

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEITH GARLOUGH, et al.,
Plaintiffs,
v.
TRADER JOE'S COMPANY,
Defendant.

Case No. 15-cv-01278-TEH

**ORDER GRANTING DEFENDANT'S
MOTION TO TRANSFER VENUE**

This matter is before the Court on Defendant Trader Joe's Company's ("Trader Joe's") motion to transfer venue to the Central District of California. Mot. at 1 (Docket No. 21). After carefully considering the arguments of the parties at the hearing and in the papers submitted, the Court hereby GRANTS Trader Joe's motion, for the reasons set forth below.

BACKGROUND

This putative class action was initially filed by Plaintiff Keith Garlough ("Garlough") in the Northern District of California in March of this year. Compl. at 1 (Docket No. 1). Garlough lives, works and claims to have been injured by Trader Joe's in the Northern District of California. Id. ¶¶ 11, 29-33. Plaintiffs Lance Alicaya and Steve Meylink were added as Plaintiffs in the First Amended Complaint ("FAC"), filed in May; both individuals live, work and claim to have been injured by Trader Joe's in the Eastern District of California. FAC ¶¶ 42-57 (Docket No. 9). Plaintiffs allege that Trader Joe's engaged in age discrimination during a companywide restructuring in April or May of 2014 (the "Refresh"), when upper-level employees aged forty or older were demoted and replaced with younger, less-qualified employees. Id. ¶ 7. While Plaintiffs bring this case as a proposed class action, they have yet to be certified as a class.

1 Trader Joe’s is a California corporation with its principal place of business in
2 Monrovia – located in the Central District of California. Mead Decl., Ex. 1 to Mot. at 2
3 (Docket No. 21-1). While there are Trader Joe’s store locations throughout California, the
4 largest concentration of stores in California is in Southern California – 107 are in Southern
5 California, compared to 65 in Northern California. Id. Accordingly, more current and
6 former Trader Joe’s employees live in Southern California than in Northern California. Id.

7 Trader Joe’s has identified five former employees who currently reside in Southern
8 California who will likely be important witnesses in this case, as they each held positions
9 of authority and were employed with the company during the Refresh. Mead Decl. at 3-4.
10 Four of these individuals are former store managers, or “Captains,” who participated in or
11 were affected by the Refresh. Id. at 3. The fifth is a former Regional Vice President who
12 oversaw approximately twenty stores in Southern California during the Refresh. Id. at 4.
13 At the hearing, Trader Joe’s stated that two comparable former Captains live in Northern
14 California, but no former Regional Managers do.

15

16 **LEGAL STANDARD**

17 “For the convenience of parties and witnesses, in the interest of justice, a district
18 court may transfer any civil action to any other district or division where it might have
19 been brought” 28 U.S.C. § 1404(a). In order to transfer venue, a court “must
20 therefore make two findings: First, that the transferee court is one where the action ‘might
21 have been brought,’ and second, that the convenience of the parties and witnesses and the
22 interest of justice favor transfer.” *Minh Hong v. Morgan Stanley & Co., LLC*, No. 12-CV-
23 1756 TEH, 2012 WL 5077066, at *2 (N.D. Cal. Oct. 18, 2012) (citation omitted).

24 In evaluating the convenience of the parties and witnesses, courts may consider:

- 25 (1) the location where the relevant agreements were negotiated
26 and executed, (2) the state that is most familiar with the
27 governing law, (3) the plaintiff’s choice of forum, (4) the
28 respective parties’ contacts with the forum, (5) the contacts
 relating to the plaintiff’s cause of action in the chosen forum,
 (6) the differences in the costs of litigation in the two forums,
 (7) the availability of compulsory process to compel attendance

1 of unwilling non-party witnesses, and (8) the ease of access to
sources of proof.

2 Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000). Additional factors
3 include the feasibility of consolidation of other claims and the relative congestion of the
4 courts. Barnes & Noble, Inc. v. LSI Corp., 823 F. Supp. 2d. 980, 993 (N.D. Cal. 2011).

5 A motion to transfer lies within the broad discretion of the district court, and must
6 be determined on an individualized basis. Jones, 211 F.3d at 498. The party seeking to
7 transfer bears the burden of persuasion. See Commodity Futures Trading Comm'n v.
8 Savage, 611 F.2d 270, 279 (9th Cir. 1979).

