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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

v.

WATSON PHARMACEUTICALS, INC., et al.,

Defendants.

Case No. CV 09-00598 MRP (PLAx)

Defendants' Joint Motion to Transfer Venue to the Northern District of Georgia

Date: March 30, 2009
Time: 10:00 a.m.
Judge: Hon. Mariana R. Pfaelzer
Room: Courtroom 12

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I. PRELIMINARY STATEMENT

The Federal Trade Commission ("FTC") has brought suit here in a forum that is inconvenient to the parties, the witnesses and even the FTC's own staff lawyers for one simple reason: "the Commission is rather openly shopping for a circuit split on the issue of reverse-payment Hatch-Waxman settlements." *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 30 (D.D.C. 2008) (granting Motion to Transfer and citing Oral Statement of FTC Commissioner Jon Leibowitz, Hearing of the Senate Judiciary Committee, at 3 (January 17, 2007) (it is "a matter of public knowledge that [the FTC is] looking to bring a case that will create a clearer split in the circuits" on Hatch-Waxman settlements)).[1] The FTC is seeking Supreme Court consideration of its theory that any settlement of non-sham patent litigation between pioneer and generic drug companies that involves consideration flowing from the pioneer to the generic (a so-called "reverse payment") violates the antitrust laws. To accomplish this policy goal, the FTC is repeatedly bringing suits in inconvenient fora governed by appellate courts the FTC hopes will be "more receptive"—although to date its strategy has been wholly unsuccessful.

This case belongs in the Northern District of Georgia. The Eleventh Circuit, however, is not on the FTC's shopping list: that Court has rejected the FTC's theory twice already. *See Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1076 (11th Cir. 2005) (reversing FTC decision and holding no liability for Hatch-Waxman infringement settlement without addressing patent merits); *Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1313 (11th Cir. 2003) (reversing district court decision holding Hatch-Waxman infringement settlement *per se* illegal without respect to patent merits). The Federal and Second Circuits have also rejected the FTC's theory. *See In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1337, 1340 (Fed. Cir. 2008) (holding, absent fraud on patent office or objectively baseless litigation, no antitrust liability for Hatch-Waxman

[1] *Available at* http://www.ftc.gov/speeches/leibowitz/071701oralstatement.pdf.

infringement settlement where restrictions on generic entry were no greater than those imposed by patent itself); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 216 (2d Cir. 2006) (same). The FTC thus has set its sights elsewhere as its now-Chairman explained:

> We could bring a case in the Sixth Circuit, which has somewhat more favorable case law; in the Ninth Circuit, which is generally more receptive to antitrust claims; or perhaps in the D.C. Circuit, which has significant experience in antitrust and with enforcement agencies.

Jon Leibowitz, Commissioner, Fed. Trade Comm'n, Remarks at In-House Counsel's Forum on Pharmaceutical Antitrust, at 1, 8 (Apr. 24, 2006). (Roberti Decl. Ex. T.) Having already been turned away from the District of Columbia Circuit by the *Cephalon* court's grant of the defendant's transfer motion, the FTC has traveled to what it hopes is a "more receptive" circuit, enlisting at the eleventh hour the California Attorney General ("CA AG") to join it in challenging these Georgia settlements. Starting just hours after the FTC announced its suit, three private plaintiffs with no apparent connection to California followed the FTC and filed in this Court.

This case has its roots not in California, but in Georgia. In 2003, a subsidiary of Defendant Solvay Pharmaceuticals, Inc. ("Solvay") filed the patent litigations at issue here in the Northern District of Georgia. The Defendants in this action litigated for more than three years in that district before the Hon. Thomas W. Thrash, Jr. The events surrounding the settlements, the witnesses, and the sources of proof in this case are concentrated in the Northern District of Georgia.

The convenience of the parties and the witnesses, as well as the interests of justice, all suggest that this case belongs back in the Northern District of Georgia. Moreover, litigating this case outside the Northern District of Georgia poses a risk of conflicting court judgments. The Plaintiffs ask this Court to unwind the Georgia

litigation settlements. Judge Thrash, however, has retained jurisdiction over the settlements. Indeed, in one of the settlements, Judge Thrash entered a Consent Judgment and Order of Permanent Injunction that set forth key terms of the patent license. Plaintiffs seek to undo that license, and if Plaintiffs prevail here, it will be impossible for Defendants to comply with both the ensuing order from this Court and Judge Thrash's order.

Maintaining the action in this Court would also waste judicial resources. Plaintiffs have put the merits of the patent litigations squarely at issue here. Judge Thrash presided over those patent suits for three years, with motions for summary judgment and claim construction briefs pending at the time of settlement.

Plaintiffs, however, would inconvenience the witnesses, the Defendants, and even the FTC's own Washington-based trial staff, side-step the judge who oversaw the underlying lawsuits and retained jurisdiction over the settlements, and put this Court into direct conflict with that court's orders. "To be sure, the Commission is free to exercise its prosecutorial judgment to pursue a strategy that it believes will ultimately result in Supreme Court review." *Cephalon*, 551 F. Supp. at 30. But to do so in a way that not only inconveniences the parties, the witnesses and the court system, but also subjects Defendants "to conflicting judgments in order to advance the agency's enforcement goals" is not only "odd and unreasonable," but "danger[ous]." *Id.* The district court transferred *Cephalon* to the obvious forum, one more convenient for the witnesses, the parties, and the court system. *See Id.* at 33. Just as in *Cephalon*, the interests of fairness, convenience, and judicial comity mandate that, pursuant to 28 U.S.C. § 1404(a), this case should be transferred to the Northern District of Georgia.

