UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FEDERAL TRADE COMMISSION, Petitioner, v. RECKITT BENCKISER PHARMACEUTICALS, INC., Respondent	)	Misc. No. 3:14-mc-005-REP

RESPONDENT RECKITT BENCKISER PHARMACEUTICALS, INC.'S
MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER

INTRODUCTION

Twelve private antitrust suits arising from the same conduct that is the subject of the FTC's investigation are now pending before Judge Mitchell S. Goldberg in the Eastern District of Pennsylvania. Those cases were filed in various fora beginning in December 2012, long before the FTC issued its Civil Investigative Demand (CID) to Reckitt. In order to promote the just and efficient conduct of those actions, they were centralized before Judge Goldberg in 2013—also before the FTC issued its CID—by the Judicial Panel on Multidistrict Litigation. *See In re Suboxone (Buprenorphine & Naloxone) Antitrust Litig.*, 949 F. Supp. 2d 1365, 1366 (J.P.M.L. 2013) ("Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings . . . ; and conserve the resources of the parties, their counsel, and the judiciary."). Judge Goldberg has, in turn, ordered Reckitt to produce to the private plaintiffs all documents that it produces to the FTC. (*See* Exh. A.)

The FTC knows that those multiple related civil actions are pending in the Eastern District of Pennsylvania, and that Judge Goldberg has ordered Reckitt to produce any documents it produces to the FTC. Indeed, at the time it issued the CID to Reckitt, it requested production of the related cases' pleadings. (See Pet. Exh. 3 at 9-10 (Spec. No. 35); id. at 20-21 (defining "Suboxone Litigations").) The FTC also knows that, in an antitrust suit raising similar issues to which the FTC is a party, Judge Goldberg has previously held that documents of the type the FTC here claims are unprivileged are in fact privileged. *See FTC v. Cephalon, Inc.*, No. 2:08-cv-2141, 2013 BL 242290, at *9 (E.D. Pa. Sept. 11, 2013) (rejecting FTC argument that documents related to "draft agreements with other pharmaceutical companies" were not privileged).

The FTC thus knows that this Court's resolution of the FTC's Petition could clearly affect what Reckitt must produce in the related cases, and that any success for the FTC here will require the same issue to be contested again in the private cases. But the FTC did not file its

Petition in the Eastern District of Pennsylvania, although there can be no dispute that the FTC could have brought this CID enforcement action there.[1] *See* 15 U.S.C. § 57b-1(e) ("[T]he Commission . . . may file, in . . . any judicial district in which such person resides, is found, *or transacts business* . . . a petition for an order of such court for the enforcement of [a CID]." (emphasis added)). Reckitt transacts business—*i.e.*, sells Suboxone—throughout the nation, including in the Eastern District of Pennsylvania. (*See* N. Schrom Decl. at ¶ 3.)

Instead, the FTC filed this miscellaneous proceeding in Richmond. The FTC has done so based on its belief that the Fourth Circuit, uniquely among the federal courts applying the common law of privilege, holds that no attorney-client privilege exists for *any* communication between a client and its lawyers related to documents that are or may become public—no matter how clearly that communication seeks or dispenses legal advice. (*See* FTC Memo. at 11 ("The Fourth Circuit does not recognize attorney-client privilege for communications in connection with a proposed public disclosure.").) Tellingly, the FTC's papers never once refer to the general federal common law of privilege, but refers to "Fourth Circuit law" by name *twenty-two* times. The FTC's discovery of what it believes to be this unique law of privilege thus explains its choice of forum: even though the FTC has investigated numerous companies over the last decade that (like Reckitt) have an office in the Fourth Circuit, the FTC has not filed a single enforcement action or sought to enforce a CID or subpoena in this Circuit. Until now.

