

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

In re: Target Herbal Supplements Litigation

MDL-_____

**PLAINTIFF MELANIE BARBER’S MEMORANDUM IN SUPPORT OF MOTION FOR
TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT OF CALIFORNIA FOR
CONSOLIDATION OF ALL PRETRIAL PROCEEDINGS PURSUANT TO 28 U.S.C. §
1407**

I. INTRODUCTION

Melanie Barber, Plaintiff in the case *Melanie Barber, individually and on behalf of herself, all others similarly situated, and the general public v. Target Corporation, Inc.*, 3:15-cv-00568 (N.D. Cal.), hereby files this Memorandum of Law in Support of her Motion for Consolidation and Transfer of proceedings under 28 U.S.C. § 1407.

The Scheduled Actions that Plaintiff seeks to consolidate are consumer class actions against Target Corporation. (“Target”). Target sells herbal supplements at its retail stores across the country under the generic brand name “Up & Up.” The Up & Up supplements at issue are Ginkgo Biloba, St. John’s Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto (“the Up & Up Supplements”). *See* Declaration of Ronald A. Marron in Support of Motion to Transfer (“Marron Decl.”), *Exs.* 2-5. All of the Scheduled Actions present the same common issues. *Id.* Do the Up & Up Supplements actually contain the advertised herbal ingredients and are they adulterated with undisclosed ingredients? *Id.* Each Scheduled Action references the New York Attorney General’s investigation into the herbal supplement industry. *Id.*

On February 2, 2015, New York Attorney General Eric Schneiderman sent a cease and desist notification letters to Target, Wal-Mart Stores, Inc. (“Wal-Mart”), Walgreen Company (“Walgreens”), and General Nutrition Corporation (“GNC”) informing those companies that their generic herbal supplements are misbranded because they either contain no active ingredients or that they are adulterated with undisclosed ingredients. The letter to Target stated:

By using established DNA barcoding technology, analytic testing disclosed that 3 out of the six types of [Up & Up] dietary supplement products were either unrecognizable or a substance other than what they claimed to be, and therefore fairly constitute contaminated or substituted products. Forty-one (41) percent of the tests yielded DNA matching the product label; 21% tested for botanical material other than what was on the label; and 38% yielded no DNA at all.

See Marron Decl., Ex. 1.

Based on Attorney General Schneiderman’s investigation, a slew of class action lawsuits have now been filed across the country. On February 13, 2015, a MDL transfer motion was filed with this Panel seeking to consolidate all of the pending herbal supplement class actions against Walgreens into the Northern District of Illinois. *See In re Walgreens Herbal Supplements Litig.*, MDL No.2619. Later, on February 16, 2015, another MDL transfer motion was filed with this Panel seeking to consolidate all of the pending herbal supplement class actions against Wal-Mart into the Northern District of California. *See In re Wal-Mart Herbal Supplements Litig.*, MDL No. 2620. This transfer motion now seeks to consolidate all of the class action lawsuits against Target into one proceeding in the United States District Court for the Northern District of California, San Francisco Division.

II. THE SCHEDULED ACTIONS

1. *Barber v. Target Corporation*, No. 3:15-cv-00568-JSC (N.D. Cal.)

The *Barber* class action lawsuit against Target was filed on February 5, 2015. *See Barber* Compl., Marron Decl., ¶ 4, *Ex. 2*. The case is currently assigned to the Honorable Magistrate Judge Jacqueline Scott Corley. No responsive pleading has yet been filed by Defendant Target.

2. *De La Torre et al. v. Target Corporation, et al.*, No. 5:15-cv-00559 (N.D. Cal.)

The *De La Torre* class action lawsuit against Target was filed on February 5, 2015. *See De La Torre* Compl., Marron Decl., ¶ 5, *Ex. 3*. The case is currently assigned to the Honorable Magistrate Judge Howard R. Lloyd. No responsive pleading has yet been filed by Defendant Target.