II. RELEVANT FACTS

This case arises out of the settlement of two lawsuits that Solvay's wholly-owned subsidiary Unimed Pharmaceuticals, L.L.C. ("Unimed") filed in 2003 to enforce Unimed's patent on the testosterone drug, AndroGel®. (First Amended Complaint in Case No. CV 09-00598 MRP (PLAx) ("FAC") ¶¶ 17, 48.) Two generic drug companies, Defendants Watson Laboratories, Inc., a subsidiary of Watson Pharmaceuticals, Inc. ("Watson"), and Paddock Laboratories, Inc. ("Paddock") independently developed versions of AndroGel® that Unimed contended infringed its patent. (*Id.* ¶¶ 45, 48.) After litigating for three years, the parties reached separate settlements under which the generic companies are licensed to market generic AndroGel® five years before patent expiration. (*Id.* ¶¶ 48, 65.) As part of its settlement, Watson forfeited its 180 days of generic market exclusivity (to which it was entitled under the Hatch-Waxman Act as the first company to file an Abbreviated New Drug Application for AndroGel®) so that it would not block any other companies attempting to challenge Solvay's patent. (York Decl. ¶ 3.) Contemporaneous with the settlements, the parties also entered business transactions that the FTC contends are too favorable to the generic companies. (FAC ¶¶ 69-85.)

Neither the patent litigation, the settlements, nor the ensuing business transactions have any significant connection to California. While the FAC alleges that "a substantial part of the events giving rise to Plaintiffs' claims arose in this District" (*Id.* ¶ 9), the FTC alleges no facts to support this assertion.

A. The Defendants

None of the Defendants in this matter maintains its principal place of business in or is incorporated in California. Solvay is a Georgia corporation whose principal place of business is in Marietta, Georgia. (*Id.* ¶ 17.) Paddock is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. (*Id.* ¶ 16.) Par is a Delaware corporation with its principal place of

business in Woodcliff Lake, New Jersey. (*Id.* ¶ 15.) Watson is a Nevada corporation. (*Id.* ¶ 14.) The FAC alleges that Watson's principal place of business is in California (*id.*), and while Watson has historically been headquartered in California, in fact its principal place of business is in New Jersey. (Carmichael Decl. ¶ 4.) Currently, six of Watson's eleven executive officers (including the CEO and CFO) are based in New Jersey. (*Id.* ¶ 20.) Moreover, New Jersey has long been the home of Watson's commercial headquarters. (*Id.* ¶¶ 7, 23, 28.)

B. The AndroGel® patent

In 1995, prior to its acquisition by Solvay, Unimed partnered with Laboratoires Besins Iscovesco ("Besins") to develop a drug treatment for low testosterone. (Roberti Decl. ¶ 4.) Upon receiving Food & Drug Administration ("FDA") approval in February 2000, Unimed began marketing AndroGel®. (FAC ¶¶ 32-34.) On January 7, 2003, the two companies jointly obtained U.S. Patent No. 6,503,894 (the "'894 Patent"). (Roberti Decl. Ex. C.) In January 2003, Unimed listed the '894 Patent for AndroGel® in the FDA's "Orange Book," notifying would-be makers of generic copies that the '894 Patent covered AndroGel®. *See, e.g.*, FDA on-line Orange Book listing for AndroGel® (*Id.* Ex. G). The '894 Patent expires on August 30, 2020, but Unimed has received an additional six months of pediatric exclusivity, through March 21, 2021. (*Id.*)

C. The Patent-Infringement Litigation in the Northern District of Georgia

In May 2003, Watson and Paddock, each of whom had independently undertaken development of generic AndroGel about a year before learning of Unimed's patent, filed "Paragraph IV" Abbreviated New Drug Applications ("ANDAs") with the FDA for their generic versions of AndroGel®. (FAC ¶ 45.) Both Watson and Paddock certified that the '894 Patent was invalid and that their

respective ANDA products did not infringe it.[2] (*Id.*) At about the same time, Paddock entered a partnership with Par, with Par assuming litigation control and expenses in exchange for partial ownership of Paddock's ANDA. (*Id.* ¶ 47.)

In August 2003, Unimed and Besins sued Watson and Paddock for patent infringement in the Northern District of Georgia. (Roberti Decl. ¶ 5.) Both cases were assigned to Judge Thrash, who actively presided over them for the next three years through discovery and the filing of claim construction briefs and motions for partial summary judgment. (*Id.* Exs. J, K.) While those motions were pending, the parties in both cases negotiated settlement agreements. (FAC ¶¶ 65, 76.)

D. The Watson Settlement

Unimed and Watson settled their litigation after a series of in-person meetings at Unimed's headquarters in Marietta, Georgia, one meeting in Houston, Texas, and several teleconferences. (Roberti Decl. ¶ 7.) On September 13, 2006, Unimed and Watson executed a Final Settlement and Release Agreement ("Watson Settlement") and a Stipulation of Dismissal. (*Id.* ¶ 10.) The Watson Settlement includes a Patent License Agreement permitting Watson to manufacture and sell its generic product in 2015, five years before the '894 Patent expires. (FAC ¶¶ 44, 65.) Notably, as part of the settlement, Watson waived its 180-day marketing exclusivity as the first ANDA filer. (York Decl. ¶ 3.) The Stipulation of Dismissal, entered on September 14, 2006, provides that Judge Thrash retains jurisdiction to enforce the terms of the settlement. (*See* Roberti Decl. Ex. B.) Unimed and Watson also negotiated and executed a Co-Promotion Agreement, under which Watson would market AndroGel® to urologists, a key group for the product that Solvay's sales force could not service efficiently. (*Id.* ¶ 14.)

[2] The filing of a "Paragraph IV" ANDA, which contains a certification that an Orange Book-listed patent "is invalid or will not be infringed by the manufacture, use, or sale of the new drug," (21 U.S.C. § 355(j)(2)(A)(vii)(IV)), constitutes an act of infringement (35 U.S.C. § 271(e)(2)(A)).