9
10 **DISCUSSION**

11 Trader Joe's moves to transfer venue to the Central District of California; as the
12 moving party, Trader Joe's bears the burden of persuasion. Savage, 611 F.2d at 279.

13 As a threshold matter, Trader Joe's must first show that the action could have
14 initially been filed in the Central District. 28 U.S.C. § 1404(a). A civil action may be
15 brought in "a judicial district in which any defendant resides" Id. § 1391(b)(1).
16 Trader Joe's correctly asserts that this matter could have been filed in the Central District,
17 because Trader Joe's headquarters is located in Monrovia, California, so it is a resident of
18 the Central District. Mot. at 4; see also Reply at 2 (Docket No. 26). At the hearing,
19 Plaintiffs agreed that the case could have been brought in the Central District.

20 Trader Joe's must also demonstrate that the convenience of the parties and
21 witnesses and the interest of justice favor a transfer of venue. 28 U.S.C. § 1404(a). While
22 Trader Joe's motion addressed many of the factors that the Court may weigh when
23 considering such a motion, several of those factors are either neutral or insignificant in this
24 case – for example, the relevant employment agreements were executed in both districts,
25 and both courts are roughly equally congested. See Mead Decl. at 4; compare Mot. at 10
26 with Opp'n at 12 (Docket No. 25). The most salient factors here are the convenience of
27 the parties, the convenience of witnesses, and the availability of compulsory process to
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1 compel the attendance of non-party witnesses at trial. Each of these factors is discussed in
2 turn, below.

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4 **I. The Convenience of the Parties Favors Transfer**

5 The convenience of the parties favors transferring this case to the Central District.
6 Ordinarily, plaintiffs will file in the district that is most convenient for them, and the
7 plaintiffs' choice of forum is accordingly given "great weight" in non-class action cases.
8 *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). However, "when an individual brings
9 a derivative suit or represents a class, the named plaintiff's choice of forum is given less
10 weight." *Id.* As the Ninth Circuit has explained, "In judging the weight to be accorded
11 [plaintiff's] choice of forum, consideration must be given to the extent of both [plaintiff's]
12 and [defendant's] contacts with the forum, including those relating to [plaintiff's] cause of
13 action." *Id.*

14 In putative class actions, courts routinely consider the location and concentration of
15 putative class members in deciding motions to transfer. For example, in *Seifi v. Mercedes-*
16 *Benz USA, LLC*, No. 12-cv-5493 TEH, 2013 WL 1345132 (N.D. Cal. Apr. 2, 2013), this
17 Court concluded that the case should not be transferred to the District of New Jersey
18 because "the Northern District of California [was] indisputably a more convenient forum
19 for members of the proposed class . . . as well as for the named plaintiffs," where "all
20 proposed class members [were] located in California" *Id.* at *2; see also *Roe v.*
21 *Intellicorp Records, Inc.*, No. 12-cv-02567 YGR, 2012 WL 3727323, at *3 (N.D. Cal.
22 Aug. 27, 2012) (transferring putative class action where plaintiff was not a resident of
23 California, none of the operative facts occurred in the district and defendants offered
24 evidence that approximately 97% of class members were not residents of California); *Ellis*
25 *v. Costco Wholesale Corp.*, 372 F. Supp. 2d 530, 544 (N.D. Cal. 2005) ("Courts may take
26 into account the distribution of a putative class in assessing transfer requests."), *rev'd in*
27 *part* on other grounds by 657 F.3d 970 (9th Cir. 2011).

28 However, even in class actions where the named plaintiffs represent members in

1 other districts, the plaintiffs’ choice of forum is given “significant” weight, so long as the
2 named plaintiffs actually reside in or have some connection to their chosen forum. *Rafton*
3 *v. Rydex Series Funds*, No. 10-cv-1171 CRB, 2010 WL 2629579, at *2-4 (N.D. Cal. June
4 29, 2010). *Rafton* was a putative class action in which the named plaintiff alleged that the
5 defendants violated securities laws by disseminating misleading prospectuses. *Id.* In their
6 motion to transfer venue to the District of Maryland, the defendants argued that the named
7 plaintiff’s choice of forum should be given little or no weight, because he sought to
8 represent a nationwide class and because the “operative facts” of the case occurred in
9 Maryland, where the alleged misleading documents originated. *Id.* at *3. The court
10 rejected the defendants’ argument, finding that they had not made a “sufficiently strong
11 showing of inconvenience to overcome Plaintiff’s forum choice,” where the named
12 plaintiff resided in the Northern District, received the allegedly problematic materials here,
13 and the defendants operated an office in this district and marketed here. *Id.* at *2.

