

**BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

In re Testofen Marketing and Sales)
Practices Litigation)
_____)

MDL Docket No.

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TRANSFER
OF ACTION PURSUANT TO 28 U.S.C. § 1407**

I. BACKGROUND OF THE LITIGATION

A. Testofen and “Testosterone Boosters”

Defendants Gencor Nutrients, Inc. and GE Nutrients, Inc. (collectively, “Gencor”) manufacture and sell Testofen, an extract of the herb fenugreek. The name, Testofen, is an amalgamation of the words “testosterone” and “fenugreek.” Gencor claims that Testofen has been “clinically proven” to increase free testosterone levels, and sells Testofen to manufacturers of nutritional supplements for inclusion in their products, which are marketed and sold as clinically-proven “testosterone boosters,” based on the inclusion of Testofen.

The claim that Testofen has been clinically proven to increase free testosterone levels is based on the results of a single study, conducted in India, which has never been published (the “Testofen Study”).¹ Counsel for plaintiffs in *Ryan, et al. v. Gencor Nutrients, Inc., et al.*, Northern District of California Case No. 1:14-cv-05682 (“*Ryan*”) obtained the protocol, raw data, and unpublished manuscript of the Testofen Study. *Ryan* plaintiffs’ counsel provided these materials to Nicholas Jewell, a Professor of Biostatistics at the University of California, Berkeley,² to determine whether Testofen has been clinically proven to increase free testosterone levels. Professor Jewell summarized his conclusions as follows:

According to the Protocol, determining the effect of Testofen on free testosterone levels was not the primary objective of the Study, and change in free testosterone levels was not included as one of at least twelve primary outcome variables, but rather one of at least three secondary outcome variables. Under universally accepted principles of statistical analysis, the threshold for statistical significance must be adjusted upward to reflect this multiplicity of comparisons. ***After making required adjustments, the results are not statistically significant with regard to free testosterone as claimed, regardless of the particular method of adjustment employed. Accordingly, the Claim is false.***

¹ An *unpublished* version of the Testofen Study, made available by Gencor on its website, is attached hereto as Exhibit A.

² Professor Jewell is the author of the textbook “Statistics for Epidemiology” (Chapman and Hall, New York 2003), as well as approximately 160 peer-reviewed articles in the field of biostatistics, and recently served as Chair of the Section on Statistics in Epidemiology of the American Statistical Association (2009-2012). See Exhibit B hereto, ¶¶ 1-4.

Exhibit B hereto, ¶ 8 (emphasis added).

At least 22 products containing Testofen are labeled, marketed, and sold as clinically-proven testosterone boosters. Nineteen of these products are marketed and sold by defendants General Nutrition Corporation, GNC Corporation, General Nutrition Centers, Inc., and S&G Properties, LLC (collectively, “GNC”). These products are manufactured by ten defendants, as follows:

- Nugenix – manufactured by defendant Direct Digital LLC
- Test X180, Test X180 Alpha, Test X180 Ignite, and Stack Factor 2 With Test X180 – manufactured by defendant Force Factor LLC
- High T, High T Senior, High T Black, and High T Black Caffeine Free – manufactured by defendant KingFisher Media, LLC
- Troxyphen and Troxyphen Elite – manufactured by defendant Truderma, LLC
- Ageless Male – manufactured by defendant NAC Marketing Company, LLC
- Mdrive and Mdrive Elite – manufactured by defendant DreamBrands, Inc.
- Test Freak – manufactured by defendant Pharmafreak Holdings, Inc.
- PMD N-TEST 600 and PMD Flex Stack – manufactured by defendant NDS Nutrition Products, Inc.
- NO2 Red Test – manufactured by Medical Research Institute, Inc. (“MRI”)³
- Ultra T Gold – manufactured by defendant Prevention, LLC⁴

³ Subsequent to the filing of the Complaint, *Ryan* plaintiffs discovered that MRI is a debtor in a Chapter 11 bankruptcy case, *In re Leaf123, Inc. (f/k/a Natrol, Inc.), et al.*, Bankr. D. Del. Case No. 14-11446 (BLS), and that the sale of substantially all of MRI’s assets, free and clear of liens, claims, encumbrances and interests, was completed on December 4, 2014. Accordingly, pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, *Ryan* has been dismissed as against MRI only, without prejudice. *See Ryan* Docket Sheet.