E. The Paddock Settlement

Unimed, Paddock, and Par also conducted settlement negotiations through a series of in-person meetings and teleconferences between February and September 2006. (*Id.* ¶ 8.) All of the in-person meetings occurred in Marietta, Georgia, within the Northern District. (*Id.*) On September 13, 2006, Unimed, Paddock, and Par executed a Final Settlement and Release Agreement ("Paddock Settlement") and a stipulated Consent Judgment and Order of Permanent Injunction ("Paddock Consent Judgment"). Judge Thrash entered the Paddock Consent Judgment on September 14, 2006. (*Id.* Ex. A.) The Paddock Settlement includes a Patent License Agreement allowing Par to manufacture and sell its generic AndroGel® product in 2015, five years before the '894 Patent expires. (FAC ¶¶ 44, 71.) The Paddock Consent Judgment decrees, among other things, that the '894 Patent is valid and that Paddock's ANDA product would infringe it. (Roberti Decl. Ex. A.) The parties also executed a Co-Promotion Agreement, under which Par would market AndroGel®, and a Backup Manufacturing and Supply Agreement, under which Paddock would serve as a backup manufacturer of AndroGel®. (FAC ¶ 77.)

F. The FTC's Investigation

On September 25, 2006, the Defendants filed the settlement agreements, licenses, co-promotion agreements, and back-up manufacturing agreement with the FTC as required by federal law. (Roberti Decl. ¶ 16.) On December 14, 2006, the FTC sent a letter to each of the Defendants, asking the Defendants to voluntarily produce certain documents. (*Id.* ¶ 17.) In March 2007, the FTC served a Civil Investigative Demand on each of the Defendants. (*Id.* ¶ 18.) Over the course of the next year, the Defendants produced millions of pages of documents. (*Id.*)

In the course of its investigation, the FTC conducted administrative depositions ("Investigational Hearings") of 21 current or former employees and officers of the Defendants. Seventeen of these Investigational Hearings took place

in Washington, D.C., plus two days of hearings in the FTC's field office in Atlanta, one day of hearings in New York City, and one day of hearings in Woodcliff Lake, New Jersey. The 21 witnesses live in the following places:

Party	*Number of and Residence of Witnesses*
Solvay	Georgia (7), New Jersey (1), Belgium (1)
Watson	New Jersey (3), California (1)
Par	New Jersey (4)
Paddock	Minnesota (2)
Besins	Virginia (2)

(*Id.* ¶¶ 20-27; York Decl. ¶ 7; Grannon Decl. ¶ 8.)

In Fall 2008, the Defendants met with Bureau of Competition management at the FTC and three of the four FTC commissioners to discuss this case. (Roberti Decl. ¶¶ 36-37.) In these meetings, all four Defendants discussed the impropriety of bringing a case outside the Northern District of Georgia, and Solvay provided a letter describing the relevant case law. (*Id.* ¶ 37 & Ex. N.) Subsequently, the FTC appears to have solicited the aid of the CA AG, which joined this Complaint without ever having any contact with the Defendants. The FTC gave the CA AG Defendants' confidential materials, likely including materials subject to Judge Thrash's Protective Order, but has refused to give sufficient details to allow Defendants to confirm whether the governmental authorities followed their own statutes and procedures. (York Decl. ¶ 14 & Exs. 1-6.) On January 27, 2009, the FTC and the CA AG lodged the complaint in this case without notice to Defendants and moved *ex parte* to temporarily seal it. The Plaintiffs told the Court that they moved *ex parte* in part because it was necessary to preserve the

government's "ability to bring suit at the time and in the forum of its choosing." *Ex Parte* Application Temporarily to Seal Complaint at 3, CV 09-00598(AHM) PLAx. The FTC notified Defendants of this suit, and of its filing under seal, on January 30. (Roberti Decl. ¶ 38.) On January 30, 2009, the Defendants learned for the first time of the CA AG's participation in this matter. (Roberti Decl. ¶ 39.) On February 2, 2009, the first of the three private class actions were filed in this Court.

G. The Current Lawsuit

The FTC, CA AG, and the private plaintiffs (collectively, "Plaintiffs") filed the present litigation to challenge the lawfulness of the Watson and Paddock Settlements, asserting that, because Solvay feared that it could lose its infringement lawsuits, it agreed to settle those suits by paying the generic firms. Absent the settlements, the FTC contends, Watson and Paddock would launch their products sooner than in 2015, because either: (a) Watson would have launched "at risk," while the infringement litigation was still pending; or (b) Watson and/or Paddock would have prevailed in the infringement suit and then launched its product; or (c) Watson and Paddock would have agreed to "cashless" settlements that would have granted them licenses to launch their products before 2015. (FAC ¶ 96.)

III. ALL OF THE FACTORS UNDER SECTION 1404(a) INDICATE THAT THE COURT SHOULD TRANSFER THIS CASE TO THE NORTHERN DISTRICT OF GEORGIA

Section 1404(a) provides that "a district court may transfer any civil action to any other district or division where it may have been brought," "[f]or the convenience of the parties and witnesses [and] in the interest of justice." 28 U.S.C. § 1404(a). The FTC certainly could have brought this case in the Northern District of Georgia (where the FTC has a field office). *See* 15 U.S.C. § 53(b) (empowering the FTC to sue wherever a defendant "resides or transacts business, or wherever venue is proper under [28 U.S.C. § 1391]").

A transfer decision under Section 1404(a) is made "'according to an individualized, case-by-case consideration of convenience and fairness.'" *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (quoting *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29, 101 L. Ed. 2d 22, 31, 108 S.Ct. 2239, 2244 (1988)). The ultimate question is the one the statute itself poses: whether "the balance of convenience of the parties and witnesses and the interest of justice" favor transfer. *Cephalon*, 551 F. Supp. 2d at 31.

A. The Northern District of Georgia Is the Most Convenient and Logical Forum for This Dispute

Fairness, convenience, and judicial comity dictate that this Court transfer this action to the Northern District of Georgia because: (1) that court already has a strong connection to the intricacies of the patent litigation squarely at issue in this case; (2) pursuing the litigation here raises the risk of inconsistent judgments and jeopardizes judicial comity; and (3) such a transfer conserves judicial resources.

