

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p style="text-align:center">ANGELA F. MONTGOMERY, Plaintiff,</p> <p style="text-align:center">v.</p> <p style="text-align:center">SCHERING-PLOUGH CORPORATION, et al., Defendants.</p>	<p style="text-align:center">CIVIL ACTION NO. 07-194</p>
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MEMORANDUM & ORDER

Katz, S.J.

February 22, 2007

I. FACTS

A. Background

On August 29, 2006, the United States Attorney for the District of Massachusetts filed an information charging Defendants with conspiracy to make false statements, including statements to the FDA regarding off-label promotion in connection with two drugs it produces, Intron A and Temodor. Later that day, the United States Attorney issued a press release stating that Defendants had agreed to settle criminal and civil charges in connection with Defendants' alleged sales and marketing program for certain oncology and hepatitis drugs.

This settlement appears to have triggered the filing of a number of class actions. On December 1, 2006, The International Brotherhood of Teamsters Local No. 331 Health and Welfare Trust Fund filed the first putative class action against

Defendant Schering-Plough in the District of New Jersey. See Int'l Bhd. of Teamsters Local No. 331 Health & Welfare Fund v. Schering-Plough Corp., Civ. A. No. 06-5774 (D.N.J.). The complaint in Teamsters seeks to certify a nationwide class composed of third-party payors who paid reimbursements or benefits for prescriptions of Temodar and Intron A. The complaint alleges that Schering-Plough improperly marketed and sold these drugs by promoting them for off-label uses, and offering remuneration to physicians who prescribed them. Teamsters Complaint, ¶ 2. Plaintiff Teamsters purports to assert causes of action under the New Jersey Consumer Fraud Act and for common law fraud and unjust enrichment. The second putative class action was filed by the Heavy and General Laborer's Local Union 472/172 Welfare Fund on January 2, 2007. See Heavy & General Laborer's Local Union 472/172 Welfare Fund v. Schering-Plough Corp., Civ. A. No. 07-0003 (D.N.J.).¹ The General Laborer's Complaint parallels the claims in Teamsters and also seeks to certify a class of third-party payors. General Laborer's Complaint, ¶ 71.

¹Although Plaintiff's counsel for General Laborer's did not designate its case as related to Teamster's, such a designation by counsel is not dispositive of the issue. See District of New Jersey Local Rule 40.1. As such, Defendants have sent a letter to the Chief Judge of the United States District Court for the District of New Jersey requesting that the latter filed General Laborers action be assigned to the Honorable Stanley R. Chesler, who is overseeing the Teamsters action.

B. The Instant Action

Plaintiff filed the instant complaint in this court on January 17, 2007 and an amended complaint on January 23, 2007. As in the actions filed in New Jersey, Plaintiff premises her allegations on the “core aspects of the fraudulent marketing and sales scheme and conspiracy” described in the August 29, 2006 press release. Am. Compl., ¶ 2. Specifically, as in the other actions, Plaintiff Montgomery contends that Schering participated in a scheme to market and sell certain of its cancer and hepatitis drugs, namely Temodar, Intron A, Rebtol and PEG-Intron, by promoting them for off-label uses and by inducing physicians to prescribe them through improper remuneration. Plaintiff Montgomery seeks to certify a broader class than in the New Jersey actions. Specifically the class would be defined as:

“All individuals and entities in the United States and its territories who, for purposes other than resale, purchased, reimbursed and/or paid for Intron A, Rebetol/Intron A Combination Therapy, Temodar, PEGIntron, Rebetol and Rebetol/PEGIntron Combination Therapy from January 1, 1998 through December 31, 2003.”

Am. Compl. ¶ 79.

Plaintiff’s complaint also contains additional counts, including a RICO claim.

Now before the court is Defendants’ Motion to Transfer These Proceedings to the United States District Court for the District of New Jersey. For the reasons stated below the court will grant Defendant’s Motion.

II. DISCUSSION

“For the convenience of the 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). Thus, the burden is on the moving party to demonstrate 1) that venue is proper in the transferee district and 2) that the transfer will serve the convenience of the parties and witnesses and will promote the interest of justice. Lindley v. Caterpillar, Inc., 93 F. Supp. 2d 615, 617 (E.D. Pa. 2000). As there is no dispute that venue is proper in the transferee district in the instant case, the court need only consider the convenience of the parties and witnesses and the interest of justice.