14 Although courts routinely consider the distribution of putative class members in
15 deciding a motion to transfer, the Court recognizes that the convenience of putative class
16 members other than the named Plaintiffs will become irrelevant if class certification is
17 ultimately denied. Although the Court does not now consider the merits or probability of
18 class certification, the Court nonetheless discounts somewhat the weight given to the
19 convenience of the putative class because of this risk.

20 Here, transfer to the Central District would be significantly more convenient for
21 Trader Joe’s and for a majority of putative class members. Trader Joe’s headquarters is
22 located in Monrovia, California, which is in the Central District. *Mead Decl.* at 2. It is
23 undisputed that the Central District would be more convenient for Trader Joe’s itself.

24 More importantly, however, there are more putative class members in the Central
25 District. *Id.* at 2-4. There are approximately 172 Trader Joe’s store locations in
26 California, of which approximately 107 are located in Southern California, and
27 approximately 65 are located in Northern California. *Id.* at 2. It must be noted that Trader
28 Joe’s provided these statistics for “Northern” and “Southern California,” rather than by

1 federal judicial district. Even so, this evidence suggests that many more current and
2 former employees, who would be putative class members, reside in or near the Central
3 District. If a class is ultimately certified, it will be more convenient for the majority of
4 class members for the case to proceed in the Central District, because they can more easily
5 participate in court proceedings there. The distribution of putative class members
6 therefore favors transfer.

7 Plaintiffs ignore the consideration of convenience owed to putative class members,
8 focusing their argument instead on the convenience of the three named Plaintiffs
9 themselves. Specifically, Plaintiffs assert that Plaintiff Garlough – the individual who
10 initially filed the complaint – was injured in the Northern District, and continues to work
11 and reside in this District, in Petaluma and Sonoma, respectively. FAC ¶¶ 21, 37. The
12 other two named Plaintiffs, Alicaya and Meylink, live in the Eastern District, near
13 Sacramento, which is much closer to San Francisco than to Los Angeles. Id. ¶¶ 22, 23. It
14 is undeniable that transferring the case to the Central District would be inconvenient for
15 the named Plaintiffs. Also, Trader Joe’s still has approximately 65 stores in Northern
16 California. Relying on Rafton, Plaintiffs argue that their residence in Northern California,
17 plus Trader Joe’s significant presence here, means that their choice of the Northern District
18 should be given significant weight, even though they are representing a statewide class.
19 Opp’n at 3-4.

20 Even so, Plaintiffs have not sufficiently addressed the inconvenience to their
21 proposed class members that would be caused by maintaining this case in the Northern
22 District. This case is distinguishable from Rafton, because in that nationwide class action,
23 the court did not find that the class was heavily concentrated in a particular geographic
24 area. See 2010 WL 2629579, at *3-4. Plaintiff’s argument that considering the
25 distribution of putative class members will always require transferring putative class
26 actions out of the Northern District is not persuasive, because other factors, such as the
27 location of witnesses and other evidence, could make up for the class members’
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1 distribution in the appropriate case. In this case, however, those concerns only reinforce
2 this factor, as discussed more below.

3 Trader Joe’s persuasively argues that, while the Northern District might be more
4 convenient for the named Plaintiffs, the Central District would be significantly more
5 convenient for a majority of the putative class members. Reply at 7. Trader Joe’s has met
6 its burden to overcome Plaintiffs’ choice of forum, and shown that the convenience of the
7 parties favors transfer.