As Reckitt will show in its Opposition to the Petition, the FTC misreads Fourth Circuit law, which is not meaningfully different than that of other courts, including the Eastern District

[1] Nor did the FTC bring its petition in the District of Columbia, where it "routinely files antitrust enforcement actions," *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 28 (D.D.C. 2008), where this CID calls for production to the lawyers located at the agency's headquarters, and where it even served this CID on Reckitt. (*See* Pet. Exh. 3 at 1; M. Lentz Decl. at ¶ 4.)

of Pennsylvania or the District of Columbia, with respect to the privilege for attorney-client communications regarding documents later published. *Compare United States v. Under Seal (In re Grand Jury Subpoena 2003)*, 341 F.3d 331, 336 (4th Cir. 2003) ("We reject the Government's 'public document' argument," which was identical to the FTC's argument here, "because it misconstrues the nature of the asserted privilege. The *underlying communications* . . . regarding [the client's] submission . . . are privileged, regardless of the fact that those communications may have assisted [the client] in answering questions in a public document." (emphasis added)) *with SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 481 (E.D. Pa. 2005) ("[T]he 'attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons . . . to the extent that such information is not contained in the document published and is not otherwise disclosed . . . .'" (quoting *In re U.S. Healthcare, Inc. Sec. Litig.*, No. 88-0559, 1989 U.S. Dist. LEXIS 1043, at *5 (E.D. Pa. Feb. 7, 1989)); *and Alexander v. FBI*, 198 F.R.D. 306 (D.D.C. 2000) ("Drafts of documents that are prepared with the assistance of counsel for release to a third party are protected under attorney-client privilege.").

By bringing this action in the single federal circuit where it believes it has any likelihood of success in undermining the attorney-client privilege, the FTC appears to be forum shopping. That alone calls for a transfer to the venue where this litigation should have been brought. *See, e.g.*, *Onyeneho v. Allstate Ins. Co.*, 466 F. Supp. 2d 1, 5 (D.D.C. 2006) ("To the extent that plaintiffs are engaging in forum shopping, it weighs in favor of transfer to the more appropriate forum.").

The same conclusion results from consideration of the traditional § 1404(a) factors. The interests of justice—which this Court has recognized "may be decisive when in ruling on a

transfer motion," *Byerson v. Equifax Info. Servs., LLC*, 467 F. Supp. 2d 627, 635 (E.D. Va. 2006)—point overwhelmingly to transfer. Assuming, *arguendo*, that the FTC is right that Fourth Circuit law is meaningfully different from the law of every other federal circuit, a transfer is the only way to avoid multiple proceedings on the same privilege issue and potentially conflicting rulings. *See Samsung Elecs. Co. v. Rambus Inc.*, 386 F. Supp. 2d 708, 722 (E.D. Va. 2005). That is, even if this Court were to accept the FTC's reading of Fourth Circuit law, that would simply guarantee further litigation of the identical issue before Judge Goldberg, as Reckitt would seek to preserve its rights under the law of every other Circuit not to produce such documents in the private litigation. And if—as Reckitt contends—the FTC is wrong, judicial economy favors resolution of the Petition by a judge who is already familiar with the facts regarding the underlying conduct at issue and pharmaceutical antitrust law generally. *See FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 31 (D.D.C. 2008).

For these reasons, as further explained below, Reckitt respectfully moves this Court to transfer this case to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a).

BACKGROUND

The FTC's investigation is focused on Reckitt's conduct with respect to Suboxone. (Pet. Exh. 2; Memo. at 5-6.) Reckitt introduced Suboxone tablets in 2002, and it rapidly became a commercial success, being sold throughout the nation. (*See* N. Schrom Decl. at ¶ 3.) After Reckitt became aware of a safety issue involving accidental pediatric exposure to the tablet product, Reckitt began work on formulating a film version of Suboxone, the single-dose packaging of which Reckitt believed could reduce such exposures. (Pet. Exh. 7 at 18-23.) (The tablets are dispensed in a single bottle, which, when open, gives a child access to all of the pills.) After Reckitt brought its film product to the market, it commissioned a study that showed that the risk of pediatric exposure was eight times greater with tablets than film. (*Id.* at 24-25.)

Reckitt then decided to discontinue Suboxone tablets and petitioned the FDA to require, *inter alia*, all Suboxone-related applications to use similar packaging. (*Id.* at 2-3.) Throughout the petition drafting process, Reckitt requested and received legal advice from lawyers at Hyman, Phelps, & McNamara PC, a District of Columbia firm. (*See* N. Schrom Decl. at ¶ 6.)

