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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANDREW NILON,
Plaintiff,
v.
NATURAL-IMMUNOGENICS CORP,
Defendants.

Civil No. 12-cv-00930-BGS
**ORDER DENYING MOTION TO
DISMISS OR TO TRANSFER TO
THE SOUTHERN DISTRICT OF
FLORIDA [doc. #3]**

On April 23, 2012, Defendant Natural-Immunogenics, Corp. (“Defendant”) filed a motion to dismiss based on improper venue, or alternatively, to transfer the action to the Southern District of Florida. [Doc. #3.] The motion has been fully briefed.

The Court found this motion suitable for determination on the papers submitted and without oral argument. [Doc. #6.] For the following reasons, the Court **DENIES** Defendant’s motion to dismiss or to transfer the action to the Southern District of Florida.

I. BACKGROUND

Plaintiff is a resident of California. (Complaint ¶ 5.) Defendant is a Florida corporation with its principle place of business in Pompano Beach, Florida. (Def.’s Motion 3:6-7.) Defendant manufactures, markets, and sells the “Sovereign Silver” line of products as colloidal silver hydrosol dietary supplement. (Complaint ¶ 1.)

Plaintiff alleges that Defendant advertised its “Sovereign Silver” products to have the

1 ability to support consumers' immune systems. (Complaint ¶ 2.) He relied on Defendant's
2 representations regarding their product when he purchased "Sovereign Silver" in California.
3 (Complaint ¶ 5.) "Sovereign Silver" did not provide Plaintiff with the immune support that
4 Defendant had advertised. (Complaint ¶ 13.) Plaintiff alleges that he would not have purchased
5 "Sovereign Silver" but for this representation. (Complaint ¶ 15.)

6 On March 5, 2012, Plaintiff initiated this action in the Superior Court of the State of
7 California, County of San Diego. [Doc. #1.] In his Complaint, Plaintiff alleges three causes of
8 action: (1) Violation of the Consumers Legal Remedies Act (Cal. Civ. Code §1750); (2)
9 Violation of California's False Advertising Law (Cal. Bus. & Prof. Code §17500); and (3)
10 Unlawful, Fraudulent & Unfair Business Practices (Cal. Bus. & Prof. Code §17200). On April
11 16, 2012, Defendants removed the action to this Court. [Doc. #1.]

12 Defendants move to dismiss for improper venue pursuant to Rule 12(b)(3), or
13 alternatively, to transfer this action to the United States District Court for Southern District of
14 Florida under 28 U.S.C. § 1404(a). [Doc. #3.] Plaintiff opposes the motion.

15 **II. DISCUSSION¹**

16 **A. Motion to Dismiss Based on Improper Venue**

17 Under Section 1391(b) of Title 28 of the United States Code,

18 A civil action may be brought in (1) a judicial district in which any
19 defendant resides if all defendants are residents of the State in which
20 the district is located: (2) a judicial district in which a substantial part
21 of the events or omissions giving rise to the claim occurred or a
22 substantial part of property that is the subject of the action is
situated: or (3) if there is no district in which an action may
otherwise be brought as provided in this section any judicial district
in which any defendant is subject to the court's personal jurisdiction
with respect to such action.

23 A defendant may raise the defense of improper venue by way of a motion to dismiss
24 under Federal Rule of Civil Procedure 12(b)(3). If the Court determines venue is improper, it
25 may dismiss the case, or if it is in the interest of justice, the Court may transfer the case to any
26

27 ¹ Neither party adequately addresses the issue of whether Defendant has sufficient minimum
28 contacts with California to establish personal jurisdiction. Accordingly, the Court finds it unnecessary to
discuss this issue.

1 other district in which it could have been brought. 28 U.S.C. § 1406(a); *Dist. No. 1, Pac. Coast*
2 *Dist. v. Alaska*, 682 F.2d 797, 799 n.3 (9th Cir. 1982). Ultimately, the decision whether to
3 dismiss or transfer rests in the Court’s sound discretion. *See King v. Russell*, 963 F.2d 1301,
4 1304-05 (9th Cir. 1992).