⁴ Prevention, LLC also manufactures and sells two of the remaining three products containing Testofen, Vitali-T-Aid and Vitali-T-Aid Energy, which it sells online and through retailers other than GNC. The last of the 22 products, Testoril, manufactured by defendant Premium Nutraceuticals, LLC, is sold on the website www.testoril.com and through retailers other than GNC.

The manufacturers also market and sell these products on their respective websites, such as www.nugenix.com and www.forcefactor.com.

B. The Litigation

1. Ryan v. Gencor Nutrients, Inc.

On December 31, 2014, plaintiffs Michael Ryan, Marco Garza, Michael Aguero, Odell Cowans, Brett Erion, Russ Ruhnke, Thomas Korves, Luis Flores, Steven Berger, Eligio Torres, and Robert Baker filed *Ryan, et al. v. Gencor Nutrients, Inc., et al.*, Northern District of California Case No. 1:14-cv-05682, naming Gencor, its principal,⁵ GNC, and the manufacturers, including Force Factor LLC (“Force Factor”) as defendants. *Ryan* Complaint ¶¶ 20-40. Nine of the eleven plaintiffs are residents of California,⁶ with three residing in the Northern District.⁷ Defendants Gencor Nutrients, Inc., GE Nutrients, Inc., Jith Veeraalli, and Prevention, LLC are also located in California. *Ryan* Complaint ¶¶ 20-22, 39.

All of the claims asserted in *Ryan*, against all of the defendants, proceed from the same factual premise: that the representation that Testofen has been clinically proven to increase free testosterone levels is false. The complaint identifies the specific misrepresentations made by each of the defendants concerning the products at issue, contained on the product labeling, packaging, the manufacturers’ websites, and GNC’s websites. *Ryan* Complaint ¶¶ 108-158, 193-204.⁸

⁵ Jith Veeravalli.

⁶ Plaintiffs Ryan, Garza, Aguero, Cowans, Erion, Ruhnke, Korves, Flores, and Berger. *Ryan* Complaint ¶¶ 9-17. The remaining plaintiffs are residents of Arizona (Eligio Torres) and Pennsylvania (Robert Baker). *Ryan* Complaint ¶¶ 18-19.

⁷ Plaintiffs Ryan, Garza, and Flores. *Ryan* Complaint ¶¶ 9-10, 16.

⁸ The *Ryan* complaint includes 122 Exhibits spanning 428 pages. In keeping with the Panel’s admonition that “[e]xcessive exhibits are not helpful and generally do little to assist the Panel in ruling on a motion for transfer” (Checklist for Filing a New MDL Motion), only those exhibits directly relevant to the instant motion are attached.

As to the products manufactured by Force Factor, the *Ryan* complaint identifies the following misrepresentations on the label and packaging for Test X180 (attached hereto as Exhibit C):

How do you safely increase testosterone levels? Well-researched ingredients are the answer, which is why the experts at Force Factor formulated Test X180 with premium, clinically supported compounds like Testofen. There's no reason to take a chance on unsafe, sketchy supplements. The ingredients in our proprietary blend are substantiated with rigorous research and hard, scientific facts – the same smart science behind the entire line of Force Factor products.

The experts at Force Factor carefully formulated Test X180 to provide the boost that every man needs. By naturally raising your levels of free testosterone

Each serving of Test X180 contains clinically researched levels of Testofen Testofen is the well-known, effective compound your body needs to combat natural testosterone decline.

There's no need to take a chance on your health with untested, risky ingredients. Look and feel confident while you perform at your peak with the trusted ingredients in Test X180.

Ryan Complaint ¶¶ 127-28.⁹

The *Ryan* Complaint identifies the misrepresentations made on the www.forcefactor.com website, which contains the same representations regarding Test X180, Test X180 Alpha, and Test X180 Ignite, and states that:

You're probably asking: "How do I safely increase my testosterone levels?" Well-researched natural testosterone boosters are the answer. That's how the experts at Force Factor formulated Test X180 – with premium, clinically supported compounds like