The Food, Drug, and Cosmetics Act required the FDA to rule on Reckitt's petition within 150 days, and prohibited the agency from delaying drug approvals based on the petition. *See* 21 U.S.C. § 355(q). But before the FDA had even ruled on Reckitt's petition, a private plaintiff claimed that the petition was a sham designed to delay approvals, part of a scheme to monopolize the alleged Suboxone market. *See Burlington Drug Co. v. Reckitt Benckiser Group plc*, No. 2:12-cv-282-JMC (D. Vt. filed Dec. 21, 2012). Eleven other plaintiffs filed similar class actions suits in three additional fora. The Judicial Panel on Multidistrict Litigation centralized the various private suits on June 6, 2013, reasoning that "[c]entralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings . . .; and conserve the resources of the parties, their counsel, and the judiciary." *In re Suboxone*, 949 F. Supp. 2d at 1366.

Exactly one week later—on June 13, 2013—the FTC issued its CID. (Pet. Exh. 3.) The CID was served on Reckitt in the District of Columbia and called for production in the District of Columbia. (*Id.* at 1.) Reckitt complied with the CID, reviewing and producing nearly 600,000 documents from June through December. (Pet. Exh. 1 at ¶ 18.) At the same time, Reckitt filed and briefed a motion to dismiss the private antitrust cases, explaining how its conduct was fully consistent with the antitrust laws. After a status conference, Judge Goldberg decided to hold full discovery in abeyance until Reckitt's motion was resolved, but ordered Reckitt to produce to the private plaintiffs all materials that it produced to the FTC. (*See* Exh. A.) Reckitt's motion to dismiss is scheduled for a hearing on September 17, 2014.

ARGUMENT

28 U.S.C. § 1404(a) permits "a district court [to] transfer any civil action to any other district or division where it might have been brought" "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). There is no question that the FTC could have filed its Petition in the Eastern District of Pennsylvania, as well as virtually any other district in the United States. *See* 15 U.S.C. § 57b-1(e) ("[T]he Commission . . . may file, in . . . any judicial district in which such person resides, is found, *or transacts business* . . . a petition for an order of such court for the enforcement of [a CID]." (emphasis added)). Reckitt transacts business—*i.e.*, sells Suboxone—throughout the nation, including in the Eastern District of Pennsylvania. (*See* N. Schrom Decl. at ¶ 3.)

In deciding whether transfer is appropriate, this Court "must consider all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." *Byerson*, 467 F. Supp. 2d at 632 (quoting 15 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3847, at 370 (2d ed.)). Here, as detailed below, both interest of justice and convenience factors favor transfer.

I. TRANSFER TO THE EASTERN DISTRICT OF PENNSYLVANIA IS NECESSARY TO ADVANCE JUDICIAL ECONOMY AND AVOID POTENTIALLY CONFLICTING RULINGS.

The interest of justice overwhelmingly favors transfer to the Eastern District of Pennsylvania. This inquiry "encompasses public interest factors aimed at 'systemic integrity and fairness.' Judicial economy and the avoidance of inconsistent judgments are prominent among the principal elements of systemic integrity." *Samsung*, 386 F. Supp. 2d at 721 (E.D. Va. 2005) (citations omitted). Here, both these factors—judicial economy and avoidance of inconsistent judgments—favor transfer.

Judicial Economy. Judge Goldberg in the Eastern District of Pennsylvania has presided over the twelve related class actions for over a year. He is knowledgeable both about the facts regarding the underlying conduct at issue and about the governing law. He is even presiding over *Cephalon*, another pharmaceutical antitrust case brought by the FTC and private class plaintiffs.

As even the FTC has argued in other cases, it would "waste resources" to "force another court to educate itself on the facts of the case." *FTC v. American Tax Relief LLC*, No. 10-6123, 2011 BL 188963, at *8 (N.D. Ill. July 20, 2011) (summarizing FTC argument against transferring deceptive advertising case 120 days after filing, when preliminary injunction and asset freeze order had already been entered); *see also, e.g.*, *Samsung*, 386 F. Supp. 2d at 722 ("When related actions are pending in the transferee forum, the interest of justice is generally thought to 'weigh heavily' in favor of transfer." (citation omitted)). This lesson is especially true here, given Judge Goldberg's extensive familiarity with pharmaceutical antitrust law—including privilege disputes arising in that context. *See Cephalon*, 551 F. Supp. 2d at 31 ("[T]his case may be resolved more expeditiously in the Eastern District of Pennsylvania: that court is already familiar with the facts and legal issues presented . . . .").[2]