A. Convenience of the Parties, Witnesses and Interest of Justice

There is no definitive list of factors for the court to consider in determining whether a transfer will serve the convenience of the parties and witnesses and will promote the interest of justice; rather, the court may consider a variety of private and public factors. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). The private interests include: 1) plaintiff's forum preference as manifested in the original choice; 2) the defendant's forum preference; 3) whether the claim arose elsewhere; 4) the convenience of the parties as indicated by their relative

physical and financial condition; 5) the convenience of the witnesses – but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; 6) and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum). *Id.* The public interests include: 1) the enforceability of the judgment; 2) practical considerations that could make the trial easy, expeditious, or inexpensive, 3) the relative administrative difficulty in the two fora resulting from court congestion; 4) the local interest in deciding local controversies at home; 5) and the familiarity of the trial judge with the applicable state law in diversity cases. *Id.* In this case, only two factors merit any significant discussion – 1) Plaintiff’s choice of forum and 2) the existence of potentially related actions in the District of New Jersey.²

1. Plaintiff’s Choice of Forum

Plaintiff Montgomery’s choice of forum weighs only slightly against transfer. Generally, a Plaintiff’s choice of forum is a paramount consideration in any determination of a transfer request. *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970). The force of the rule, however, is substantially diminished

²Neither party has argued that either witnesses or books or records will be available in one forum but not the other. Given the close proximity between the two courthouses, the court finds that there would little difference in the convenience of parties or witnesses regardless of whether the instant case is heard here or in the transferee court.

when the plaintiff does not reside in her chosen forum. See e.g., New Image, Inc. v. Travelers Indem. Co., 536 F. Supp. 58, 59 (E.D. Pa. 1981). Here, the named Plaintiff is a resident of the State of Washington. Even if Plaintiff's class were to contain individuals from this forum, the choice of forum for a plaintiff in a class action deserves less emphasis than the choice of an plaintiff in an action not involving a class with numerous potential plaintiffs scattered across the country. See General Refractories Co. v. Washington Mills Electro Minerals Corp., No. Civ. A. 94-6332, 1995 WL 361164, at *2 (E.D. Pa., June 16, 1995) (citing Impervious Paint Indus., Ltd. v. Ashland Oil, Inc., 444 F. Supp. 465, 467 (E.D. Pa. 1978)). Moreover, there is only a limited connection between this district and the alleged wrongdoing. Although the conduct and patterns of conduct alleged in Plaintiff's Complaint allegedly occurred "throughout the entire United States," Defendant alleges the primary wrongdoing occurred in New Jersey. See Am. Compl., ¶ 78 (alleging that "Defendants' sales, promotional and marketing strategies were developed and disseminated by Defendants from their World Headquarters in Kennilworth, New Jersey"). Thus, Plaintiff is entitled to less deference in her choice of forum, and this factor weighs only slightly against transferring the action.

2. Judicial Efficiency

Even if full deference were accorded to Plaintiff's choice, Defendant has met its burden of demonstrating that transfer is warranted in the interests of judicial efficiency. The pendency of a related case in the proposed transferee forum is a powerful reason to grant a motion to transfer. See, e.g., Supco Auto Parts, Inc. v. Triangle Auto Spring Co., 538 F. Supp. 1187, 1192 (E.D. Pa. 1982) (transferring action to district where there was a related pending action). The rationale supporting transfer under these circumstances is that:

(1) pretrial discovery can be conducted more efficiently; (2) the witnesses can be saved time and money, both with respect to pretrial and trial proceedings; (3) duplicitous litigation can be avoided, thereby eliminating unnecessary expense to the parties and at the same time serving the public interest; (4) inconsistent results can be avoided.

Blanning v. Tisch, 378 F. Supp.1058, 1061 (E.D. Pa.1974)(quoting Schneider v. Sears, 265 F. Supp. 257, 267 (S.D.N.Y. 1967)

An action is considered to be related "when a civil action grows out of the same transaction" as another pending action.³ Local Rule 40.1; cf. Fed. R. Civ. P.

³NJ Local Rule 40.1 states:

"When a civil action: (1) relates to any property included in a case already pending in this Court; (2) grows out of the same transaction as any case already pending in this Court; or (3) involves the validity or infringement of any patent, copyright or trademark which is involved in a case already pending in this Court, counsel shall at the time of filing the action inform the Clerk of such fact." Situations (1) and (3) are inapplicable to the instant case.

42(a)(“When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”). Here, the foundation for all three actions is Defendants' alleged fraudulent marketing and sales scheme, which formed the basis of the settlement described in the August 27, 2006 press release. Although there are some differences between the three actions, the cases need not be identical to be related. Cf. Blender v. Sibley, 396 F. Supp. 300, 305 (E.D. Pa. 1975) (transferring case to district with prior-filed case despite certain dissimilarities, because the complaints overlapped enough that even if consolidation were to prove undesirable, there would be duplication in discovery and proof). Given the substantial overlap in allegations and class definitions, the court considers the instant action to be related to those in New Jersey.⁴ Considerations of judicial efficiency therefore weigh heavily in favor of transferring the instant action to the District of New Jersey.

This language mirrors that of Local Rule 40.1 for the Eastern District of Pennsylvania.

⁴ Federal Rule of Civil Procedure 42(a) states, “When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

An Appropriate Order follows.

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ORDER

AND NOW, this 22nd day of February, 2007, upon consideration of Motion of Defendants Schering-Plough Corporation, Schering Corporation, and Schering Sales Corporation to Transfer These Proceedings to the United States District Court for the District of New Jersey, and the response thereto, it is hereby **ORDERED** that said Motion is **GRANTED**. The above-captioned case is **TRANSFERRED** to the United States District Court for the District of New Jersey. The Clerk shall transfer the record forthwith.

BY THE COURT:

/s/ **Marvin Katz**

MARVIN KATZ, S.J.