BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: USPLABS DIETARY SUPPLEMENT LITIGATION	)	**MDL NO._____**

BRIEF IN SUPPORT OF DEFENDANT USPLABS, LLC'S MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

USPlabs, LLC, ("USPlabs") respectfully submits this memorandum of law in support of its motion, pursuant to 28 U.S.C. § 1407, to centralize nine (9) federal actions, and any other subsequently filed related actions, before a single judge in the United State District Court for the Eastern District of Pennsylvania for coordinated pretrial proceedings. Alternatively, USPlabs respectfully moves this panel to transfer all related actions to the United States District Court for the Western District of Texas. The actions consist of six (6) product liability suits and three (3) consumer class actions, in which plaintiffs assert claims against USPlabs alleging that two of its product lines, OxyElite Pro and Jack3d, contained unsafe ingredient(s) and are "adulterated" as defined by the United States Food and Drug Administration ("FDA").

USPlabs requests coordination of the federal OxyElite Pro and Jack3d actions in a multidistrict litigation ("MDL") because (i) the complaints all assert claims against USPlabs based on allegations that the OxyElite Pro and/or Jack3d product lines contained unsafe ingredients, *i.e.* 1,3-dimethylamylamine ("DMAA") and/or Aegeline, and the "adulterated" products caused either personal injury damages or monetary damages, (ii) the actions involve

common questions of fact, including whether plaintiffs can proffer reliable scientific evidence on the pivotal issue of whether the ingredients are unsafe or "adulterated," and on the issue of general causation, specifically whether OxyElite Pro or Jack3d is capable of causing the injuries alleged; (iii) transfer to a single district will be convenient for the parties and witnesses and will promote the just and efficient conduct of the litigation; and (iv) absent transfer and coordination, the parties and courts will face the burden and expense of needlessly duplicative discovery and pretrial proceedings and possible inconsistent pretrial rulings. The creation of an MDL at this time is appropriate because there are nine similar actions involving more than thirty plaintiffs pending before eight different judges in seven different federal courts from Hawaii to Pennsylvania. Additional actions are expected to be filed in, or removed to, federal court in the near future.

I. BACKGROUND

USPlabs is an own label distributor of dietary supplements headquartered in Dallas, Texas. Numerous lawsuits have been filed claiming that two of the company's lines of products, OxyElite Pro and Jack3d, contain unsafe ingredient(s), *i.e.* DMAA and/or Aegeline, and are allegedly considered "adulterated" by the FDA. All of the claims asserted are premised, in large part, upon alleged violations of the federal Food Drug & Cosmetic Act (FDCA), as amended by the Dietary Supplement Health and Education Act (DSHEA). All of the plaintiffs rely heavily on allegations made by and actions taken by the FDA to assert their claims against USPlabs.

The products and ingredients at issue in all of these actions have been the subject of numerous clinical and analytical studies. Despite the fact that these studies show that the use of the products and/or the ingredients is safe for human consumption (and hence do not support the plaintiffs' contentions that the products or the ingredients are unsafe), the FDA recently urged

the dietary supplement industry to discontinue use of those ingredients in supplements. The plaintiffs rely upon the FDA actions and statements to surmise that the products are "adulterated" and effectively unsafe.

Furthermore, plaintiffs, in support of their claims, rely upon the FDA issuance of warning letters to USPlabs and others averring that the use of the ingredients made the products "adulterated" and requesting that USPlabs cease distribution of the products. Although USPlabs' products were and are safe, effective, and legal, the company ultimately decided for business reasons to phase out products containing DMAA and replace them with advanced formulae. Nevertheless, the ensuing controversy generated extremely negative publicity that painted these product lines as dangerous and injury-causing. USPlabs is now defending a number of actions, both in federal and state court, nationwide. Those actions which are currently pending in federal court, as listed in the Schedule of Actions attached hereto, allege that OxyElite Pro and/or Jack3d are unsafe and have caused injuries and/or damages.