3. *Sparks v. Target Corporation, et al.*, No. 5:15-cv-05033-TLB (W.D. Ark.)

The *Sparks* class action against Target was filed on February 4, 2015. *See Sparks* Compl., Marron Decl., ¶ 6, *Ex. 4*. The case is currently assigned to the Honorable Judge Timothy L. Brooks. No responsive pleading has yet been filed by Defendant Target.

4. *Farrell v. Target Corporation*, No. 3:15-cv-00635-MEJ (N.D. Cal.)

The *Farrell* class action against Target was filed on February 10, 2015. *See Farrell* Compl., Marron Decl., ¶ 7, *Ex. 5*. The case is currently assigned to the Honorable Magistrate Judge Maria-Elena James. No responsive pleading has yet been filed by Defendant Target.

III. ARGUMENT

Transfer for coordinated or consolidated pretrial proceedings is appropriate where federal civil actions present “common questions of fact” and transfer will serve “the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407. Both criteria for transfer are satisfied here.

A. The Scheduled Actions Have Common Factual and Legal Issues

All of the Scheduled Actions clearly present common questions of fact. Each complaint alleges that Target's Up & Up Supplements do not actually contain the advertised herbs and that the supplements are adulterated with undisclosed ingredients and contaminants. Each complaint also present common legal issue because the Plaintiffs in each case are asserting claims for violations of consumer protection statutes and deceptive business practices. Moreover, each of the Scheduled Actions proposes a nationwide or multistate class of consumers. Each Scheduled Action undeniably presents common factual and legal issues.

B. Coordination or Consolidation Will Serve the Interests of the Courts, the Parties, and the Witnesses

Transferring the Scheduled Actions for pretrial proceedings will significantly reduce the burden on the federal courts, the parties, and the witnesses involved. Without transfer, the federal court system will be forced to administer—and the parties will be forced to litigate—several similar actions on different pretrial schedules. The actions allege similar legal violations and necessarily require overlapping factual inquiries. Discovery in each will require much of the same information from Target and Target's third party manufactures and suppliers.

Transferring the Scheduled Actions to a single judge will preserve judicial resources by avoiding the need for several federal judges in multiple different districts to address identical legal issues and similar factual patterns. *See, e.g., In re Union Pac. R.R. Co. Empl. Practices Litig.*, 314 F. Supp. 2d 1338, 1384 (J.P.M.L. 2004) (holding that centralization is necessary to “conserve the resources of the... judiciary.”). Moreover, the actions have all been commenced within the past two weeks, and no discovery has yet to occur in any of the actions. Thus, transfer

will save Target and its witnesses from duplicative document production, duplicative written discovery responses, redundant depositions, and the significant likelihood of conflicting scheduling obligations. Transfer is appropriate to mitigate these burdens. Additionally, it will save the resources of Plaintiffs' counsel because discovery requests and depositions can be coordinated amongst counsel, thus reducing litigation expenses and attorneys' fees. Any inconvenience to the individual parties does not outweigh the substantial economies centralization offers the litigation as a whole. *See, e.g., In re Crown Life Ins. Premium Litig.*, 178 F. Supp. 2d 1365, 1366 (J.P.M.L. 2001) (noting that "transfer is often necessary to further the expeditious resolution of the litigation taken as a whole.")

C. Consolidation Is Necessary for these Class Action Lawsuits

In cases involving putative class actions, this Panel has frequently noted the importance of avoiding inconsistent class certification rulings. *See, e.g., In re Charlotte Russe, Inc. Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 505 F. Supp. 2d 1377, 1378 (J.P.M.L. 2007) ("Centralization will . . . prevent inconsistent trial rulings, especially with respect to class certification . . ."); *In re Sugar Indus. Antitrust Litig.*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975) ("We have consistently held that transfer of actions under Section 1407 is appropriate, if not necessary, where the possibility of inconsistent class determination exists."); *see also* David F. Herr, MULTIDISTRICT LITIGATION MANUAL § 5.24 (2014) ("The reason for the importance of potentially conflicting class actions is fairly clear. The management of the litigation would become exceedingly difficult if similar actions involving overlapping classes were proceeding in different districts."). Transfer will thus ensure consistent application of Rule 23 and avoid the risk of inconsistent classes.

