BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re: USPLABS DIETARY SUPPLMENT LITIGATION	)	**MDL DOCKET No. 2523**

PLAINTIFFS MICHAEL CAMPOS, AND JENNIFER SOUTHWICK'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR TRANSFER PURSUANT TO 28 U.S.C. § 1407[1]

I. INTRODUCTION

Defendant USPLabs, LLC ("USP"), seeks transfer of three putative class actions. As a threshold matter, there are only a small number of manageable *consumer* class actions – three total – filed against USP. This small number of cases does not warrant consolidation.

Furthermore, the problem in applying Section 1407 here is that the individual rather than common factual questions predominate. As a number of cases make clear, if the common questions are purely legal in nature, the statutory requirement for transfer is not satisfied since Section 1407 only refers to "common questions of fact." *In re American Home Products Corp.*, 448 F.Supp. 276, 278 (J.P.M.T. 1977). Here, Defendant seeks to transfer these consumer class actions to venues where personal injury cases are being litigated against USP. In other words, Defendant seeks to unnecessarily lump in these consumer class actions with personal injury cases for its convenience. However, these consumer class actions involve *completely different*

[1] Counsel represents the interests of Plaintiffs Campos and Southwick in *Campos, et al. v. USPLabs, LLC, GNC Corporation*, USCD, Central District of California No. 13-cv62891.

claims, facts, and legal issues largely because none of them assert personal injury claims. Rather, they challenge the advertising of USP's products.

As a result of this distinction, the discovery required for the putative consumer class actions would significantly differ from the personal injury cases. As Defendant itself acknowledges, the personal injury cases will involve factual issues of "biology, toxicity, and physiology." Defendant's Motion to Transfer, Dkt. #6, p.7. In addition, the personal injury cases will have to deal with prior medical histories, voluminous individualized medical records, specific medical causation issues, and the injury to the families/survivors. The consumer class actions, on the other hand, will not have to deal with medical histories, and evidence related to biology, toxicity, and physiology. Rather, the discovery and evidence will be focused on whether the products' advertising was "likely to mislead" the public.

Moreover, the parties and witnesses will be completely different with almost no overlap. While the personal injury cases will require witnesses to testify about the physical effect of the USP's products, the consumer class actions need no such testimony. In fact, such testimony will only complicate our case because it could result in purported "individual issues" of injury that could destroy a class action.

The consumer class actions should not be consolidated with the personal injury actions. This transfer would massively complicate discovery, pre-trial proceedings, expert witness selection, class notice, and nearly every aspect of the case.

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II. ARGUMENT

A. The Standard on a Motion to Transfer

"In motions to transfer venue, there is a strong presumption in favor of plaintiff's choice of forum." *Royal Queentex Enterprises v. Sara Lee Corp.*, 2000 U.S. Dist. LEXIS 10139 at *9 (N.D. Cal. March 1, 2000) (Jenkins, J.). "A plaintiff's choice of forum is accorded substantial weight in proceedings under § 1404(a) (so-called 'home turf' rule). Courts generally will not order a transfer unless the 'convenience' and 'justice' factors . . . strongly favor venue elsewhere." Schwarzer, Tashima, and Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial (The Rutter Group, 2002) ¶ 4:281.

On a Rule 1404(a) motion to transfer, the defendant bears the burden of overcoming the presumption in favor of plaintiff's choice of venue by demonstrating that the balance of inconveniences substantially weighs in favor of transfer. *Royal Queentex*, at *9-10. The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum. *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834 (9th Cir. 1986). "Where transfer would merely 'shift' the inconvenience from one party to another, it should not be granted." *Royal Queentex Enterprises*, at * 21. This court should deny the motion to transfer because the defendant has failed to demonstrate that the balance of inconvenience "strongly" and "substantially" weighs in favor of transfer. At most, the record shows that the transfer would "shift" the inconvenience from the defendant to the plaintiffs.

B. Transfer of the Related Actions Will Not Further the Goals Of Section 1407

1. While there may be some common questions of fact, there are little to no common questions of law, and the common questions do not predominate.

The presumption in favor of the plaintiffs' choice of forum is even stronger considering this case is a class action. It is a cornerstone of class action jurisprudence that absent class members have a due process right to have their claims governing by the state law applicable to their dispute. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985) (court "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law'"); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3rd Cir. 1996) (court must apply an individualized choice of law analysis to each plaintiffs' claims) (citing *Shutts*, 472 U.S. at 823).