5 Defendant argues that venue is improper here because Plaintiff has failed to plead any
6 facts showing that the alleged acts took place in California or that Defendant conducted business
7 in California. (Def’s Motion 5:26-28.) Plaintiff claims that venue is proper because Defendant
8 sells “Sovereign Silver” in California and Plaintiff purchased the product in California.
9 (Complaint ¶ 5.) The Court concludes that venue is proper because the alleged events that led
10 Plaintiff to purchase the product (*i.e.*, Defendant’s alleged false advertising) took place in
11 California. The transaction that gave Plaintiff a private right of action also took place in
12 California. Accordingly, Defendant’s motion to dismiss for improper venue is DENIED.

13 **B. Motion for Change of Venue under 28 U.S.C. § 1404(a)**

14 Section 1404(a) of Title 28 of the United States Code provides that even when venue is
15 proper, the court has discretion to transfer an action “[f]or the convenience of parties and
16 witnesses, in the interest of justice, . . . to any other district or division where it might have been
17 brought.” 28 U.S.C. § 1404(a). The purpose of this section is to “prevent the waste ‘of time,
18 energy and money’ and to ‘protect litigants, witnesses and the public against unnecessary
19 inconvenience and expense.’” *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (quoting
20 *Continental Grain Co. v. Barge F.B.L.-585*, 364 U.S. 19, 26-27 (1960)). The party requesting the
21 transfer bears the burden of showing that the balance of conveniences weighs heavily in favor of
22 the transfer in order to overcome the strong presumption in favor of the plaintiff’s choice of
23 forum. *Piper Aircraft v. Reyno*, 454 U.S. 235, 255-56 (1981); *Decker Coal Co. v.*
24 *Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

25 To support a motion to transfer under § 1404(a), the moving party must first show the
26 proposed transferee court possesses subject matter jurisdiction over the action, the parties would
27 be subject to personal jurisdiction in the transferee court, and venue would have been proper in
28 the transferee court. *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960); *A.J. Indus., Inc. v. United*

1 *States Dist. Ct. for the Cent. Dist. of Cal.*, 503 F.2d 384, 386 (9th Cir. 1974). Once this threshold
2 requirement has been established, the Court next looks at whether the convenience of parties and
3 witnesses, and the interests of justice favor transfer. 28 U.S.C. § 1404(a). In the Ninth Circuit,
4 courts weigh several considerations when determining whether transfer is appropriate: (1)
5 plaintiff's choice of forum; (2) convenience of the parties; (3) convenience of the witnesses and
6 availability of compulsory process; (4) ease of access to the evidence; (5) feasibility of
7 consolidation of other claims; (6) familiarity of each forum with the applicable law; (7) any local
8 interest in the controversy; and (8) the relative court congestion and time to trial in each forum.
9 *Decker Coal*, 805 F.2d at 843; *see Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th
10 Cir. 2000), *cert. denied*, 531 U.S. 928 (2000).

11 Defendant does not contest subject matter jurisdiction or personal jurisdiction in their
12 motion. The parties do not expressly dispute whether the court in the Southern District of Florida
13 would have jurisdiction over this claim. Plaintiff argues that a substantial part of the events
14 giving rise to his claim took place in California. Defendant claims that transfer should be granted
15 in the interest of justice and for the convenience of the parties and witnesses. Applying the
16 personal jurisdiction analysis above, it is not likely that Florida would have personal jurisdiction
17 over Plaintiff. He has no minimum contacts with Florida nor is he within reach of a long-arm
18 statute. *See International Shoe Co. V. Washington*, 326 U.S. 310, 319; *Pebble Beach Co. v.*
19 *Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). Although the Court has concluded that Florida
20 would likely lack personal jurisdiction over Plaintiff, the Court will continue with the analysis.

21 **1. Plaintiff's Choice of Forum**

22 Plaintiff chose to litigate his claim in California. (Complaint ¶ 5.) He resides in San
23 Diego, California, and his claim arises out of his purchase of Defendant's product in California.
24 *Id.* It is undisputed that Defendants do not reside in California. Plaintiff alleges that Defendant is
25 amenable to California courts because they advertise and sell their "Sovereign Silver" products
26 in the state. (Complaint ¶ 9.) Additionally, Plaintiff claims that Defendant has benefitted from
27 having their products sold in California with substantial profits. Therefore, it is reasonable to
28 find that a substantial part of Plaintiff's claims arose in California. Furthermore, the Southern

1 District of California does have an interest in Plaintiff and his claim. Because the “operative
2 facts” relating to Plaintiff’s claim occurred within this forum, the Court gives Plaintiff’s choice
3 of forum substantial weight. Accordingly, the Court finds that the convenience of the parties
4 weighs in favor of retaining the action in this forum.

