



## **Sandys v. Willard et al**

2021 | Cited 0 times | N.D. California | March 22, 2021

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

THOMAS SANDYS,

Plaintiff, v. HOWARD A. WILLARD, et al.,

Defendants.

MARIA CECILIA LORCA,

Plaintiff, v. WILLIAM F. GIFFORD, et. al.,

Defendants.

Case Nos. 20-cv-05480-PJH; 20-cv- 06041-PJH.

ORDER GRANTING MOTION TO CONSOLIDATE, GRANTING MOTION TO TRANSFER, DENYING MOTION TO STAY, DENYING REQUEST TO APPOINT LEAD PLAINTIFF Re: Dkt. Nos. 31, 32, 46, 51, 56

Before the court is nominal defendant Altria Group, Inc.

Crosthwaite, Jr. motion to transfer these related shareholder derivative actions to the United States District Court for D 20-cv-5480 (the Sandys action), Dkt. 51; 20-cv-6041 (the Lorca action), Dkt. 32. Defendants Juul above motion. Dkt. 54.

and motion to consolidate the above related actions and appoint their selection of co-lead counsel. 20-cv-5480, Dkt. 46 (motion filed October 27, 2020); 20-cv-5480, Dkt. 56 (materially similar motion filed November 16, 2020); 20-cv- 6041, Dkt. 31. The subject motions filed in both the above captioned actions are

materially similar. For purposes of this order, the court will cite only the Sandys docket number (20-cv-5480) when referring to either motion. Given the overlap between the complaint filed in Sandys and that in Lorca, the court will cite the Sandys complaint when summarizing the relevant background information and cite the Lorca complaint only where necessary.



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relevant legal authority, and good cause appearing, the court hereby GRANTS motion to consolidate, GRANTS transfer, DENIES the alternative motion to stay, and DENIES appointment of lead counsel.

BACKGROUND Plaintiffs own shares in Altria. 20-cv-5480, Dkt. 1 (Sandys Compl.) ¶ 12; 20-cv- 6041, Dkt. 1 (Lorca Compl.) ¶ 19. On August 7, 2020, Sandys filed the instant shareholder derivative action Willard, Gifford, and Crosthwaite, as well as JUUL, Burns, .

Altria is a Virginia corporation that sells and distributes tobacco products. Sandys Compl. ¶ 22. It owns the popular Marlboro cigarette brand. Id. ¶ 4. Willard was the chief CEO of Altria between May 2018 and April 2020. Id. ¶ 13. Gifford was the CFO 2020, its CEO. Id. ¶ 14. C Officer until Id. ¶ 15. For purposes of this order, the court will refer to Willard, Gifford, and Crosthwaite (for the pre-

JUUL was a San Francisco based company that manufactures and sells vaping devices and products. Id. ¶ 20. Burns Id. ¶ 17. Pritzker and Valani are both members of JUUL board of directors. Id. ¶¶ 18-19. The court will refer to JUUL, Burns, Pritzker, Valani, and Crosthwaite (for the post-September

ants

### I. Factual Background and the Instant Derivative Actions

Between 2017 and 2019, JUUL showed success in the e-cigarette market. Id. ¶ 3. To reach such success, JUUL allegedly marketed its products to youth. Id. Seeing its revenue from conventional cigarette sales decline, Altria sought to enter the e-cigarette market. Id. ¶ 4. . Id. Pivoting, Altria turned to potentially acquire or otherwise partner with JUUL. Id. ¶¶ 5-7.

Sometime on or before December 2018, JUUL and Altria reached a deal on a partnership that involved Altria cross-marketing JUUL products and licensing to JUUL intellectual property. Id. ¶ 6. Sometime on or before December 20, 2018, Altria invested \$12.8 billion in JUUL in return for a 35 percent stake in JUUL. Id. ¶ 7.

marketing practices and vaping health risks, its value sharply decreased. Id. ¶ 8. That decrease resulted in an \$8 billion loss to Altria. Id. ¶ 72.