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9 **II. The Convenience of the Witnesses Strongly Favors Transfer**

10 The convenience of the witnesses also favors transferring the case to the Central
11 District. “The relative convenience to the witnesses is often recognized as the most
12 important factor to be considered in ruling on a motion under § 1404(a).” Saleh v. Titan
13 Corp., 361 F. Supp. 2d 1152, 1160 (S.D. Cal. 2005) (quoting State Street Capital Corp. v.
14 Dente, 855 F. Supp. 192, 197 (S.D. Tex. 1994)). The convenience of non-party witnesses
15 is of greater importance than that of party witnesses. Saleh, 361 F. Supp. 2d at 1160.

16 Trader Joe’s argues that “[the] most likely witnesses to Plaintiffs’ age
17 discrimination claims are the current and former employees of Trader Joe’s who
18 participated in or were affected by the Refresh.” Mot. at 7. Trader Joe’s argues that a
19 greater number of its current and former employees reside in the Central District, because
20 its headquarters is located there, and it has a greater concentration of stores there. Id.
21 (citing Mead Decl. at 2-3). While the convenience of current Trader Joe’s employees
22 certainly favors transfer, current employees are party witnesses, and their convenience is
23 weighed less heavily than that of non-party witnesses.

24 Trader Joe’s more compelling argument focuses on the inconvenience of non-party
25 witnesses, especially former employees. Trader Joe’s has identified a Regional Vice
26 President and four retired store managers (out of twenty nationwide) who reside in or near
27 the Central District. Mead Decl. at 3-4. At the hearing, Trader Joe’s indicated that two
28 comparable former Captains, but no former Regional Vice Presidents, currently reside in

1 Northern California. The location of the identified non-party witnesses strongly favors
2 transfer.

3 In response to this concern, Plaintiffs argue that “this case is brought as a
4 representative action, and as such, Plaintiffs’ cause of action will not necessarily turn on
5 the individual testimony of putative members, whether through deposition or trial.” Opp’n
6 at 8. Further, Plaintiffs claim that from their perspective, “the actual key witnesses in this
7 case, certainly with respect to [their] disparate impact claims, will likely be the parties’
8 experts.” Id. at *10. However, neither of these assertions address the convenience of the
9 non-party witnesses that Trader Joe’s has identified and will likely use; rather, Plaintiffs
10 argue that the testimony of these non-party witnesses will be inconsequential to them and
11 therefore irrelevant. This argument is unpersuasive, because the convenience of non-party
12 witnesses is of paramount concern, no matter which party calls them. See Metz v. U.S. Life
13 Ins. Co., 674 F. Supp. 2d 1141, 1147-48 (C.D. Cal. 2009).

14 Plaintiffs also argue that Trader Joe’s did not sufficiently identify the non-party
15 witnesses who reside in or near the Central District because it did not provide their names.
16 Opp’n at 8. Plaintiffs rely on Florens Container v. Cho Yang Shipping, 245 F. Supp. 2d
17 1086 (N.D. Cal. 2002), which found, when evaluating the convenience of witnesses, that it
18 was “more persuasive” for a party to set forth the nature of its witnesses’ testimony and
19 why the witnesses were important, than to merely state where the witnesses resided
20 without more context. Id. at 1092-93. Unfortunately for Plaintiffs, Trader Joe’s has done
21 that here, by explaining that these store managers had “primary responsibility” for carrying
22 out the Refresh, Mead Decl. at 2, that these individuals cooperated with their Regional
23 Vice Presidents to make staffing decisions, id. at 3, and that they coordinated with the
24 corporate headquarters to make the resulting position changes. Id. Compared to Plaintiffs’
25 silence regarding their non-party witnesses, Trader Joe’s account is the “more persuasive.”
26 See Florens, 245 F. Supp. 2d at 1092.

27 The Court recognizes that Plaintiffs have offered to depose all witnesses close to
28 their residences, including in Southern California. See Opp’n at 7. While this offer

1 certainly reduces the inconvenience to both party and non-party witnesses, it does not
2 sufficiently address the inconvenience that any Southern California witnesses would suffer
3 in travelling to the Northern District for trial, discussed more below.

4 The Court finds that the convenience of the party and non-party witnesses who
5 reside in or near the Central District strongly favors transferring the case there.