Byerson and *FTC v. Fortune Hi-Tech Marketing, Inc.*, No. 13-578, 2013 BL 116270 (N.D. Ill. May 1, 2013), are particularly instructive. In both cases, the court found that the pendency of related class actions in other fora urged in favor of transfer. *See, e.g.*, *Fortune*, 2013

[2] It does not matter that the FTC is not seeking to litigate the antitrust merits. "[C]ourts have transferred cases to jurisdictions with related pending matters *even when the cases merely shared similar facts, rather than similar legal claims.*" *Barham v. UBS Fin. Servs.*, 496 F. Supp. 2d 174, 180 (D.D.C. 2007). Moreover, as noted above, the Eastern District of Pennsylvania has entered an order requiring Reckitt to produce in that jurisdiction all documents that it produces to the FTC (Exh. A), so the same legal issue will be squarely presented in both courts absent transfer.

BL 116270, at *5 ("Due to the pendency of these related actions, the interest of justice would be served by transfer" of pyramid-scheme complaint filed by FTC, Illinois, Kentucky, and North Carolina to where the related cases were pending, despite plaintiffs' objections). Indeed, in *Byerson*, the pendency of the earlier-filed related class action was dispositive. 467 F. Supp. 2d at 637 ("[E]ven though, as to the class plaintiffs, Equifax and Experian have not established that the other convenience factors, considered individually, warrant transfer, consideration of systemic integrity and fairness outweigh the other factors in this class action.").[3]

The result should be the same here as in *Byerson* and *Fortune*. The pendency of the twelve related actions in the Eastern District of Pennsylvania weighs strongly transfer. In the words of the Supreme Court, "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26 (1960). Reckitt's motion should be granted.

Risk of Inconsistent Rulings. Transfer is especially appropriate in light of the risk of inconsistent rulings that could result from proceeding in this Court. While Reckitt believes that the FTC is wrong in its interpretation of the federal common law of privilege as applied in this Circuit, it is certainly clear that the documents that the FTC is seeking would be considered privileged in federal courts in every other federal circuit, including the Eastern District of Pennsylvania. *See, e.g.*, *SmithKline Beecham*, 232 F.R.D. at 481. But Judge Goldberg has ordered Reckitt to produce in the Eastern District of Pennsylvania all documents that it produces

[3] *Byerson* relied in part on *Bunch v. W.R. Grace & Co.*, No. 04-218, 2005 WL 1705745 (E.D. Ky. July 21, 2005), and *Reisman v. Van Wagoner Funds, Inc.*, No. 02-012, 2002 WL 1459384 (D. Del. June 7, 2002), which both likewise transferred later-filed actions to the venue where related class actions were pending.

to the FTC. (Exh. A.) Thus, if this Court were to conclude that these documents are not privileged as against the FTC in a federal court in Richmond, Reckitt would be forced to seek a protective order ruling that the same documents are privileged as against the private plaintiffs in a federal court in Philadelphia.

In *Cephalon*, the District for the District of Columbia confronted similar forum shopping by the FTC, which had filed in that court hoping to create a circuit split regarding the legality of certain pharmaceutical patent settlements. The court found that the risk of inconsistent judgments "strongly weighs in favor of transfer":

> Indeed, the FTC would likely be content if this case did result in inconsistent judgments. That is because . . . the Commission is rather openly shopping for a circuit split . . . . 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. But it strikes this Court as both odd and unreasonable to do so at the expense of exposing a *single* defendant (engaged in a single course of conduct) to conflicting judgments in order to advance the agency's enforcement goals. The danger, and burden, of inconsistent judgments against one defendant based on the same events, in short, outweighs whatever legitimate interest the FTC may have in achieving that result for strategic reasons.

Cephalon, 551 F. Supp. 2d at 30 (original emphasis, footnote omitted). The result should be the same here, and for the same reason. It would be unjust to force Reckitt to undertake the expense of litigating its privilege claim in two courts and to expose Reckitt to conflicting rulings based on the same course of conduct.