Between March 2013 and the present, thirty-one plaintiffs filed nine lawsuits against USPlabs in federal court alleging that OxyElite Pro and/or Jack3d were unsafe, "adulterated", and caused injury or monetary damages. Seven of those nine lawsuits were filed in November and December 2013.[1] In each case, plaintiffs claim that USPlabs failed to issue adequate warnings regarding the products. One case is pending in the Eastern District of Pennsylvania

[1] *See* Exhibit 3, *Ogbanna et al. v. USPlabs, et al.*, (W.D. Tx), Case No. 3:13-cv-00347-KC, filed on November 1, 2013; Exhibit 4, *Carlson, et al. v. USPlabs, et al.*, (N.D. Fla.), Case No. 4:13-cv-00627-RH-CAS, filed on November 13, 2013; Exhibit 5, *Mazzeo v. USPlabs,* (S.D. Fla.), Case No. 0:13-cv-62639-WJZ, filed on December 4, 2013; Exhibit 6, *Van Houten v. USPlabs, et al.*, (D. Hawaii), Case No. 1:13-cv-00635-LEK-KSC, filed on November 19, 2013; Exhibit 7, *Waikiki v. USPlabs, et al.*, (D. Hawaii), Case No. 1:13-cv-00639-LEK-KSC, filed on November 21, 2013; Exhibit 8, *Campos et al, v. USPlabs, LLC, et al.,* (S.D. Cal.), Case No. 3:13-cv-02891-DMS-BLM, filed on December 5, 2013; Exhibit 9, *Reed et al. v. USPlabs, et al.,* (S.D. Cal.), Case No. 3:13-cv-03135-L-NLS, filed on December 20, 2013.

(*Battuello)*, two cases are pending in the Western District of Texas (*Sparling* and *Ogbanna*), one case is pending in the Northern District of Florida (*Carlson*), one case is pending in the Southern District of Florida (*Mazzeo*), two cases are pending in the District of Hawaii (*Van Houten* and *Waikiki*), and two cases are pending in the Southern District of California (*Campos* and *Reed*).

In *Reed*, USPlabs has removed the action, which involves eighteen different personal injury plaintiffs who are residents of fourteen different states, on federal question jurisdiction grounds. Plaintiffs have made a motion to remand. Although the motion to remand is pending, the panel may still transfer the action pursuant to 28 U.S.C. § 1407. *See Colvin v. DePuy Orthopaedics, Inc*., 2011 WL 4965488 (E.D. La. Oct. 19, 2011) (quoting *In re Vioxx Products Liab. Litig.,* 360 F.Supp.2d 1352, 1354 (J.P.M.L. 2005) ("The pendency of a motion to remand to state court is not a sufficient basis to avoid inclusion in Section 1407 proceedings.").

All nine cases listed in the accompanying Schedule of Actions are in the preliminary stages of litigation. Activity to date has been limited to initial pleadings and a preliminary conference held in one of the matters, *Battuello*. No depositions have taken place, and no trials are scheduled in these matters. In addition, at least five other actions are pending in state courts in Pennsylvania, Texas, New Jersey, New York, and California that may become tag-along actions if and when they are removed to federal court.

USPlabs avers that other actions may be pending of which it is unaware. However, in the past two weeks, USPlabs has been made aware of more than one hundred other claimants for which it anticipates actions will be filed in the near future.

II. LAW & ARGUMENT

Transfer and coordinated proceedings are appropriate when: (i) actions involving one or more common questions of fact are pending in different districts, (ii) transfer and coordination

will serve the convenience of the parties and witnesses, and transfer "will promote the just and efficient conduct" of the proceedings, and (iii) transfer and coordination will serve "the convenience of parties and witnesses." 28 U.S.C. § 1407(a). As set forth below, each of the criteria is satisfied here.