1. The Events Giving Rise to This Suit, and the Relevant Sources of Proof, are Concentrated in the Northern District of Georgia

When deciding a motion to transfer venue, this Court should take into account "the location where the relevant agreements were negotiated and executed," as well as "the ease of access to sources of proof." *Jones*, 211 F.3d at 498-99.[3] The circumstances of this case, in which the events and sources of proof

[3] Consistent with the Ninth Circuit's decision in *Jones*, this Court has weighed the location of documents and witnesses heavily in its venue-transfer decisions. *See, e.g., Multistate Legal Studies, Inc. v. Marino*, No. CV 96-5118 ABC (RNBx), 1996 WL 786124, at *10-11 (C.D. Cal. Nov. 4, 1996) (transferring case even though the plaintiff maintained an office in California and the defendant transacted business in California, because most witnesses and evidence were located in New York); *Painters Dist. Council No. 30 Health & Welfare Fund v. Amgen, Inc.*, No. CV 07-3880 PSG (AGRx), 2007 WL 4144892, at *8 (C.D. Cal. Nov. 13, 2007) (finding that the "convenience of witnesses . . . weighs heavily in favor of transfer" when the majority of testifying witnesses are located in another district); *Paaluhi v. U.S.*, No. CV 05-3997 PA (SSx), 2006 WL 5671235, at *2-3 (C.D. Cal. Feb. 1, 2006) (transfer-

(cont'd)

are concentrated in Georgia, confirm the Supreme Court's observation that "the most convenient forum is frequently the place where the cause of action arose." *Van Dusen v. Barrack*, 376 U.S. 612, 628, 11 L. Ed. 2d 945, 956, 84 S. Ct. 805, 815 (1964).

None of the Defendants is incorporated here or has its principal place of business here,[4] none of the private plaintiffs does business here (Roberti Decl. Exs. Z, AA, BB), and this forum bears no relation to the underlying events. The events leading up to this litigation occurred in Georgia. The parties negotiated the settlement agreements in Georgia, primarily through in-person meetings in Marietta, Georgia; the only other in-person meeting took place in Houston, Texas. (*Id.* ¶¶ 7-8.) The agreements settled litigation filed in the Northern District of Georgia regarding a patent owned by Unimed (a Delaware limited liability

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ring when most of the evidence consisted of testimony from persons located in another judicial district); *Broad. Data Retrieval Corp. v. Sirius Satellite Radio, Inc.*, No. CV 06-1190JFWSSX, 2006 WL 1582091, at *2 (C.D. Cal. June 6, 2006) (ordering transfer when all of defendant's witnesses were located in the transferee forum and plaintiffs failed to identify any witness residing in California).

[4] Although Watson is nominally still headquartered in California, Watson currently maintains its principal place of business in New Jersey. (Carmichael Decl. ¶ 4.) Watson conducts its business across the United States, and does not conduct a substantial predominance of its business in any one state. (*Id.* ¶ 8.) Watson makes nationwide sales (the largest percentage of which are in Tennessee) and has employees in eight states (the largest percentage of which are in Florida). (*Id.* ¶ 11.) New Jersey has long been the location of Watson's commercial headquarters, and since late 2007, Watson's Chief Executive Officer and Chief Financial Officer have been based in New Jersey. (*Id.* ¶¶ 14-15, 23.) Currently, six of Watson's eleven executive officers are based in New Jersey, while only two reside in California. (*Id.* ¶ 20.) Under the Ninth Circuit's "nerve center" test, Watson's principal place of business is in New Jersey. *See Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001) (stating that the Ninth Circuit applies the nerve center test "when no state contains a substantial predominance of the corporation's business activities" and that the nerve center test locates a corporation's principal place of business "in the state where the majority of its executive and administrative functions are performed") (citations and emphasis omitted); *Chase v. Rite Aid Corp.*, No. CV 07-8385 DSF (FFMX), 2008 WL 5131200, at *2 (C.D. Cal. Dec. 3, 2008).

company with its principal place of business in Georgia). (*Id.* ¶¶ 4-8.) Unimed actively pursued the patent suits there before Judge Thrash for three years prior to the settlements. (*Id.* Exs. J, K.)

Moreover, witness convenience weighs heavily in favor of the Northern District of Georgia. Of the twenty-one witnesses known to the Defendants and questioned during the FTC's investigation, only one resides in California. (Roberti Decl. ¶ 26; York Decl. ¶ 7.) On the other hand, seven witnesses reside in Georgia. (Roberti Decl. ¶¶ 21, 23.) For twelve of the other witnesses, Georgia represents a much more convenient forum than California because these witnesses live on the East Coast or in Minnesota; the remaining witness lives in Europe. (*Id.* ¶¶ 22-23, 25-27.) Several witnesses are former employees, including two of Solvay's former Chief Executive Officers, both of whom live in Georgia; and two former employees of Par, both of whom live in New Jersey. (*Id.* ¶¶ 23, 27; Grannon Decl. ¶ 8.) Other potential non-party witnesses may be located in Illinois, Indiana, Texas, Pennsylvania, and Maryland. (Roberti Decl. ¶¶ 28-31.) Because the testimony of former employees and non-parties will be voluntary, it will be substantially easier to secure their attendance at trial in Georgia than in California. For most of these witnesses, Atlanta is 2,000 miles and three time zones closer than Los Angeles (and the FTC has a field office in Atlanta, just as it does here).

Notably, two circuit courts recently issued writs of mandamus to district courts that denied motions to transfer matters to venues more convenient for sources of proof, including witnesses and documents. *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320 (Fed. Cir. 2008) (holding that a patent-infringement suit should proceed in the Southern District of Ohio, rather than in the Eastern District of Texas, because "[a]ll of the identified key witnesses in this case are in Ohio, Michigan, and Canada" and "the identified witnesses would need to travel a significantly further distance from home to attend trial in Texas than Ohio"); *In re*

Volkswagen of Am., Inc., 545 F.3d 304, 308 (5th Cir. 2008) (en banc) (holding that the trial court had abused its discretion by failing to transfer where it was undisputed that "no known source of proof [was] located in [the transferor district]; and none of the facts giving rise to this suit occurred in [the transferor district]").