* * * * * *

In sum, this Court has previously recognized that "'the interest of justice may be decisive in ruling on a transfer motion.'" *Byerson*, 467 F. Supp. 2d at 635 (citation omitted). And these factors are no less relevant because this is a Petition to Enforce a CID. *See Fed. Hous. Fin. Agency v. First Tenn. Bank N.A.*, 856 F. Supp. 2d 186, 194-95 (D.D.C. 2012) (transferring subpoena enforcement action to forum where related securities action was pending because

"judicial economy is best served" and transfer would avoid "the risk of inconsistent judgments attendant with retaining this case"). As in *Byerson* and *First Tennessee*, transfer of the FTC's Petition to the Eastern District of Pennsylvania is the only way to avoid inconsistent judgments and conserve judicial resources.

II. THE REMAINING FACTORS LIKEWISE FAVOR TRANSFER

Transfer is even more appropriate here than it was in *Byerson*, because the remaining factors urge the same result. These factors include the plaintiff's choice of forum, the locus of the relevant facts, and the convenience of the parties and the witnesses. *Koh v. Microtek Int'l, Inc.*, 250 F. Supp. 2d 627, 633 (E.D. Va. 2003). As explained below, the FTC's choice of forum deserves little consideration and is, in any event, outweighed by the locus of the relevant facts and the convenience of the parties and the witnesses.[4]

Choice of Forum. The FTC's choice of forum should be given little if any weight. Any deference ordinarily given a private litigant's choice of forum is not warranted "if a plaintiff chooses a foreign forum and the cause of action bears little or no relation to that forum." *Samsung*, 386 F. Supp. 2d at 716 (quotation marks and citation omitted). Moreover, the government is not a private litigant, and its choice of forum "is 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." *United States v. Klearman*, 82 F. Supp. 2d 372, 375 (E.D. Pa. 1999); *see also, e.g.*, *EEOC v. Area Erectors, Inc.*, No. 06-516, 2007 U.S. Dist. LEXIS 30723, at *5 (D. Wis. April 23, 2007);

[4] While the convenience of witnesses is normally accorded little weight in the context of summary subpoena or CID enforcement proceedings, *see, e.g.*, *First Tenn. Bank*, 856 F. Supp. 2d at 193, Reckitt includes a discussion of this issue to show how this forum has only a marginal connection with the merits of the FTC's Petition.

United States v. Nature's Farm Products, No. 00-6593, 2004 U.S. Dist. LEXIS 8485, at *19-20 (S.D.N.Y. May 3, 2004).

The location of Reckitt's Virginia office cannot conceal what an unusual—indeed, unprecedented—choice of forum this is for the FTC. The FTC is headquartered in the District of Columbia, and the lawyers who filed this petition are based there. The FTC does not have a regional office or a field office in Richmond. And the FTC's cause of action—whether defined as the entire antitrust investigation or just this particular privilege dispute—has no particular ties to this jurisdiction. As explained in the discussion of the relevant facts below, the relevant conduct for either cause of action took place throughout the East Coast, including primarily the District of Columbia as well as New York, New Jersey, and Virginia.

The FTC has previously defended its decisions ***not*** to bring actions where the respondents are headquartered, explaining that it "routinely files antitrust enforcement actions in the District of Columbia, particularly when the challenged conduct, such as here, is felt by consumers on a nationwide scale." *Cephalon*, 551 F. Supp. 2d at 28 (FTC unsuccessfully opposed transfer of an enforcement action filed in District of Columbia against Pennsylvania company). And the facts bear this out. In the past decade, the FTC has filed eighteen petitions seeking to enforce subpoenas or CIDs. (*See* M. Lentz Decl. at ¶¶ 2-3.) Eight of these petitions, and *every one* related to pharmaceutical antitrust investigations, were filed in the District of Columbia, against companies located in, *inter alia*, California, Minnesota, and Connecticut. (*Id.* at ¶ 4.) Indeed, the FTC has only once in the past decade filed a petition relating to an antitrust investigation outside the District of Columbia, seeking to enforce a subpoena (not a CID) in the

Southern District of Texas.[5] (*See id.* at ¶ 5.) Even then, the FTC did so only after the District of Columbia had held a year before that it lacked jurisdiction over subpoena enforcement cases where "the subject-matter of th[e] investigation is undeniably" elsewhere, notwithstanding that the FTC's "inquiry is being carried on within the District of Columbia." Order at 2-3, *FTC v. Promedica Health System, Inc.*, No. 1:10-mc-586-RMC (D.D.C. filed Oct. 12, 2010) (ECF No. 10) (attached as Exh. B) (following this dismissal, the FTC refiled in the Northern District of Ohio). No petitions—antitrust or otherwise—were filed in the Fourth Circuit.