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7 **III. The Court’s Ability to Compel the Attendance of Non-Party Witnesses**
8 **Somewhat Favors Transfer**

9 Finally, the relative ability of a court in the Central District to compel the
10 production of evidence and the attendance of witnesses somewhat favors transfer in this
11 case. Federal Rule of Civil Procedure 45(c)(1)(A) authorizes a court to issue a subpoena
12 commanding a person to attend a trial, hearing or deposition within 100 miles of where the
13 person resides, is employed, or regularly transacts business in person. Additionally, Rule
14 45(c)(1)(B) allows a court to command a party to attend a trial, deposition, or hearing
15 anywhere in the state where they reside, are employed, or regularly transact business in
16 person; for non-parties, the court may only command their statewide attendance at trial,
17 and only if they would not incur “substantial expense.”

18 These provisions of Rule 45 were added to the Rule in 2013, and they have not yet
19 been thoroughly addressed by other courts. The commentary to the 2013 amendment
20 clarifies that, “When travel over 100 miles [to attend a trial] could impose substantial
21 expense on the [non-party] witness, the party that served the subpoena may pay that
22 expense and the court can condition enforcement of the subpoena on such payment.”

23 The other sections of the Rule provide useful insight into what constitutes
24 “substantial expense.” Rule 45(d)(2)(B)(ii) “states in relevant part that when a court orders
25 compliance with a subpoena over an objection, ‘the order must protect a person who is
26 neither a party nor a party’s officer from significant expense resulting from compliance.’”
27 *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1184 (9th Cir. 2013). In *Legal Voice*, the
28 Ninth Circuit held that cost shifting is mandatory in all instances in which a non-party

1 incurs “significant expense” from compliance with a subpoena. *Id.* And, in that case, the
2 court had “no trouble concluding that \$20,000 [in expenses related to compliance with the
3 subpoena were] ‘significant.’” *Id.* at 1185.

4 Additionally, Rule 45(d)(3)(A)(ii) requires the court to quash or modify a subpoena
5 that “requires a person to comply beyond the geographical limits specified in Rule 45(c).”

6 Here, as discussed above, Trader Joe’s argues that the most likely witnesses to be
7 called are current and former Trader Joe’s employees. *Mot.* at 7. Moreover, Trader Joe’s
8 asserts that many of these individuals are residents of the Central District, because the
9 company is headquartered there and has the majority of its California stores there. *Mead*
10 *Decl.* at 3-4. At least five identified non-party witnesses, and possibly more, work and
11 reside greater than 100 miles from San Francisco, and this Court has a somewhat limited
12 subpoena power over such individuals – the Court can only compel them to attend trial
13 here if they would not incur substantial expense.

14 Plaintiffs respond to this argument by emphasizing that the Court still has the power
15 to compel non-party witnesses to testify at trial so long as they would not incur substantial
16 expense. *Opp’n* at 9-10 (emphasis added).

17 Given that there is no actual evidence regarding the costs that non-party witnesses
18 will incur if they are required to travel from the Central District to the Northern District,
19 the Court cannot now find conclusively that such expenses would be substantial in this
20 case. What is clear is that a court in the Central District would not even need to perform a
21 “substantial expense” inquiry for the identified non-party witnesses who reside in Southern
22 California, because the identified witnesses reside within 100 miles of the Los Angeles
23 courthouses. *Mead Decl.* at 4.

24 A court in the Central District would have the power to compel the attendance of
25 non-party witnesses who live within 100 miles of the Los Angeles courthouses at both
26 depositions and trial in the Central District, without inquiring as to whether such witnesses
27 would incur substantial expense. By contrast, this Court can only compel their attendance
28 at trial if they would not incur substantial expense. Although these differences in the two

1 courts' abilities to subpoena non-party witnesses are not very significant, they do militate
2 somewhat in favor of transferring the case to the Central District.

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4 **CONCLUSION**

5 After establishing that this matter could have initially been filed in the Central
6 District, Trader Joe's demonstrated that transferring this case there would be more
7 convenient for itself, for the majority of putative class members, and for several non-party
8 witnesses, and that the Central District Court would also have a broader subpoena power
9 over non-party witnesses. For these reasons, Trader Joe's motion to transfer venue to the
10 Central District of California is GRANTED.

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13 **IT IS SO ORDERED.**

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15 Dated: 08/04/15

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THELTON E. HENDERSON
United States District Judge