

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

In re: Lumber Liquidators Flooring Products Marketing and Sales Practices Litigation

MDL-_____

**PLAINTIFFS SHELLY CONTE’S, MARK REYES’, AND DANIEL TACKTILL’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

Shelly Conte, Mark Reyes, and Daniel Tacktil, Plaintiffs in the case *Shelly Conte, Mark Reyes, Daniel Tacktil, individually and on behalf of themselves, all others similarly situated, and the general public v. Lumber Liquidators, Inc. and Lumber Liquidators Holdings, Inc.*, 3:15-cv-01012 (N.D. Cal.), hereby file this Memorandum of Law in Support of their Motion for Consolidation and Transfer of proceedings under 28 U.S.C. § 1407.

The Scheduled Actions that Plaintiffs seek to consolidate are consumer class actions against Lumber Liquidators, Inc. and its affiliated companies (“Lumber Liquidators”). Lumber Liquidators sells various Chinese-made Flooring Products at its retail stores across the country. Several investigations have shown that the Lumber Liquidators Chinese-made Flooring Products emit dangerous levels of Formaldehyde. Exposure to high levels of Formaldehyde can be

irritating to the eyes, nose, and throat. It can also cause long-term respiratory problems and can elevate cancer risks.¹

The packaging for each of the Lumber Liquidators Chinese-made Flooring Products state in a uniform manner that the products are “CARB 2 Compliant for Formaldehyde” meaning that the products are in compliance with the California’s Air Resource Board’s (“CARB”) regulations regarding formaldehyde emissions. Pursuant to the CARB regulations, no medium density fiberwood product, such as laminate flooring, can be sold in California if it emits more than 0.13 parts per million of formaldehyde.²

Recently, 60 Minutes conducted an investigation into the Lumber Liquidators Flooring Products. 60 Minutes tested 31 different samples of various flooring product at independent and reputable laboratories. The results revealed that almost none of the Chinese-made Flooring products were compliant with CARB regulations and that some of the samples exceeded formaldehyde emissions by more than 13x the limit set by CARB. 60 Minutes then sent its investigative news team to three factories in China that product Lumber Liquidators’ flooring. Managers at the facilities admitted on camera that the Lumber Liquidators’ Flooring Products are falsely labeled as being CARB compliant.³

Based on the 60 Minutes report and other earlier investigations, at least ten class action lawsuits have been filed across the country alleging that Lumber Liquidators has violated various consumer fraud statutes. Plaintiffs Conte, Reyes, and Tackill expect that more class actions will be filed within the coming weeks. Because of the overlapping nature of these class action

¹ https://www.osha.gov/OshDoc/data_General_Facts/formaldehyde-factsheet.pdf (last visited March 4, 2015).

² See Title 17 of the California Code of Regulations Sections 93120-93120.12.

³ *Lumber Liquidators Linked to Health and Safety Violations*, 60 MINUTES (Mar. 1, 2015), available at <http://www.cbsnews.com/news/lumber-liquidators-linked-to-health-and-safety-violations/> (last visited March 4, 2015).

lawsuits, Plaintiffs are moving to transfer these actions for consolidated pre-trial proceedings before a single judge.

II. 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 Lumber Liquidators’ Chinese-made Flooring Products emit formaldehyde levels above the formaldehyde standards set by CARB. 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 Lumber Liquidators and Lumber Liquidators’ 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 recently, and no discovery has yet to occur in any of the actions. Thus, transfer will save Lumber Liquidators 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. The Balero Action In the Northern District of California was Filed First

Out of all the class actions filed against Lumber Liquidators, the *Balero* action was filed first on December 11, 2014 in the California Superior Court for the County of Alameda. Defendant Lumber Liquidators filed a notice of removal to the Northern District of California on March 4, 2015. *See Ex. 2*. The Northern District of California also has three pending actions: the *Conte*, *Balero*, and *Ezovski* actions. Moreover, five of the ten Scheduled Actions are pending in California showing that California is the nexus of this litigation. These factors weigh 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, including the first-filed.”).

2. The Scheduled Actions Involve California Regulations

The Northern District of California is also the most appropriate because all of the scheduled actions allege that Lumber Liquidators has failed to comply with regulations that were promulgated by the California Air Resource Board. Therefore, a California Judge who is familiar with California law and the California Code of Regulations would be in the best position to preside over this litigation.