In his complaint, Sandys alleges the following two claims: Breach of fiduciary duty against the Altria defendants for failure to exercise due

. Id. ¶¶ 124-28. Aiding and abetting breach of fiduciary duty, predicated on the above breaches

by the Altria defendants, against the JUUL defendants. Id. ¶¶ 129-31. defendants breached their duties to the company by doing business with JUUL when they knew and understood the financial and legal risks that such partnering entailed. Id. ¶¶ 9-11, 62-72. Sandys further in its purportedly



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illegal marketing practices and misrepresentations concerning the JUUL

. Id. ¶¶ 11, 73-91. Sandys also alleges that the Altria defendants, through a tacit noncompete agreement with JUUL, conspired with it to engage in anticompetitive behavior, id. ¶¶ 93-109, thereby exposing

Altria to further regulatory liability, id. ¶ 92.

On August 27, 2020, twenty days after Sandys filed his action, Lorca filed her action against defendants. In her complaint, Lorca alleges breach of fiduciary duty claims against the Altria defendants, Lorca Compl. ¶¶ 124-28, as well as a claim for aiding and abetting such breaches against the JUUL defendants, id. ¶¶ 129-32. Additionally, Lorca alleges claims for corporate waste and unjust enrichment against the Altria defendants, id. ¶¶ 134-41.

To substantiate her claims, Lorca relies on a theory of liability that is similar but not identical to that advanced in Sandys. Like Sandys, Lorca alleges that the Altria defendants breached their fiduciary duties to the company by entering the \$12.8 billion JUUL investment despite knowing that JUUL faced significant financial and legal risks. Id. ¶¶ 48-63. Lorca similarly alleges that the Altria defendants participated in anticompetitive behavior with JUUL, id. ¶¶ 64- false and unlawful practice of marketing its products to youth, id. ¶¶ 42-47.

In addition to the above, Lorca adds that the Altria defendants made various Id. ¶¶ 5, 36. According to Lorca, the Altria defendants claimed that the JUUL inves mission to switch adult smokers to e-

Id. ¶ 5. Lorca details the various statements at issue, id. ¶¶ 73-106, as well as why they were improper, id. ¶ 107. II. The Instant Motions

On November 16, 2020, the court related Lorca to Sandys and ordered the former reassigned to the u docket. 20-cv-5480, Dkt. 55. Prior to that decision, on October 27, 2020, plaintiffs filed the instant motions to consolidate these actions under Rule 42(a) and authority, - For whatever reason, plaintiffs refiled this motion in only the Sandys action on November 16, 2020.

On November 10, 2020, the Altria defendants filed the instant motion to transfer both Lorca and Sandys to the East -cv- 5480, Dkt. 51 (motion attaching original opening brief); 20-5480, Dkt. 53-1 (November 13, 2020 opening brief errata); 20-6041, Dkt. 32 (motion attaching opening brief); 20-6041, Dkt. 34 (November 13, 2020 opening brief errata). JUUL and Burns joined motion in its entirety. Pritzker and Valani III. Related Litigation in Virginia and California

On October 1, 2020, a third Altria shareholder, plai a derivative action against the Altria defendants, JUUL, Burns, and other defendants ( ) in the Eastern District of Virginia. Judge David J. Novak presides over that action, which is captioned Gilbert v. Gifford, et. al., No. 20-cv- 00772-DJN (E.D.



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Va.). Like plaintiffs, Gilbert alleges breach of fiduciary duty claims against the Altria defendants as well as aiding and abetting claims against JUUL and Burns. The court will detail the complaint in Gilbert as necessary in its analysis below.

On October 27, 2020, Gilbert and the appearing parties filed a joint motion to stay

against Altria alleging violations of the federal securities laws. 20-cv-00772-DJN (E.D. Va), Dkt. 4 ¶. Judge Novak also presides over that federal securities action, which is captioned Klein v. Altria Group, Inc., et. al., No. 20-cv-00075-DJN (E.D. Va.).