⁹ The *Ryan* Complaint identifies similar misrepresentations on the label and packaging for Test X180 Alpha (attached hereto as Exhibit D), which call the product "THE PREFERRED TESTOSTERONE BOOSTER OF ELITE MEN;" state that "the natural ingredient Testofen is clinically demonstrated to raise your body's free testosterone levels;" and state that "The Force Factor team perfected the Test X180 Alpha formula with one of the only natural ingredients clinically demonstrated to increase free testosterone levels: Testofen." *Ryan* Complaint ¶ 129. The label and packaging for Test X180 Ignite (attached hereto as Exhibit E) similarly states that the product "was developed to be the ultimate all-in-one free testosterone booster, using safe, trusted ingredients backed by real science. Test X180 Ignite is fueled by Testofen" *Ryan* Complaint ¶ 129. The packaging for Stack Factor 2 With Test X180 states that "[t]he main ingredient, Testofen, is the only natural compound that has been clinically demonstrated to increase free testosterone levels" *Ryan* Complaint ¶ 281.

Testofen that will pump up your testosterone to superhero levels as part of your workout routine.

Test X180 is backed by smart science, not fly-by-night sketchy “science.” There’s no reason to risk your health and your life with disreputable natural solutions. It’s just not worth it.

NATURAL TESTOSTERONE BOOSTER CLINICALLY RESEARCHED INGREDIENTS

HOW TEST X180 WORKS

When taken along with regular exercise, Test X180 works with your body to naturally raise your levels of free testosterone. It doesn’t contain any mysterious substances – only premium, rigorously researched, natural ingredients.

STEP ONE

Test X180 permeates the bloodstream

STEP TWO

Testofen goes to work raising your levels of free testosterone.

SERIOUSLY POWERFUL INGREDIENTS

The ingredients in our proprietary blend are substantiated with rigorous research and hard, scientific facts.

TESTOFEN

This clinically researched natural fenugreek seed extract has been shown to help men add hard, sculpted muscle to their bodies by increasing their levels of free testosterone safely and effectively.

Ryan Complaint ¶ 130.

Based on these misrepresentations, and similar misrepresentations made by the other manufacturers, Gencor, and GNC, *Ryan* asserts claims under the Racketeer Influenced and Corrupt Organizations Act, California’s Consumer Legal Remedies Act, California’s Unfair Competition Law, California’s False Advertising Law,¹⁰ and for breach of express warranty, breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, fraud, negligent misrepresentation, and restitution. *Ryan* Complaint ¶¶ 267-370. These claims are asserted on behalf of a national class, as well as product-specific subclasses, including a Test X180 Subclass, defined as “as all persons who purchased Test X180,

¹⁰ In the alternative, *Ryan* asserts claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law on behalf of a Pennsylvania Subclass, based on plaintiff Baker’s purchases in that state, and under the Arizona Consumer Fraud Act on behalf of an Arizona Subclass, based on plaintiff Torres’ purchases in that state. *Ryan* Complaint ¶¶ 256-57, 371-92.

Test X180 Alpha, Test X180 Ignite, or Stack Factor 2 With Test X180.” *Id.* ¶ 248. Plaintiffs Ryan and Aguero purchased these products in the State of California. *Id.* ¶¶ 223, 226.

2. *Camey v. Force Factor LLC*

On December 23, 2013, plaintiffs Daniel Camey and Raymond Alvandi filed *Camey, et al. v. Force Factor, LLC*, District of Massachusetts Case No. 1:14-14717 (“*Camey*”). Both of the plaintiffs are California residents, and purchased the products at issue in California. *Camey* Complaint ¶¶ 6-7. The action is brought on behalf of a national class and a California subclass. *Id.* ¶¶ 91-92. The defendant is headquartered in Massachusetts. *Id.* ¶ 8. One of the law firms representing the plaintiffs is also located in California. *Id.* at 50.

The claims asserted in *Camey* proceed from exactly the same factual premise as the claims asserted in *Ryan*: that the representation that Testofen has been clinically proven to increase free testosterone levels is false.¹¹ The claims asserted against Force Factor in *Camey* are based on the same misrepresentations, contained on the same product packaging and websites, as the claims asserted against Force Factor in *Ryan*. *See, e.g.,* *Camey* Complaint ¶¶ 36-37 (misrepresentations on Test X180 label), ¶ 38 (misrepresentations on Test X180 Ignite label), ¶ 39 (misrepresentations on Test X180 Alpha label), ¶¶ 40-42 (misrepresentations on Force Factor website).¹²