D. The Northern District of California, San Francisco Division Is the Most Appropriate Forum for Consolidation

In selecting the transferee court, the Panel considers several factors, including, but not limited to, “where the largest number of cases is pending, where discovery has occurred, where cases have progressed furthest, the site of the occurrence of the common facts, where the cost and inconvenience will be minimized, and the experience, skill, and caseloads of available judges.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2010).

1. Three of the Four Scheduled Actions Are Pending in the Northern District of California

Three out of the four class actions pending against Target— *Barber, De La Torre*, and *Farrell*— are pending in the Northern District of California. This factor weighs heavily in favor of transfer to the Northern District of California. *See In re Rosuvastatin Calcium Patent Litig.*, 560 F. Supp. 2d 1381, 1383 (J.P.M.L. 2008) (transferee district selected primarily because “[s]even of the nine actions, including the first-filed actions, are already pending in that district.”); *In re Make-Up Art Cosmetics (M.A.C.) Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 559 F. Supp. 2d 1404, 1405 (J.P.M.L. 2008) (transferee forum appropriate where “[t]wo of the three actions are already pending there...”).

2. The Northern District of California Will Allow for Speedy Disposition of the Scheduled Actions

“The Panel has expressly stated that it will consider docket conditions in selecting a transferee district. If two potential transferee districts have widely different docket conditions, one being current and the other being marked by long delays before trial, the Panel will favor the court with the most current docket.” MULTIDISTRICT LITIGATION MANUAL § 6:17 (2014)

(Collecting Authority). In evaluating whether to transfer an action because of court congestion, the Ninth Circuit has stated that the “real issue is not whether a dismissal will reduce a court’s congestion but whether a trial may be speedier in another court because of its less crowded docket.” *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984); *see also Panchias v. Bullock*, No. 2:12-cv-2082 JAM CKD P, 2012 WL 5425393, at *3 (E.D. Cal. Nov. 5, 2012) (explaining that courts in the Ninth Circuit consider “relative court congestion and time of trial in each forum” when considering whether to transfer an action).

Here, the Northern District of California is most convenient of all the districts where the Scheduled Actions are pending. In the Northern District of California, it takes only an average of 7.9 months for a civil action to proceed to trial compared to 12.5 months in the Western District of Arkansas. *See Marron Decl.*, ¶ 8, *Ex. 6*. Thus, the Northern District of California is the least congested out of the two forums where the Scheduled Actions are currently pending. Additionally, the San Francisco Courthouse is close to two major international airports and is easily accessible through public transit.

3. Judge James Is the Ideal Transferee Judge

According to her biography, Judge James “was appointed in 1994” and “she has presided over numerous cases and conducted thousands of conferences.” *See* <http://www.cand.uscourts.gov/mej>. In addition, “[o]utside the courtroom, she teaches a number of classes at three Bay Area law schools.” Plaintiff Barber believes that Judge James has the skill and experience to preside over this proposed MDL.

IV. CONCLUSION

For the foregoing reasons, Plaintiff Melanie Barber respectfully requests the Panel to centralize the Scheduled Actions for consolidated proceedings in the United States District Court for the Northern District of California.

Respectfully Submitted,

Dated: February 18, 2015

/s/ Ronald A. Marron

By: Ronald A. Marron

**LAW OFFICES OF RONALD A. MARRON,
APLC**

RONALD A. MARRON

SKYE RESENDES

651 Arroyo Drive

San Diego, California 92103

Telephone: (619) 696-9006

Facsimile: (619) 564-6665

Attorneys for Plaintiff and the Proposed Class