Courts confronted with similar forum shopping have not hesitated to discount or ignore entirely the plaintiff's choice of forum. *See, e.g.*, *Madani v. Shell Oil Co.*, No. C07-04296, 2008 WL 268986, at *3 (N.D. Cal. Jan. 30, 2008) (transferring case and stating: "Discouraging forum-shopping provides a strong reason to transfer this case."); *Freeman v. Hoffman-La Roche, Inc.*, No. 06-13497, 2007 WL 19 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. 06-1435, 2007 WL 666606, at *3 (W.D. Wash. Feb. 27, 2007) (transferring case and stating: "The fact that there is precedent adverse to plaintiffs in California raises the question of forum shopping. Accordingly, the Court gives little deference to plaintiffs choice of forum.").

Locus of Relevant Facts and Convenience. In contrast, the locus of the relevant facts and interests of convenience support Reckitt's requested transfer. The conduct relevant both to

[5] The statute governing venue for subpoena enforcement proceedings is more restrictive than the statute for CIDs; it lays venue only in "the district courts . . . within the jurisdiction of which such inquiry is carried on . . . ." 15 U.S.C. § 49.

the FTC's general antitrust investigation and to this particular privilege dispute took place throughout the East Coast, and has no connection to the Eastern District of Virginia in particular.

Broadly defined, the relevant facts concern the actions Reckitt took allegedly to preserve a monopoly in the putative Suboxone market. Reckitt sold Suboxone nationwide. (*See* N. Schrom Decl. at ¶ 3.) The particular conduct that the FTC is focused on is not tied to Virginia. Reckitt's citizen's petition was based on data obtained from a **Colorado** company and was filed with the Food and Drug Administration in **Maryland**. (*See* N. Schrom Decl. at ¶ 7; Pet. Exh. 7 at 1.) Likewise, Reckitt's negotiations with generic companies headquartered in, *inter alia*, **New Jersey**, took place in various locations, including the **District of Columbia**. (*See* N. Schrom Decl. at ¶ 5.)

Even the relevant facts pertaining to this privilege dispute are not tied to Virginia. The FTC's CID was served in the **District of Columbia** and called for production there. (Pet. Exh. 3); *see First Tenn. Bank*, 856 F. Supp. 2d at 192 (discounting FHFA's choice of forum because it was not where the administrative subpoena was served, nor where the subpoena called for production). Moreover, the subpoena calls for production not just from Reckitt, but from Reckitt's affiliated companies, which include companies headquartered in **New Jersey**. (*See* Pet. Exh. 3; N. Schrom Decl. at ¶ 4.) Those affiliates, moreover, maintain the IT systems by which Reckitt maintains its files in **New Jersey**. (*See* N. Schrom Decl. at ¶ 4.) Finally, and most tellingly, a *majority* of the privilege log entries filed by the FTC as Petition Exhibit 5 concern communications with individuals outside of this district:

- David Clissold, Roger Thies, Josephine Torrente, and Delia Stubbs were all **District of Columbia**-based attorneys with the law firm of Hyman, Phelps & McNamara, which served as outside counsel to Reckitt. (*See* N. Schrom Decl. at ¶ 6.)

- Brian Malkin was a **New York and District of Columbia**-based attorney with the law firm of Frommer, Lawrence & Haug, which served as outside counsel to Reckitt. (*See* N. Schrom Decl. at ¶ 8)

- Daniel Ladow is a **New York** based attorney with Troutman Sanders, which served as outside counsel to Reckitt. (*See* N. Schrom Decl. at ¶ 8.)

- Batisha Anson was a **New York** based public relations consultant to Reckitt. (*See* N. Schrom Decl. at ¶ 7.)