When filing their joint motion, the parties in Gilbert identified a fourth derivative

Cohen v. Willard, et. al., No. CL20-7051 (Va. Cir. Ct. Henrico Cty.). Based on that motion, it appears that state court stayed Cohen. The court need not detail Cohen to decide the instant motion to transfer.

On October 29, 2020, Judge Novak entered a docket order in the Gilbert action stating the following in relevant part:

This case is hereby STAYED pending resolution of the defendants' motion to dismiss in Klein. Within thirty (30) days of final resolution of the motion to dismiss in Klein, the parties

shall submit a proposed schedule to the Court regarding the filing of any amended complaint, any responses thereto and the status of the Board's inquiry into the allegations contained in Plaintiff's demand. 20-cv-00772-DJN (E.D. Va), Dkt. 10. On March 12, 2021, Judge Novak filed an order in Klein largely denying the above-referenced motions to dismiss. 20-cv-00075-DJN (E.D. Va.), Dkt. 139.

Separate from the Virginia actions, JUUL, Altria, and various individuals associated with each entity have faced significant litigation across the country concerning ucts. In this district, Judge William Orrick presides over two actions relevant to the instant motion to transfer namely (1) a multidistrict litigation action captioned In re Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation, No. 19-md-02913-WHO (N.D. Cal); and (2) a related antitrust action In re Juul Labs, Inc. Antitrust Litigation, No. 20-cv-02345-WHO (N.D. Cal.). Further, in Los Angeles County Superior Court, Judge Ann I. Jones presides over a California Judicial Council C See 19-02913, Dkt. 1154 at 2 (In re JUUL November 18, 2020 joint CMC statement detailing the same Id. at 6-7; 20-cv- 5480, Dkt. 64 ; 20- cv-5480, Dkt. 6

The court will detail the above actions as necessary in its analysis below.

DISCUSSION I. Motion to Consolidate



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A court may consolidate multiple actions on its docket if such actions involve a common question of law or fact. Fed. R. Civ. Pro. 42(a)(2). *A. J. Indus., Inc. v. U.S. Dist. Ct. for Cent. Dist. of California*, 503 F.2d 384, 389 (9th Cir. 1974).

Both Sandys and Lorca assert claims for breach of fiduciary duty against the Altria defendants and claims for aiding and abetting such breach against the JUUL defendants. Compare Sandys Compl. ¶¶ 124-31 with Lorca Compl. ¶¶ 124-32. Both sets of claims rest on Virginia law. *Id.* Further, the breach of fiduciary duty claims in both actions

attempt to hold the Altria defendants liable for entering into the JUUL investment despite knowing that JUUL faced significant financial and legal risks. Compare Sandys Compl. ¶¶ 9-11, 62-72 with Lorca Compl. ¶¶ 48-63. They also rest on similar allegations that the Altria defendants participated in anticompetitive behavior and wrongfully acquiesced in Compare Sandys Compl. ¶¶ 11, 73-91, 93-109 with Lorca Compl. ¶¶ 42-47, 64-72. Separately, all answering parties agree that consolidation is proper. Dkt. 46 at 7-8; Dkt. 53-1 at 13; Dkt. 54 at 2.

Given the above, the court will consolidate Sandys and Lorca. II. Motion to Transfer or, Alternatively, Stay

Title 28 U.S.C. § 1404(a) provides the following in relevant part:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. 28 U.S.C. § 1404(a).

A court may transfer an action under § 1404(a) only if it makes two findings. First, is one that might have been brought in the *Thermolife Int'l, LLC v. Vital Pharm., Inc.*, 2014 WL 12235190, at \*2 (C.D. Cal. Aug. 15, 2014). the convenience of the parties and the interest of justice *Id.*

The party moving for transfer bears the burden of showing that the requested transfer is proper. *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, 2013 WL 5273088, at \*4 (N.D. Cal. Sept. 17, 2013). Courts have broad discretion when adjudicating motions to transfer. *Ctr. for Biological Diversity v. Kempthorne*, 2008 WL 453043, at \*2 (N.D. Cal. Oct. 10, 2008).