Based on these misrepresentations, *Camey* asserts six of the same claims asserted in *Ryan*, under California’s Consumer Legal Remedies Act, California’s Unfair Competition Law, California’s False Advertising Law, and for breach of express warranty, breach of the implied

¹¹ *See, e.g.,* *Camey* Complaint ¶¶ 2-3 (“Defendant boasts that all of the Test X180 Products contain ‘one of the only natural ingredients clinically demonstrated to increase free testosterone levels: Testofen.’ Defendant’s representations, however, were materially false and misleading when made.”), ¶¶ 30-31 (“The main ingredient in the products is Testofen. In the marketing materials and on the product packaging and labeling, Defendant claims the fenugreek seed extract, Testofen, contained in all three of the Test X180 Products is ‘proven’ and ‘clinically demonstrated’ to increase free testosterone levels.”).

¹² Exhibits A-C to the *Camey* Complaint are the same labels for Test X180, Test X180 Ignite, and Test X180 Alpha attached as Exhibits 19-21 to the *Ryan* Complaint (attached hereto as Exhibits C-E). *See* *Camey* Complaint ¶¶ 36, 38-39.

warranty of merchantability, and unjust enrichment. *Camey* Complaint ¶¶ 120-172. *Camey* also asserts claims under California’s Song-Beverly Consumer Warranty Act, the Magnuson-Moss Warranty Act, the Massachusetts Consumer Protection Act, and, in the alternative, under the consumer fraud laws of the various states. *Id.* ¶¶ 100-119, 173-233.

II. CAMEY SHOULD BE TRANSFERRED TO THE NORTHERN DISTRICT OF CALIFORNIA

Under 28 U.S.C. § 1407:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings . . . for the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions.

These requirements are easily satisfied here.

A. The Actions Involve the Same Questions of Fact

The first requirement for transfer is that the actions “involve one or more common questions of fact.” *Id.* *Ryan* and *Camey* present the same central question of fact, upon which all else depends: whether Testofen has been clinically proven to increase free testosterone levels. This question of biostatistics can have only one correct answer, regardless of the product in which Testofen is included.

The remaining factual questions presented in *Camey* are also present in *Ryan*, the more inclusive action: whether the representations by Force Factor set forth above are false or misleading; whether they caused class members’ damages; and the proper measure thereof. As the actions involve the same questions of fact, transfer is appropriate under 28 U.S.C. § 1407.

B. The Convenience of Parties and Witnesses Favors Centralization in the Northern District of California

The convenience of the parties and witnesses favors the transfer of *Camey* to the Northern District of California. As set forth above, both of the plaintiffs in *Camey*, and nine of the eleven plaintiffs in *Ryan*, are residents of California. *None* are residents of Massachusetts, and only one resides in the eastern United States.

Four of the defendants, including Gencor, the original source of the misrepresentations, are also located in California. Only one of the seventeen defendants, Force Factor, is headquartered in Massachusetts, and another, Direct Digital LLC, maintains an office there. *Camey* asserts four statutory claims against Force Factor under California law, and only one under Massachusetts law. As between the two states, California is more convenient for the parties and witnesses, and the “center of gravity” of the coordinated actions.

Ryan is also the larger and more comprehensive of the two actions, involving 22 products and 17 defendants, while *Camey* involves three products and a single defendant. This factor also favors centralization in the Northern District of California. *See In re Novartis Wage & Hour Litig.*, 460 F. Supp. 2d 1382, 1383 (J.P.M.L. 2006) (transferring to district where pending action “encompasses a broader group of employees”).

In addition, the individual defendant named in *Ryan* – Gencor’s principal, Jith Veeravalli – is a California resident who may not be subject to personal jurisdiction in Massachusetts. *See, e.g., In re Yarn Processing Patent Validity Litig.*, 341 F. Supp. 376, 382 (J.P.M.L. 1972) (transferring to district where important defendant was subject to personal jurisdiction). Centralization in California would also facilitate trial of the action, placing Gencor executives within the reach of a trial subpoena. *See Fed. R. Civ. P. 45(c)(1)(B)* (party’s officers may be subpoenaed to attend trial within state of residence).

III. CONCLUSION

For the foregoing reasons, the plaintiffs in *Ryan* respectfully request that the Panel order *Camey* transferred to the Northern District of California for coordinated or consolidated pretrial proceedings.

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