2. Transferring the Case Is Necessary to Avoid Subjecting Defendants to Inconsistent Judgments and to Preserve Judicial Comity

The risk of exposing litigants to conflicting judgments "is exactly the sort of inconsistent result that transfer can ameliorate." *Cephalon*, 551 F. Supp. 2d at 29; *see also, e.g.*, *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 11 (1st Cir. 2000) (transferring arbitration to forum of prior, related proceedings to facilitate Section 1404(a)'s goal of "preventing duplication of effort and incompatible rulings").

In this case, the Plaintiffs seek a judgment declaring that the Watson and Paddock Settlements violate the antitrust laws and enjoining Solvay from continuing to enforce the terms of those settlements. (FAC at 29-30.) The Plaintiffs ask this Court to decide that all of the parties' agreements, including the settlement agreements and patent licenses, be declared "null and void." (*Id.*) However, the Paddock Settlement cannot be unwound without undoing Judge Thrash's Consent Judgment and Order of Permanent Injunction, which requires the parties to abide by terms materially identical to those of the settlement agreements. (Roberti Decl. Ex. A.) Hence, the Plaintiffs' desired relief will expose Solvay, Paddock, and Par to conflicting judgments; if the Plaintiffs prevail, Solvay, Paddock, and Par will be obligated to comply with their settlement obligations by one court, yet enjoined from doing so by another. Transfer to the Northern District of Georgia will avoid this problem because that court has the power to modify its judgment if necessary.

In addition to subjecting the Defendants to inconsistent judgments, a ruling by this Court that is inconsistent with Judge Thrash's Consent Judgment and Order

of Permanent Injunction against Paddock would offend judicial comity. Federal courts commonly refrain from exercising jurisdiction when doing so would interfere with the judgment of a sister court. As the Ninth Circuit has observed, "[w]hen a court entertains an independent action for relief from the final order of another court, it interferes with and usurps the power of the rendering court just as much as it would if it were reviewing that court's equitable decree." *Treadaway v. Acad. of Motion Picture Arts & Sci.*, 783 F.2d 1418, 1422 (9th Cir. 1986) (affirming dismissal of suit filed in Arizona district court to invalidate a bankruptcy sale approved by district court in California).[5]

Additionally, a judgment in favor of the Plaintiffs will potentially reopen the patent-infringement litigation in the Northern District of Georgia. Thus, allowing this suit to proceed in this Court could interfere with the Northern District of Georgia's jurisdiction over further proceedings related to the settlements. Judge Thrash expressly reserved such jurisdiction. (Roberti Decl. Ex. A at ¶ 13, Ex. B at ¶ 3.)

3. Transfer to the Northern District of Georgia Will Conserve Substantial Judicial Resources

Transfer is also warranted because of the substantial savings in judicial resources that will result from the Northern District of Georgia's familiarity with

[5] *See also Goulart v. United Airlines, Inc.*, No. C 94-1751 SC, 1994 WL 544476, at *3 (N.D. Cal. Sept. 28, 1994) (granting transfer to the Northern District of Illinois where "at the heart of [the] complaint [was] a request for [the transferor] court to upset the seniority scheme [among unionized airline labor force] under the Consent Decree [previously entered in the transferee court]"); *Zdrok v. V Secret Catalogue, Inc.*, No. CV 01-4113 DT RZX, 2001 WL 35902107, at *5-6 (C.D. Cal. July 30, 2001) (refusing jurisdiction, based on grounds of judicial comity, over action that sought relief from a judgment entered in the Southern District of Ohio); *Lundborg v. Phoenix Leasing, Inc.*, 91 F.3d 265, 272 (1st Cir. 1996) (affirming decision not to entertain suit that indirectly challenged a state-court judgment, stating: "Although in form she does not ask for a declaration or injunction, in substance this is a collateral attack because the relief sought would undo the Maine judgment").

the underlying patent litigation.[6] This Court has repeatedly recognized the propriety of transfer when another forum is familiar with the history and facts underlying a lawsuit. *E.g.*, *B & B Hardware, Inc. v. Hargis Indus., Inc.*, No. CV 06-4871 PA SSX, 2006 WL 4568798, at *6 (C.D. Cal. Nov. 30, 2006) (transferring to court which was already "familiar with the prior case" and thus in the "best position" to hear related matter); *In re Genesisintermedia, Inc. Secs. Litig.*, No. CV 01-09024 SVW (Mcx), 2003 WL 25667662, at *4 (C.D. Cal. June 12, 2003) (transferring to court "more familiar with the underlying facts of the lawsuit" as a result of presiding over related litigation).

The issues in the cases over which Judge Thrash presided for three years are not only related to the Plaintiffs' complaint, they are central to it. The Plaintiffs have put the merits of the patent litigations squarely at issue in this case. (FAC ¶¶ 3, 6, 86, 88, 91-94, 96, 112.) For example, Plaintiffs allege:

> Over the course of their patent litigation with Solvay and Besins, Watson and Par/Paddock amassed substantial evidence that their generic products did not infringe the formulation patent and that the patent was invalid and/or unenforceable. . . . Solvay and Besins bore the burden of proving that Watson and Par/Paddock each infringed the formulation patent—in other words, that the generic products were within the scope of the patent claims. Solvay and Besins had not met their burden when the litigation ended in settlements.

[6] Although this Court can transfer the case only to the Northern District of Georgia, not directly to Judge Thrash, the U.S. District Court for the Northern District of Georgia has procedures in place to ensure that a new case is assigned to a judge who has presided over related cases. *See, e.g.*, N.D. Ga. R. 5.1(H); Civil Cover Sheet, JS44 (Rev. 1/08 NDGA) (providing opportunity to relate cases), *available at* http://www.gand.uscourts.gov/pdf/JS44NDGA.pdf; *see also* N.D. Ga. R. 16.2.1 (requiring that, thirty days after the first defendant appears, counsel provide the court with a joint preliminary report listing "any pending or previously adjudicated related cases").