- MonoSol Rx is a **Delaware** company with its principal place of business in **New Jersey**. It is the owner of Suboxone film related patents. (*See* N. Schrom Decl. at ¶ 9.)

In sum, the relevant facts for both the antitrust merits and this privilege investigation concern conduct that took place throughout the East Coast, without a particular tie to this jurisdiction.

CONCLUSION

The FTC's forum shopping raises the possibility of conflicting rulings on the application of the attorney-client privilege to the same communications, and ignores the principles of judicial economy inherent in having a single court preside over related matters. For these reasons, Reckitt respectfully prays this Court grant its Motion to Transfer to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a).

Respectfully submitted,

September 3, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will then send a notification of such filing (NEF) to the following:

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Exhibit A

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

IN RE: SUBOXONE (BUPRENORPHINE HYDROCHLORIDE AND NALAXONE) ANTITRUST LITIGATION	**:**	**MDL NO. 2445 13-MD-2445**

ORDER

AND NOW, this 1st day of October, 2013, upon consideration of Plaintiffs and Defendant's proposals for limited discovery, it is hereby **ORDERED** that Defendant shall produce the following materials within thirty (30) days of the date of this order[1]:

- All documents submitted to or received from the Food and Drug Administration relating to Defendant's 2012 Citizen's Petition.
- All documents submitted to or received from the Federal Trade Commission in connection with any investigation of Defendant's conduct with regards to Suboxone.
- The most recent public versions of Defendant's REMS and RiskMAP programs for Suboxone film and tablets.
- Defendant's most recent marketing, advertising and promotional materials relating to Suboxone film and tablets.

IT IS FURTHER ORDERED that within thirty (30) days of the completion of any document production in response to any ongoing or future governmental investigation, Defendant shall:

[1] In denying Plaintiffs' broader discovery requests, we are not opining on the discoverability of such materials. Rather, this Order is premised on the fact that broader discovery is more properly carried out following the disposition of Defendant's motions to dismiss.

- (a) Produce all relevant, non-confidential documents, (b) object to some or all of such production on the basis of relevance or the need for a protective order and (c) provide Plaintiffs with a proposed protective order if one is necessary.

BY THE COURT:

/s/ Mitchell S. Goldberg

_____

Mitchell S. Goldberg, J.

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. FEDERAL TRADE COMMISSION **Petitioner,** **v.** **PROMEDICA HEALTH SYSTEM, INC., *et al.*** **Respondents.**	)	**Civil Action No. 10-mc-0586 (RMC)**

ORDER

Respondents ProMedica Health System, Inc., Paramount Health Care, and St. Luke's Hospital, all of the Toledo, Ohio metropolitan area, seek to consummate the merger of St. Luke's Hospital into ProMedica's hospital system. The Federal Trade Commission fears an anti-competitive effect and has issued subpoenas *duces tecum* and civil investigative demands ("CIDs") to the Respondents. When responses to its demands were slow or non-existent, the FTC sought to enforce its subpoenas and CIDs in this Court in the District of Columbia under Section 9 of the FTC Act, 15 U.S.C. § 49. Respondents argue that this Court lacks subject-matter jurisdiction over this enforcement action pursuant to *NLRB v. Cooper Tire & Rubber Co.*, 438 F.3d 1198 (D.C. Cir. 2006), as the subject matter of the FTC's investigation lies in Ohio.

At a hearing on the FTC's Emergency Petition for an Order Enforcing Subpoena Duces Tecum and Civil Investigation Demands Issued in a Merger Investigation, [Dkt. # 1], held on October 8, 2010, the Court heard argument from the parties and indicated its intent to issue the requested order. At the hearing, FTC argued that *Cooper Tire* supports the Court's jurisdiction as

the D.C. Circuit recognized that where, among other factors, an agency investigation is "nationwide," the proper judicial district for an enforcement action may be the District of Columbia. *See Cooper Tire*, 438 F.3d at 1202–03. The Court agreed with the FTC and based its ruling on its representations that the investigation involved the collection of data from commercial health plans "in Connecticut, Indiana, Kentucky, Michigan, Minnesota, and New York." Pet'r's Reply in Support of Emergency Pet. [Dkt. # 8], Supplemental Decl. of Jeanne Liu [Ex. A] ¶ 6. Based on the scope of the investigation, the Court determined that it spanned several states and was quasi-national and, thus, not cabined by the analysis in *Cooper Tire*. The Court did not issue the order, however, because Respondents sought leave to file a reply — which the Court will deem a surreply — which they did on October 11, 2010 (the Columbus Day holiday), and which the Court has now reviewed.