A. The Safety Of OxyElite Pro and Jack3d Is The Crux Of Every Action

Although the three (3) actions that are purported class actions are barred in whole or in part by a 2012 nationwide class settlement of all non personal injury claims relating to Jack3d and OxyElite Pro,[2] the nine (9) actions do share common factual allegations that OxyElite Pro and Jack3d are unsafe, "adulterated", and cause injury and/or damages. The plaintiffs in each action have alleged that USPlabs wrongly marketed and/or promoted its products by labeling and advertising that the products were safe and effective. Each complaint alleges that USPlabs misled and/or was negligent in its representations and manufacturing of the products and the use of their constituent ingredients. Furthermore, each complaint relies upon the statements and purported representations of the FDA as the basis for its factual allegations against USPlabs. Plaintiffs further allege that their injuries/damages arose from this common nucleus of facts.

USPlabs vehemently contests plaintiffs' allegations and believes there is no reliable scientific basis for asserting that the products, OxyElite Pro or Jack3d, or their ingredients, DMAA or Aegeline, are unsafe, ineffective, "adulterated", or can cause injury. To the extent the

[2] *See* Exhibit 4, *Carlson, et al., v. USPlabs, LLC, et al.*, (N.D. Fla.), Case No. 4:13-cv-00627-RH-CAS; Exhibit 5, *Mazzeo v. USPlabs, LLC*, (S.D. Fla.), Case No. 0:13-cv-62639-WJZ; Exhibit 8, *Campos, et al., v. USPlabs, LLC, et al.*, (S.D. Cal.), Case No. 3:13-cv-02891-DMS-BLM. USPlabs intends to move to dismiss in these cases pursuant to the 2012 settlement, as appropriate. *See* Plaintiffs Motion for Preliminary Approval of Class Action Settlement and the accompanying Stipulation and Agreement of Settlement, *Hogan, et al., v. USPlabs, LLC*, Case No. BC486925, Los Angeles County Superior Court of the State of California, Docket No. 08/03/2012 (the *Hogan* settlement was finally approved on Dec. 18, 2012, *see* Final Approval Order and Judgment, Docket No. 12/18/2012).

cases are not dismissed and proceed beyond the pleadings, discovery relating to adequacy of product testing, product warnings, product design, and causation will overlap across the cases.

When two or more complaints assert comparable allegations against an identical defendant based on similar transactions and events, common factual questions are presumed. *See In re Air W., Inc. Sec. Litig.*, 384 F.Supp. 609, 611 (J.P.M.L. 1974) (citing *In re Professional Hockey Antitrust Litigation*, 369 F.Supp. 1119 (J.P.M.L. 1974); *In re Seeburg-Commonwealth United Merger Litigation*, 362 F.Supp. 568 (J.P.M.L. 1973). Additionally, the presence of individualized factual issues in the pending cases is not a barrier to transfer and consolidation under Section 1407 as it "does not require a complete identity or even a majority of common factual issues as a prerequisite to centralization." *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, 717 F. Supp. 2d 1376, 1378 (J.P.M.L. 2010); *see also In re: North Sea Bent Crude Oil Futures Litig.*, 2013 WL 5701579 (J.P.M.L. 2013) (quoting *In re: Park West Galleries, Inc., Litig.,* 887 F.Supp.2d 1385, 1385 (J.P.M.L. 2012)). The actions pending against USPlabs fall within the scope of the Panel's centralization authority.

B. Consolidation and Coordination Serves Judicial Economy and Efficiency of Pretrial Proceedings in the Actions

The Panel has repeatedly recognized that transfer of multiple actions to a single forum is appropriate because it will prevent duplication of discovery and eliminate the possibility of overlapping or inconsistent pleading determinations by courts of coordinate jurisdiction. *See e.g. In re: Tribune Co. Fraudulent Conveyance Litig.*, 2011 WL 6740260 (J.P.M.L. Dec. 19, 2011) (noting centralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary); *In re: LivingSocial Mktg. & Sales Practices Litig.*, 2011 WL 3805967 (J.P.M.L. Aug. 22, 2011) (same); *In re: Groupon, Inc., Mktg. & Sales Practices Litig.*, 2011 WL 2132959 (J.P.M.L. May 25, 2011)