> . . . Solvay and Besins were unlikely to prevent generic entry through their patent lawsuits.

(*Id.* ¶¶ 86, 91-92.) Plaintiffs seek to have the court hearing this case predict the outcome of settled patent litigations, which necessarily entails an assessment of their merits, a task best left to the judge that presided over this case for three years.

In addition, because the evidence produced in the patent litigations will be central to the Plaintiffs' case here, the management of this case will naturally touch upon the management of the patent litigations. For example, the documents produced in those litigations are already the subject of a negotiated protective order entered by Judge Thrash. (Roberti Decl. Ex. L.) Non-parties to the patent litigations produced documents pursuant to Judge Thrash's Protective Order and set their expectations by that Order. (*Id.* ¶ 6.) The need to deal with the Protective Order in a different court is another reason that comity compels transfer.

Significantly, just last year, the FTC's investigation underlying this case required intervention by Judge Thrash. In its investigation, the FTC required Solvay to produce nearly two million pages of documents pertaining to the patent suits, including sealed transcripts of the status conferences that Judge Thrash conducted during the months preceding settlement. (*Id.* ¶¶ 18-19.) In August 2008, Judge Thrash had to rule on contested motions to unseal those transcripts of Northern District proceedings to allow Unimed and Besins to comply with the FTC's request. (*Id.* Ex. J, Dkt. # 184; Ex. K, Dkt. # 142.)

B. The Plaintiffs' Choice of Forum Should Not Be Accorded Any Weight

Although a plaintiff's choice of forum is ordinarily an important factor under Section 1404(a), such choice should be disregarded (1) when the chosen forum bears no relationship to the underlying events; or (2) when the plaintiff is forum shopping. Both circumstances are present here.

1. Minimal Consideration Should Be Given to Plaintiffs' Choice of an Inconvenient Forum

California is clearly an inconvenient forum for this case. *See supra* Section IIIA. Only "minimal consideration" should be given to a plaintiff's choice of forum when, as here, "'the operative facts have not occurred [there] and that forum has no particular interest in the parties or the subject matter.'" *Ironworkers Local Union No. 68 v. Amgen, Inc.*, No. CV 07-5157 PSG (AGRx), 2008 WL 312309, at *4 (C.D. Cal. Jan. 22, 2008) (quoting *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)). As Judge Walter recently explained, "'where the forum lacks a significant connection to the activities alleged in the complaint,' the degree to which courts defer to the plaintiff's chosen venue is 'substantially reduced.'" *Broad. Data Retrieval Corp.*, 2006 WL 1582091, at *3 (quoting *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)); *see also, e.g.*, *Raynes v. Davis*, No. CV 05-6740 ABC (CTx), 2007 WL 4145102, at *2 (C.D. Cal. Nov. 19, 2007) ("[I]f the operative facts did not occur within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice of forum will be given considerably less weight.").

The appropriate course in such cases is to transfer venue to the district in which the most significant facts giving rise to the litigation occurred. *E.g.*, *Vista Healthplan, Inc. v. Amgen, Inc.*, No. CV 07-3711 PSG (AGRx), 2007 WL 4144893, at *4 (C.D. Cal. Nov. 13, 2007) (transferring case to Florida because, though some events occurred in California, "[m]ore significant facts" took place in Florida, and Florida was substantially connected to plaintiff's specific claims).

This principle also applies when the plaintiff is a governmental agency. Indeed, the government's choice of venue generally is entitled to *less* deference than that of a private litigant. *E.g.*, *EEOC v. Area Erectors, Inc.*, No. 06-C-516-C, 2007 WL 5601487, at *2 (W.D. Wis. Apr. 23, 2007) (EEOC's venue choice entitled to less deference because a federal agency is no more a resident of one

district than another); *United States v. Klearman*, 82 F. Supp. 2d 372, 375 (E.D. Pa. 1999) (government's forum selection "not a choice that deserves the same level of deference as does a choice by a plaintiff to bring an action in her home district").

As the court held in *Cephalon*, the FTC's choice of venue, like that of a private litigant, is entitled to deference only "[i]f the particular controversy has meaningful ties to the forum." 551 F. Supp. 2d at 26 (citation and emphasis omitted). Indeed, it is not uncommon for courts to transfer cases filed by the government to venues with more meaningful ties to the underlying events. *See, e.g.*, *SEC v. Ernst & Young*, 775 F. Supp. 411, 416 (D.D.C. 1991) (transferring civil enforcement action to district where underlying events occurred and majority of fact witnesses resided); *SEC v. Page Airways, Inc.*, 464 F. Supp. 461, 465 (D.D.C. 1978) (transferring action to district where underlying marketing practices occurred and where action involving some of the same issues was pending).

2. The FTC's Forum Shopping Deprives Its Forum Choice of Any Weight

The public record makes clear that the FTC is openly forum shopping in bringing cases such as this one—both to avoid unfavorable Eleventh Circuit law, and also to attempt to create a circuit split. The FTC has publicly announced its intention to create a circuit split to challenge rulings in the Second, Eleventh, and now Federal Circuits. As now-Chairman Leibowitz explained:

> We are looking to find cases so that we can create, for example, a split in the circuits that would militate toward the Supreme Court taking a case. I can't discuss any of our individual investigations publicly, but we are looking to find a case.

The Generic Drug Maze: Speeding Access to Affordable Life-Saving Drugs, Hearing Before the S. Special Comm. on Aging, 109th Cong. 51 (2006) (testimony

of Jon Leibowitz, Commissioner, FTC) (Roberti Decl. Ex. U); *see also* J. Thomas Rosch, Commissioner, FTC, FTC Litigation at the Antitrust/Intellectual Property Interface, at 3 (Apr. 26, 2007) ("The Commission is hopeful that the Supreme Court will review and reverse *Tamoxifen* in a fashion that will discredit *Schering*.") (Roberti Decl. Ex. V).