For the reasons provided below, the court finds that the Altria defendants have demonstrated that transfer is proper.

A. Plaintiffs Could Have Filed This Action in the Eastern District of

Virginia Title 28 U.S.C. § 1401 serves as the venue statute for shareholder derivative suits

brought in federal court. It provides that:



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Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants. 28 U.S.C. § 1401. civil action may be brought in

a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated. 28 U.S.C. § 1391(b)(2).

The court finds that plaintiffs might have brought this consolidated action in the Eastern District of Virginia. A and its management considered, made, and

implemented , Virginia headquarters. Dkt. 51-1 ¶¶ 5-9. Willard and Gifford both work in the headquarters and participated in that decision. Id. ¶ 6. Given that decision to invest in JUUL serves as part of the events giving rise to claims occurred in Richmond.

However, whether plaintiffs could have brought their claims for aiding and abetting the above-referenced breaches of fiduciary duty against the JUUL defendants in the Eastern District of Virginia is a closer question. By virtue of their joinder to to transfer, JUUL and Burns have consented (and, presumably, would have consented)

to that court exercising personal jurisdiction over them. That leaves Pritzker and Valani.

Both of these defendants have appeared in this action. Dkt. 44 (Pritzker waiver of service); Dkt. 45 (Valani waiver of service); Dkt. 59 (signed ). Despite that, neither defendant filed any indication of its position on the requested transfer. In its opposition, plaintiffs fail to address whether the Eastern District of Virginia could, in the first instance, even exercise personal jurisdiction over these defendants. Instead,

be a proper venue for the prosecution of the derivative

According to plaintiffs, both these defendants took on additional roles, including actively managing JUUL and leading CEO). Sandys Compl. ¶ 110. Burns (a California resident, id. ¶ 27) is named as a defendant for his role in purportedly aiding and abetting the alleged breaches of fiduciary duties at issue in Gilbert. Thus, it appears that Pritzker and Valani are similarly situated to Burns for purposes of a personal jurisdiction analysis. Given that, the court finds that the claims for aiding and abetting against Prizker and Valani could also have been brought in the Eastern District of Virginia. The court adds that this conclusion is particularly appropriate where, as here, Pritzker and Valani both chose not to object to the motion to transfer on grounds of personal jurisdiction (or otherwise).

In light of the above, the court concludes that plaintiffs may have brought this consolidated action in



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the Eastern District of Virginia.

B. The Interest of Justice and Convenience Factors Favor Transfer By its text, title 28 U.S.C. § 1404(a) identifies three types of concerns as relevant to a court's discretionary transfer determination: (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interest of justice. 28 U.S.C. § 1404(a). When analyzing those concerns, the Ninth Circuit has instructed district courts to consider various non-exhaustive factors. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). In relevant part, such factors include the following:

1. The plaintiff's chosen forum.
2. The parties' contacts with the forum.
3. The contacts relating to the claims in the chosen forum.
4. The differences in litigation costs between the two forums.
5. The ease of access to sources of proof.
6. The judicial district that is most familiar with the governing law.

Id.

Further, the Ninth Circuit has also characterized the possible consolidation of *A. J. Indus., Inc.*, 503 F.2d at 389 The feasibility of consolidation is a significant factor in a

transfer decision . *Ctr. for Biological Diversity*, 2013 WL 5273088 at \*4.

For the reasons provided below, the court finds that the above factors clearly favor transfer to the Eastern District of Virginia.

1. Gilbert Appears Feasible As previously mentioned, there are two actions pending in Virginia that assert derivative claims against the Altria defendants, namely *Gilbert v. Gifford, et. al.*, No. 3:20-cv-0772 (E.D. Va.) and *Cohen v. Willard, et. al.*, No. CL-20-7061 (Va. Cir. Ct. Henrico Cty). The Altria defendants argue that Gilbert a -1 at 17. Plaintiffs do not disagree.