The Court has reconsidered its decision announced at the hearing and now concludes that it lacks jurisdiction to enforce the FTC's subpoenas and CIDs.[1] The Court must apply a two-part test to determine "the location of an investigative inquiry for purposes of district court jurisdiction to enforce agency subpoenas: '(1) whether [the location bears] a sufficiently reasonable relation to the subject matter of the investigation . . ., and (2) whether the agency's choice of this [location for enforcement] . . . exceeds the bound of reasonableness." *Cooper Tire*, 438 F.3d at 1201 (quoting *FEC v. Comm. to Elect Lyndon La Rouche*, 613 F.2d 849, 856–57 (D.C. Cir. 1979)). Mirroring the NLRB's unsuccessful arguments in *Cooper Tire*, *see id*. at 1202, the FTC first argued at the hearing that its inquiry is being carried on within the District of Columbia as the FTC has spearheaded the

[1] As Petitioner moved the Court to exert supplemental jurisdiction over the CID enforcement action, *see* Pet'r's Emergency Pet. [Dkt. # 1], Mem. in Support of Emergency Pet. [Ex. 2] 3, the Court lacks jurisdiction over the CID enforcement action since it lacks jurisdiction over the subpoena enforcement action.

investigation from its headquarters in D.C., it issued the subpoenas and CIDs from D.C., the compulsory process was returnable to D.C., and testimony was taken in D.C. While this Court's exercise of jurisdiction would no doubt convenience the FTC, *Cooper Tire* clearly underscored that the critical question in determining whether a court has jurisdiction is the relationship between the jurisdiction and the subject-matter of the investigation. *See id*. The subject-matter of this investigation is undeniably in Ohio, not within the District of Columbia. It cannot be said that the FTC can avoid the import of *Cooper Tire* "in any health care-related inquiry" just because the agency seeks information from various states. Pet'r's Reply in Support of Emergency Pet. [Dkt. # 8], Supplemental Declaration of Jeanne Liu [Ex. A] ¶ 6. In this case, the three entities involved are all in the Toledo, Ohio, area.[2] The subject matter of the investigation concerns these three Respondents and not any entity elsewhere. This differs starkly from the nationwide investigation in *La Rouche*, which focused on the potential improprieties of a national political party, engaged in a national election, with a record of donations from twenty states. *See Cooper Tire*, 438 F.3d at 1202–03. The Court is, of course, bound by *Cooper Tire*, which the Court finds applies to these facts.

As the Court lacks jurisdiction, the Court declines to order compliance with the FTC's subpoenas *duces tecum* and CIDs. Inasmuch as the parties might have anticipated an order enforcing the subpoenas and CIDs, the Court has hastened to issue this order declining to do so.

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[2] Petitioner acknowledges, at a minimum, that any anti-competitive effects would be felt primarily, if not exclusively, in the Toledo, Ohio area. *See* Pet'r's Emergency Pet. [Dkt. # 1], Mem. in Support of Emergency Pet. [Ex. 2] 2 ("This case involves the consolidation of two general acute-care hospital systems in the Toledo area. . . The transaction may substantially lessen competition in the market for general acute-care inpatient hospital services and other medical services, such as obstetrics. The [FTC] is conducting an investigation to determine whether the transaction violates the antitrust laws and would result in higher rates for health plans, as well as increased insurance premiums and greater out-of-pocket expenses for consumers in the Toledo area.").

Accordingly, it is hereby

ORDERED that Petitioner's Emergency Petition for an Order Enforcing Subpoena Duces Tecum and Civil Investigation Demands Issued in a Merger Investigation [Dkt. # 1] is **DENIED** for lack of jurisdiction; accordingly, this case is now closed.

This is a final appealable Order. *See* Fed. R. App. P. 4(a).

SO ORDERED.

Date: October 12, 2010

/s/
ROSEMARY M. COLLYER
United States District Judge