Notably, the FTC was a party in the precedent that the FTC seeks to avoid here. In 2001, the FTC brought an administrative law case against a pharmaceutical patent settlement, making allegations similar to those here. *Schering-Plough Corp.*, 402 F.3d at 1061; (FAC ¶¶ 106-13). After a forty-day trial, the FTC's own administrative law judge found that the settlement and contemporaneous business transactions were not anticompetitive. *Schering-Plough Corp.*, 402 F.3d at 1061-62. Hearing no testimony, the five FTC Commissioners reversed. *Id.* at 1062. On appeal, the Eleventh Circuit unanimously vacated the Commissioners' opinion and vindicated the findings of the FTC's administrative law judge. *Id.* at 1076. The Eleventh Circuit held that settlements of patent litigation that do not extend the exclusionary effect of a non-sham patent do not offend the antitrust laws. *Id.* at 1066. The same rationale has been followed in the numerous cases discussed *supra* at 1-2.

The Defendants settled the patent litigation at issue here in Unimed's home forum, the Northern District of Georgia, where *Schering-Plough*—to which the FTC was a party—had been established law for one-and-one-half years prior to the parties' settlements. *Schering-Plough*, 402 F.3d 1056 (decided Mar. 8, 2005); (FAC ¶¶ 65, 76). Having litigated the patent-infringement cases in the Northern District of Georgia for three years—and having settled those cases in the same circuit—the parties reasonably expected that the standard of *Schering-Plough* would apply to their conduct. While the facts will bear out that the Defendants' conduct was legal even under the FTC's idiosyncratic standard, the application of

another Circuit's law to this case would unfairly subject the Defendants to something other than the standard under which they settled. Yet the FTC is forum shopping to avoid *Schering-Plough* and create a circuit split by bringing this case far from where it originated. The *Cephalon* court refused to allow the FTC to pursue its litigation strategy at the expense of convenience, efficiency, and the interests of justice. 551 F. Supp. 2d at 30. This Court should refuse for the same reasons.

"Where forum-shopping is evident," not only is there no deference, but "courts should *disregard* plaintiff's choice of forum." *Foster v. Nationwide Mut. Ins. Co.*, No. C 07-04928 SI, 2007 WL 4410408, at *2 (N.D. Cal. Dec. 14, 2007) (granting transfer of class action brought under federal Fair Labor Standards Act and California state law) (emphasis added). Where, as the FTC has done here, the plaintiff makes a tactical decision to sue in a remote venue to avoid unfavorable law, courts frequently transfer such cases to the more appropriate forum specifically to discourage such forum shopping. *Madani v. Shell Oil Co.*, No. C07-04296 MJJ, 2008 WL 268986, at *3 (N.D. Cal. Jan. 30, 2008) ("Discouraging forum-shopping provides a strong reason to transfer this case."); *see also, e.g.*, *Freeman v. Hoffman-La Roche, Inc.*, No. 06CIV13497(RMB)(RLE), 2007 WL 895282, at *3 (S.D.N.Y. Mar. 21, 2007) (transferring case after finding that plaintiffs sought to take advantage of favorable Second Circuit law, stating: "An important interest to be considered is the discouragement of forum shopping") (citation omitted); *Avritt v. Reliastar Life Ins. Co.*, No. C06-1435RSM, 2007 WL 666606, at *3 (W.D. Wash. Feb. 27, 2007) ("The fact that there is precedent adverse to plaintiffs in California raises the question of forum shopping. . . . Accordingly, the Court gives little deference to plaintiff's choice of forum."); *Onyeneho v. Allstate Ins. Co.*, 466 F. Supp. 2d 1, 5 (D.D.C. 2006) ("To the extent that plaintiffs are engag[ed] in forum shopping, it weighs in favor of transfer to the

more appropriate forum."); *Italian Colors Rest. v. Am. Express Co.*, No. C 03-3719 SI, 2003 WL 22682482, at *4 (N.D. Cal. Nov. 10, 2003) (transferring action, stating: "One could rationally infer forum shopping here, based on . . . plaintiffs' admitted perceptions that California provides a more favorable rule of decision"); *Williams*, 157 F. Supp. 2d at 1106 ("If there is any indication that plaintiff's choice of forum is the result of forum shopping, plaintiff's choice will be accorded little deference.").

These decisions adhere to Section 1404(a)'s purpose of preventing the venue abuses that became possible after the "minimum contacts" standard announced in *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945). The sequence of developments leading up to the enactment of Section 1404(a) confirms that Congress enacted the statute "to mitigate abuses stemming from broad federal venue provisions." *Van Dusen*, 376 U.S. at 635.

These considerations apply with greater force when the plaintiff is the government. Indeed, some courts that view the government as "circuit shopping" to avoid unfavorable precedents and create a circuit split have imposed the sanction of attorneys' fees to the prevailing defendant. *Allbritton v. Comm'r*, 37 F.3d 183, 184 (5th Cir. 1994) (per curiam) (affirming the award of attorneys' fees to the defendant in a case in which the government had engaged in blatant "'circuit shopping' . . . in the hopes of creating a circuit conflict"); *Estate of Martin Perry v. Comm'r*, 931 F.2d 1044, 1046 (5th Cir. 1991) (per curiam) ("A policy decision to continue to whip a dead horse in circuit after circuit in the hope, however vain, of establishing a conflict is clearly an option within the discretion of the [government]. . . . But when [it] does so time and again[,] . . . [it] does so at the risk of incurring the obligation to reimburse [the Defendants] for attorneys' fees.").

