court of Judge Breyer in the Northern District of California for centralized pretrial proceedings.

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Respectfully submitted,

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