The court reviewed the complaint in *Gilbert*. In it, Gilbert appears to allege three principal theories in support of his breach of fiduciary duty claims against the Altria defendants. 20-cv-0772, Dkt. 1 (*Gilbert Compl.*) ¶¶ 223-26. First, Gilbert alleges that the Altria defendants violated their duty of good faith to the company by recommending investment in JUUL in the face of known risks. *Id.* ¶¶ 140, 143-51. Second, Gilbert

xposed Altria *Id.* ¶¶ 141, 152-58. Third, Gilbert alleges that the Altria defendants wrongfully exposed Altria to liability by engaging in unfair trade practices with JUUL. *Id.* ¶¶ 142, 170-84.

Gilbert further adds that the Altria defendants made false and misleading statements similar to those identified by Lorca in her complaint. Compare *Id.* ¶¶ 186-218 with *Lorca Compl.* ¶¶ 73-107. Lastly, Gilbert also alleges an ancillary claim for aiding and abetting the above-referenced breaches of fiduciary duty against JUUL, Burns, and other JUUL directors and officers. *Gilbert Compl.* ¶¶ 232-36. The court notes, however, that these JUUL defendants do not include Valani and Pritzker. *Id.* ¶¶



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23-43 (listing

defendants).

Based on the above-identified similarities between Gilbert and the instant action, the court finds it possible that, if transferred to the Eastern District of Virginia, Judge Novak would consolidate this action with Gilbert.

2. The Relevant Jones Factors Cut in Favor of Transfer The court also finds that the relevant Jones factors cut in favor of transfer.

a. Plaintiffs Choice of Forum Is Entitled to Little Weight Plaintiffs are correct that, in the ordinary course, their choice of forum is entitled to deference. Dkt. 62 at 18-19. However, as the Altria defendants point out, the instant action is not ordinary. Dkt. 53-1 at 16. Rather, it is a derivative action brought on behalf of Altria for purported harms that the company suffered as a result of the alleged breaches of fiduciary duties.

The Ninth Circuit has ruled th hen an individual brings a derivative suit or represents a class, the named plaintiff's choice of forum is given less weight. *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). The Ninth Circuit has also explained that judging the weight to be accorded [ ] choice of forum, consideration must be given to the extent of both and contacts with the forum, including those relating to cause of action. . . . If the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter, choice is entitled to only minimal consideration. *Id.*

In their complaints, neither plaintiff alleges any contact with California. Given that Sandys is an Ohio resident, Sandys Compl. ¶ 24, and Lorca is a Florida resident, Lorca Compl. ¶ 19, the court will infer that neither plaintiff, in fact, had any such contact. While Sandys does allege at least some part of the JUUL investment negotiations occurred in San Francisco, such contact appears vague. Sandys several, negotiation sessions were conducted in San Francisco, California . . . Willard, at least on one instance, visited JUUL headquarters in San Francisco . . . in conduct underlying this litigation . . . Gifford . . . attended JUUL Board meetings in San Francisco .

. . Willard and Gifford both communicated with JUUL Defendant when JUUL Defendants real party in interest preference for litigating this action in its home state of Virginia, Dkt. 53-1 at 16, the court finds such contacts insufficient to warrant deference forum. 1

b. The Convenience-Related Factors Favor Transfer In his declaration, Bryant identifies over a dozen Altria personnel who both participated in decision to invest in JUUL and reside or work in Virginia. Dkt. 51-1 ¶¶ 6-9. That decision is at the core of .





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Given the ion, the court finds that the requested transfer would improve access to the relevant proof and likely decrease litigation costs. 2

at finding. First, plaintiffs insistently cite the JUUL actions pending in this district to support its argument that California is the more convenient forum. Dkt. 62 at 19-20. However, when making that argument, plaintiffs fail to explain how or why the discovery presently underway in either action could be used in the instant derivative action to streamline proof issues and mitigate costs. In any event, even if plaintiffs had, the JUUL actions in this district are before Judge Orrick, not the undersigned. MDL. Thus, to the extent there could be any cost savings by keeping this action in this district, the court cannot see how, in practice, they would be realized.