C. Only A Small Number Of Actions Are Pending On Very Straightforward Factual Issues

When only a small number of actions are pending, a single judicial determination will not represent a significant savings in time and resources for the courts and litigants. Here, there are only three consumer class actions against USP pending. The cases in Pennsylvania and Texas, the two venues where Defendant seeks to transfer this case, are expressly personal injury cases where Plaintiffs have alleged Defendant's products caused the Plaintiffs' to die. Those cases present uniquely complex issues that simply do not exist in the consumer class actions against USP. The issues presented in the consumer class action cases are straightforward and not very complex. *In re Boeing Company Employment Practices Litigation*, 293 F.Supp.2d 1382 (J.P.M.L. 2003) (in the face of "minimal" number of actions (3), moving party failed to show existence of sufficient common questions such that transfer "necessarily" would serve the convenience of the parties or just an efficient conduct of litigation); *In re Hamilton Bank Secs. Litigation*, 438 F.Supp. 940 (J.P.M.L. 1977) (denying coordination because there were only three actions in two districts); *In re Dow Chemical Company "Polystyrene Foam" Products Liability*

Litigation, 429 F.Supp. 1035 (J.P.M.T. 1977) (transfer denied -- only four actions); *In re BP Products North America Inc., Anti-trust Litigation*, 560 F.Supp.2d 1377 (U.S.J.P.M.L. 2008) (proponents of centralization failed to convince court that common questions of fact were sufficiently complex or numerous enough to justify § 1407 transfer).

The three consumer class actions generally allege that the Defendants falsely market their products to consumers as safe and effective supplements to promote weight loss and energy health, which Plaintiffs claim is deceptive under various consumer law statutes. These facts, while contested, are not particularly complex or difficult to adjudicate. Because there are only three actions which the moving party seeks to coordinate, coordination under § 1407 is entirely inconsistent with the intent of Congress in passing the Multidistrict Litigation statute. House Rep. No. 1130, 90th Cong., 2d Ses. 4, reprinted in 1968 U.S. Code Cong. and Admin. News, pp. 1898, 1991 ("it is possible … that a few ***exceptional cases*** may share ***unusually complex questions of fact***, or that many complex cases may share a few questions of fact. In either of these instances substantial benefit may accrue to courts and litigations through consolidated or coordinated pretrial proceedings.").

D. Consolidation Would Massively Complicate Discovery

As explained above, Defendant seeks to consolidate the consumer class actions with other personal injury and wrongful death cases, despite the plain reality that none of the consumer class actions have asserted personal injury causes of action. Consolidation would not promote efficiency or conserve judicial resources here because the discovery would not be duplicative or overlapping. The discovery in the personal injury cases will focus on the medical histories, individualized medical records, specific medical causation issues, and the injury or death of the plaintiffs. These plaintiffs will likely hire experts focused on medical issues and the

measurement of non-economic damages. In addition, these cases will require testimony and witnesses regarding the effect of Defendant's products on the individual plaintiffs.

The consumer class actions will not need this type discovery. For example, Plaintiffs here will not need an expert on non-economic damages because they are not requesting any. Plaintiffs are simply seeking a refund on their purchases. The discovery here will be much more limited since it will not include an examination of the medical histories of the Plaintiffs or the class members. Rather, the focus of discovery in these cases will be whether or not Defendant's advertising was likely to mislead and deceive consumers, and Defendant's knowledge of the hazardous nature of their products.

The type of discovery in personal injury cases is not only distinct from the discovery in consumer class action but is actually counterproductive to this case. For example, the discovery related to individual medical injuries may only undermine the claims in the consumer class actions since Defendant may claim this generates "individualized" issues, even though Plaintiffs' claims do not require that each class member show individualized proof of deception, reliance and injury. *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

III. CONCLUSION

Defendant has not met its burden to transfer this consumer class action alleging, in part, *state* claims on behalf of a *California* class to a completely foreign venue that is adjudicating unique personal injury claims. There are little to no overlapping legal issues since Plaintiffs claims are limited to false advertising and consumer protection laws, not personal injury statutes. As such, the discovery required for these cases will not be duplicative since discovery for the consumer class actions will be much more limited and focused on the nature of the advertising, not medical histories or injuries suffered by the Plaintiffs. In light of these distinctions, and

strong presumption in favor of the plaintiffs' choice of forum particularly in a class action, transfer under Section 1407 is improper.

Respectfully submitted, this 16th day of January, 2014.

By: */s/Aashish Y. Desai*

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CF/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 16, 2014.

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