5 **2. Location of Witnesses and Documentary Evidence**

6 One of the most important factors in weighing whether to transfer an action is the
7 convenience of the witnesses. *In re Eastern Dist. Repetitive Stress Injury Litig.*, 850 F. Supp.
8 188, 194 (E.D.N.Y. 1994). To demonstrate inconvenience, the moving party:

9 should produce information regarding the identity and location of the witnesses,
10 the content of their testimony, and why such testimony is relevant to the action.
11 The court will consider not only the number of witnesses located in the respective
12 districts, but also the nature and quality of their testimony in relationship to the
13 issues in the case.

14 *Steelcase, Inc. v. Haworth, Inc.*, 41 U.S.P.Q.2d 1468, 1470 (C.D. Cal. 1996) (citation omitted).

15 Defendant contends that it is a resident of the State of Florida and all of its witnesses and
16 documents are located in Florida. (Def.’s Motion 4:13). But Defendant, as the moving party,
17 failed to specifically identify any of the anticipated witnesses in its motion. Instead, it makes the
18 general statement that all of the important witnesses reside in Florida. It is undisputed that many
19 of the documents crucial to this litigation are in Florida. Defendant’s company is headquartered
20 in Florida and the studies on “Sovereign Silver” were conducted in Florida. (Def.’s Motion
21 5:13). Undoubtedly, it is more convenient for Defendant if this action were to proceed in Florida,
22 but it fails to explain why video depositions are unavailable to the witnesses. Also, documents
23 can be scanned onto an electronic disk, which can save Defendant from incurring significant
24 costs.

25 Taking into consideration factors from both parties, the Court finds that the location of
26 the witnesses and documentary evidence only slightly favors Defendant’s preference of forum.

27 **3. Interest of Justice**

28 “The question of which forum will better serve the interest of justice is of predominant
importance on the question of transfer, and the factors involving convenience of parties and
witnesses are in fact subordinate.” *Madani v. Shell Oil Co.*, 2008 WL 268986, *2 (N.D. Cal.,

1 Jan. 30, 2008) (quotation omitted); *see also Mussetter Distrib., Inc. v. DBI Beverage Inc.*, 2009
2 WL 1992356, *6 (E.D. Cal., July 8, 2009); *Amazon.com v. Cendant Corp.*, 404 F. Supp.2d 1256,
3 1261 (W.D. Wash. 2005).

4 California has an interest in protecting its residents from becoming victims to unlawful
5 business practices. Furthermore, California has an interest in seeing businesses engaged in these
6 kind of practices answer to a court within the state. Plaintiff's alleged harm occurred in
7 California. He claims that he purchased Defendant's product because he relied on Defendant's
8 advertisement that "Sovereign Silver" would provide immune support. Plaintiff's three causes of
9 action fall under California law: (1) Consumers Legal Remedies Act (Cal. Civ. Code §1750); (2)
10 California's False Advertising Law (Cal. Bus. & Prof. Code §17500); and (3) Unlawful,
11 Fraudulent & Unfair Business Practices (Cal. Bus. & Prof. Code §17200). Although Cal. Bus. &
12 Prof. Code §17500 has been preempted by the Consumers Legal Remedies Act, Plaintiff has two
13 causes of action under California law remaining.

14 The interest of justice is not outweighed by Defendant's inconvenience of having to
15 litigate this action in California. Plaintiff alleges that Defendant has economically benefitted
16 from having its products sold in California—a result from the way it chose to market its product.
17 Florida has little interest in seeing this action litigated in the state because the causes of action
18 are brought under California laws, which are designed to protect California consumers. The
19 Court finds that the transfer of this action to the Southern District of Florida would not serve the
20 interest of justice.

21 Plaintiff's choice of forum is given substantial weight and a court will "not grant a motion
22 under section 1404(a) unless the 'convenience' or 'justice' factors tip strongly in favor of
23 transfer." *Madani*, 2008 WL 268986, *1; *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235,
24 257. Neither the convenience or justice factors weigh heavily here. The aggrieved Plaintiff is
25 located in California, the causes of action are brought under California laws, and Defendant has
26 failed to adequately show why this case should be litigated in Florida rather than California.
27 Accordingly, Defendant's motion to transfer venue will be denied.

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