1 T uthority to support the contention that a company must formally adopt such a bylaw to express a cognizable interest in its preferred place of litigation. 2 The court agrees with plaintiffs that the location of documents is a nullity. Defendants (and their counsel) are more than technically capable of electronically processing documents for transfer to anywhere in the world.

Second, plaintiffs argue that the convenience factor cuts against transfer because some of the JUUL defendants reside in California. Dkt. 62 at 19. That argument gets it backwards. The instant consolidated action principally alleges breach of fiduciary duty claims against the Altria defendants. Indeed, to maintain its aiding and abetting claim against the JUUL defendants (to the extent that claim is even cognizable under Virginia law), plaintiff must first show a predicate breach of a fiduciary duty by the Altria defendants. Thus, it appears that most factual development (if any) in this action will focus on the Altria defendants, not their JUUL counterparts. Given that, the court will assign more convenience value to their preferred place of litigation.

In any event, by virtue of their joinder to the instant motion to transfer, neither

outside California. Given that neither plaintiff is a California resident, the court finds the same with respect to them. In light of the above, the court concludes that the convenience factors favor transfer to the Eastern District of Virginia.

c. The Eastern District of Virginia Is More Familiar with the

Applicable Corporate Law In their respective complaints, plaintiffs allege their breach of fiduciary duty claims under Virginia law. Sandys Compl. ¶¶ 36-38; Lorca Compl. ¶ 121 (citing demand letter since Altria is incorporated in Virginia, Virginia's laws regarding shareholder litigation demands and derivative actions apply to the Board. plaintiff indicates in their complaint that their aiding and abetting claims rest on California law. Thus, Virginia law appears to control this consolidated action in its entirety.

While this court is more than capable of interpreting and applying Virginia law, the Eastern District



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of Virginia plainly has more familiarity with its own substantive law. Accordingly, the court finds that this remaining Jones factor cuts in favor of transfer.

3. Local Interest Cuts in Favor of Transfer Both California and Virginia have an interest in the substance of this litigation. As plaintiff cites throughout its opposition, Dkt. 62 at 14-15, Judge Orrick is presently

handling a complex multidistrict litigation action brought by over a thousand plaintiffs alleging claims against JUUL, Altria, and others for unlawful business practices premised on intentional youth marketing or negligent In re JUUL Labs, Inc., Mktg., Sales Practices, & Prod. Liab. Litig., -- F.Supp. 3d --, 2020 WL 6271173, at \*7 (N.D. Cal. Oct. 23, 2020). Judge Orrick also presides over a related consolidated antitrust action, In re Juul Labs, Inc. Antitrust Litigation, No. 20-cv-02345-WHO (N.D. Cal.). That said, the primary focus of both litigations appears to be on JUUL, which, at , was a Delaware corporation with its principal place of business in San Francisco.

Altria, on the other hand, is a Virginia corporation with its principal place of business in Virginia. Sandys com Altria. Moreover, the Altria defendants proffered evidence showing that the decisions adquarters in Richmond. Dkt. 51-1 ¶¶ 5-14. Given the above, the court finds that this final factor cuts in favor of transfer. 3

\*\*\* For the above reasons, the court will transfer this consolidated action to the Division. Given that decision, the court need not decide the motion to stay. Because the court will no longer

determination. Accordingly, the court denies both remaining motions without prejudice.

CONCLUSION For the above reasons, the court GRANTS Sandys and Lorca. 20-cv-5480, Dkt. 46; 20-cv-5480, Dkt. 56; 20-cv-6041, Dkt. 31. The court

3 The court finds that the relative docket congestion factor does not cut for or against transfer. Both districts are busy.

also DENIES . Id. Further, the court GRANTS and DENIES their alternative request to stay the instant litigation. 20-cv-5480, Dkt. 51; 20-cv-6041, Dkt. 32. The court directs the clerk to consolidate and then transfer this action to the United States District Court for the

IT IS SO ORDERED. Dated: March 22, 2021

/s/ Phyllis J. Hamilton PHYLLIS J. HAMILTON United States District Judge