C. Neither the Presence of the State of California as Plaintiff, nor the Inclusion of California State-Law Claims, Offsets the Factors Mandating Transfer to the Northern District of Georgia

Just as in *Cephalon*, this district has "no meaningful ties" with "the events (or parties) that gave rise to this action." 551 F. Supp. 2d at 26. The debut of the CA AG on the Complaint can neither create a nexus to California nor obscure the fact that the FTC—not the CA AG—is the primary agency prosecuting this case. For example, the FAC lists eleven FTC attorneys (ten of whom are located in Washington, D.C.), but only one CA AG attorney. This peppercorn is borne out by the CA AG's absence from the over two-year FTC investigation leading up to this suit. Until January 30, 2009, when they were notified of this lawsuit, no Defendant had been contacted by any representative of the CA AG. (Roberti Decl. ¶ 39; York Decl. ¶ 11; Grannon Decl. ¶ 15.) No representative of the CA AG's Office had appeared at any of the 21 Investigational Hearings that the FTC conducted. (Roberti Decl. ¶ 39; York Decl. ¶ 12; Grannon Decl. ¶ 16.) Contrary to typical practice, no representative of any of the Defendants was given an opportunity to discuss the merits of the matter with the CA AG's office prior to the filing of the complaint. (Roberti Decl. ¶¶ 39-40.) The first contact that Defendants had with any representative of the CA AG was in the conference pursuant to Local Rule 7-3 to discuss this motion. (Roberti Decl. ¶ 41; York Decl. ¶ 13; Grannon Decl. ¶ 17.) The addition of the CA AG is a last-minute transparent attempt by the FTC to respond to the venue arguments that Defendants raised in Fall 2008 and accordingly should be given no weight in the venue analysis.

Moreover, like many other state Attorneys General, the CA AG regularly pursues antitrust cases under both federal and California law in venues far away from California, often in conjunction with federal antitrust agencies and in antitrust suits alleging anticompetitive conduct in the pharmaceutical industry. *E.g.*, *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998); *Teva Pharms. USA, Inc.*

v. Abbott Labs., 2008 U.S. Dist. LEXIS 63333 (D. Del. Aug. 18, 2008); *Colorado v. Warner Chilcott Holdings Co. III, Ltd.*, No. 1:05-CV-02182-CKK (D.D.C. Compl. filed Nov. 7, 2005); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999). A transfer to the Northern District of Georgia thus would not subject the CA AG to any unusual or unfair burden.

The presence of state-law claims similarly cannot create a nexus to California. In *In re Funeral Consumers Antitrust Litigation*, No. C 05-01804 WHA, 2005 WL 2334362 (N.D. Cal. Sept. 23, 2005), for example, the court granted a motion to transfer an antitrust class action to the Southern District of Texas. The Plaintiffs had alleged violations of both the Sherman Act and Section 17200 of California's Unfair Competition Law. In rejecting the notion that the presence of state-law claims should dictate jurisdiction, the Court held:

> [T]he tail should not wag the dog. This is first and foremost a purported nationwide antitrust class action under the Sherman Act. . . . If the main *federal* event is clearly better served in the Southern District of Texas than in San Francisco, the pendency of a supplemental state-law claim should not override the indicated result.

Id. at *6 (emphasis in original). Although the court noted that Texas state-law claims also were involved, "this state-law question is a very small factor in the overall balance." *Id.*; *see also Hoefer v. U.S. Dep't of Commerce*, No. C 00 0918 VRW, 2000 WL 890862, at *3 (N.D. Cal. June 28, 2000) ("[W]hen the gravamen of the case involves federal law, a state law claim is usually not a significant consideration on a motion to transfer venue."); *accord Foster*, 2007 WL 4410408, at *6 ("[O]ne forum's familiarity with supplemental state law claims should not override other factors favoring a different forum.") (citing *Funeral Consumers*, 2005 WL 2334362, at *6)).

D. Nor Does the Filing of Follow-on Private Cases Provide Any Support for Keeping This Case in California

Following on the heels of the FTC and CA AG's complaint in this matter, three putative private class-action lawsuits—the first of which was filed only hours after the FTC and CA AG complaint became publicly-available on the FTC's website—appeared in the Central District of California. *Meijer, Inc. v. Unimed Pharms., Inc.*, CV 09-0215; *Louisiana Wholesale Drug Co., Inc. v. Unimed Pharms., Inc.*, CV 09-0228; *Rochester Drug Coop. v. Unimed Pharms., Inc.*, CV 09-0226. These class-action plaintiffs are old friends of the federal court system, having collectively filed dozens of antitrust cases in federal courts all over the country. (Roberti Decl. Exs. W, X, Y.) Furthermore, these class-action plaintiffs' connections to California are imperceptible. None of these plaintiffs is a California company: none is incorporated here, and according to their complaints, one is headquartered in Michigan, another in Louisiana, and the third in New York. (Meijer Compl. ¶ 16; Rochester Compl. ¶ 17; Louisiana Wholesale Compl. ¶ 17.) Two of the three plaintiffs are not registered to do business in California, and the other's registration status is "suspended." (Roberti Decl. Exs. Z, AA, BB.) Indeed, Meijer's business is limited to the Midwest; Rochester ships only to states in the Northeast and Mid-Atlantic, and Louisiana Wholesale's geographic reach, while unclear, does not extend to California. (Roberti Decl. Exs. CC, DD.) These follow-on private plaintiffs do not tie this case to California.

E. Transfer to the Northern District of Georgia's Less Burdened Docket Also Would Promote Judicial Economy and Efficiency

The most recent available judiciary caseload statistics show that the docket of the Northern District of Georgia could absorb this case easily:

	C.D. Cal.	N.D. Ga.
Civil filings per judgeship	425	355

Total filings per judgeship	505	408
Pending cases per judgeship	422	319
Trials completed per judgeship	12	23
Civil cases over 3 years old	712 (7.2 %)	70 (2.5%)

See Administrative Office of the U.S. Courts, Federal Court Management Statistics—2007, U.S. District Court—Judicial Caseload Profile (showing data for fiscal year ending Sept. 30, 2007).[7] Transfer to the Northern District of Georgia would further the resolution of this case, without inviting inconsistent judgments, and the transfer would not be burdensome to the Northern District of Georgia. *Cephalon*, 551 F. Supp. 2d at 31.

IV. CONCLUSION

For the foregoing reasons, the Court should transfer this action to the United States District Court for the Northern District of Georgia.

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[7] *Available at* http://www.uscourts.gov/fcmstat/index.html.