3. The Northern District of California Is a Convenient Forum

In all of the Scheduled Actions, there are 19 total proposed class representatives thus far. Fourteen of these proposed class representatives reside in the State of California compared to only five proposed class representatives who reside in districts outside of California. The Northern District of California will also provide easy access to the sources of proof. Several, if not all, of the labs that tested the Lumber Liquidators Flooring Products for formaldehyde are located in California. *Bolero Compl., Ex. 2*, ¶¶ 43, 51, 56, 62. Testimony from representative of those labs will undoubtedly be necessary during this litigation. Relevant evidence in these actions may also require language translation because Lumber Liquidators maintains an office in Shanghai, China to oversee its product sourcing and it contracts with Chinese manufacturers to produce its wood flooring Products. *Conte Compl., Ex. 1*, ¶ 2. The County of San Francisco has over 40 certified translators who are fluent in Mandarin and who are recommended by the California court system.⁴ Therefore, it would be easy and cost-effective to have foreign documents and testimony translated into English if the Scheduled Actions were to proceed in the

⁴ <http://www.courts.ca.gov/3796.htm>.

Northern District of California. Moreover, the San Francisco International Airport is the seventh busiest airport in North America and it offers non-stop flights to locations throughout the United States.⁵ There is also convenient access to the Phillip Burton United States Courthouse from the San Francisco International Airport on the Bay Area Rapid Transit (“BART”) network.⁶ These factors support consolidation in the Northern District of California.

4. The Northern District of California Has Favorable Docket Conditions

“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). The Northern District of California is a convenient forum because it takes only an average of 7.9 months for a civil action to proceed from filing to disposition.⁷ In contrast, it takes 16 months from filing to disposition in the Southern District of Florida,⁸ 9.9 from filing to disposition in the Eastern District of North Carolina,⁹ and 8.4 month from filing to disposition

⁵ <http://www.faa.gov/nextgen/snapshots/airport/?locationId=46>.

⁶ According to Google Trip Planner, it takes less than an forty minutes to travel from the San Francisco International Airport to the United States District Court for the Northern District of California- San Francisco Division, <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=SFO+to+450+golden+gate+avenue+san+francisco>

⁷ See United States District Court for the Northern District of California Case Load Statistics, available at

<http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2014/district-fcms-profiles-september-2014.pdf#page=66>

⁸ See United States District Court for the Southern District of Florida Case Load Statistics, available at

<http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2014/district-fcms-profiles-september-2014.pdf#page=92>

⁹ See United States District Court for the Eastern District of North Carolina Case Load Statistics, available at

<http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2014/district-fcms-profiles-september-2014.pdf#page=21>

in the Western District of Oklahoma.¹⁰ These conditions support transferring the Scheduled Actions to the Northern District of California.

E. Honorable Judge Jon S. Tigar Is the Ideal Transferee Judge

The *Conte* action has been assigned to the Honorable Jon S. Tigar of the Northern District of California. This Panel should find that Judge Tigar is an experienced and capable jurist who is well-qualified to preside over this MDL. Judge Tigar began his career as a Public Defender before going into private practice.¹¹ Before being appointed as a Federal District Court Judge, he served for ten years as a Judge for the Superior Court of California, County of Alameda.¹² Judge Tigar has significant experience presiding over complex class-action litigation. *See, e.g., Lilly v. Jamba Juice Company*, No. 13-cv-02998-JST, 2014 WL 4652283 (N.D. Cal. Sept. 18, 2014); *Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2014 WL 988992 (N.D. Cal. Mar. 9, 2014); *Gaudin v. Saxon Mortgage Services, Inc.*, 297 F.R.D.417 (N.D. Cal. 2013). Judge Tigar also has sat by designation on the Ninth Circuit Court of Appeals in at least one class action appeal. *See Martin v. Pacific Parking Systems, Inc.*, 583 Fed.Appx. 803 (Sept. 18, 2014). Moreover, Judge Tigar is currently not presiding over any pending MDLs.¹³

F. Alternatively, the Panel Should Assign this MDL to the Honorable Judge Edward M. Chen

The first-filed *Bolero* action has been assigned to the Honorable Judge Edward M. Chen. Judge Chen is an experienced and capable jurist who has previously served as a staff attorney for

¹⁰ *See* United States District Court for the Western District of Oklahoma Case Load Statistics, available at <http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2014/district-fcms-profiles-september-2014.pdf#page=84>.

¹¹ Biography of the Honorable Judge Jon S. Tigar, <http://www.cand.uscourts.gov/jst>.

¹² *Id.*

¹³ <http://www.jpml.uscourts.gov/pending-mdls-0>

the American Civil Liberties Union Foundation of Northern California.¹⁴ This Panel has previously assigned an MDL to Judge Chen and found that he is a “jurist experienced in multidistrict litigation.” *See In re: Carrier IQ, Inc. Consumer Privacy Litigation*, 856 F.Supp.2d 1332, 1333 (J.P.M.L. 2012).

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request 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: March 9, 2015

/s/ Ronald A. Marron

By: Ronald A. Marron

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¹⁴ Biography of the Honorable Judge Edward M. Chen, <http://www.cand.uscourts.gov/emc>