(same); *In re Merscorp, Inc., Real Estate Settlement Procedures Act (RESPA) Litig.*, 473 F. Supp. 2d 1379 (J.P.M.L. 2007) (holding that centralization was warranted in order to eliminate duplicative discovery); *In re Starmed Health Pers. Fair Labor Standards Act Litig.*, 317 F. Supp. 2d 1380 (J.P.M.L. 2004) (consolidating two actions, in part, to eliminate duplicative discovery and to conserve the resources of the parties); *In re Visa/MasterCard Antitrust Litig.*, 295 F. Supp. 2d 1379 (J.P.M.L. 2003) (finding centralization is warranted to avoid duplicative discovery, and conserve the resources of the parties, their counsel and the judiciary); *In re Uranium Indus. Antitrust Litig.*, 458 F.Supp. 1223 (J.P.M.L. 1978) (transfer and consolidation is warranted when parties will have to depose many of the same witnesses, examine many of the same documents, and make many of the same or similar pretrial motions).

Those actions that are not dismissed will present complex factual issues of biology, toxicity, and physiology that will require extensive expert testimony, specifically regarding the safety of the ingredients and its effect on the human body. Moreover, they are likely to involve the highly specific factual determination of whether the ingredients in USPlabs' products can only be produced synthetically or occur naturally, another issue that is disputed. Given the technical complexity of these issues and the varying procedural dispositions of the actions, the possibility of overlapping and inconsistent pleading determinations is more likely if the actions are not centralized for coordinated pretrial proceedings. Moreover, judicial coordination of the attendant discovery and review of pretrial proceedings will streamline the actions' course, promoting the most efficient use of resources for the parties and the federal bench. Centralization of these actions will ease the burden on the individual parties, their attorneys, and presiding judges by distributing the workload into a more manageable, structured proceeding.

C. Consolidation Serves The Convenience Of Parties And Witnesses

Transfer of the above-referenced actions to Pennsylvania or Texas serves the convenience of parties and witnesses because the proposed transferee courts are geographically central locations for those cases currently pending and are the situs for cases already pending. Specifically, there is one case currently pending in the Eastern District of Pennsylvania and two cases currently pending in the Western District of Texas.[3]

Additionally, at least one of the other defendants, GNC, who has been named in several of these matters is located in Pennsylvania. USPlabs is located in Texas. Transfer to one of these venues will undoubtedly ease the access to documents and witnesses that plaintiffs will likely seek. Additionally, evidence that will need to be produced by several plaintiffs as to medical treatment and related issues is centrally located near and/or in these venues as well, as these venues lie in or near the state of residency for several of the plaintiffs and/or alleged events that lead to the individual case. For example, plaintiffs in the following cases allege associations with States in or near the Eastern District of Pennsylvania or the Western District of Texas:[4]

1. In *Battuello v. USPlabs, LLC, et al.*, (E.D. Pa.), Case No. 2:13-cv-04101-NIQA, the Complaint alleges that the decedent was a resident of Pennsylvania, consumed OxyElite Pro

[3] The case pending in the Eastern District of Pennsylvania appears ready for discovery to begin, as responsive pleadings have been filed and there are no pending jurisdictional motions before that Court.

[4] Conversely, in *Carlson, et al v. USPlabs, LLC, et al.*, (N.D. Fla.), Case No. 4:13-cv-00627-RH-CAS, and *Mazzeo v. USPlabs, LLC.*, (S.D. Fla.), Case No. 0:13-cv-62639-WJZ, the five named plaintiffs' allegedly reside in the State of Florida. *See* Exhibits 4 and 5. Likewise, in *Van Houten v. USPlabs, LLC, et al.*, (D. Hawaii), Case No. 1:13-cv-00635-LEK-KSC and *Waikiki v. USPlabs, LLC, et al.*, (D. Hawaii), Case No. 1:13-cv-00639-LEK-KSC, the two named plaintiffs allegedly reside in Hawaii. *See* Exhibits 6 and 7. Similarly, in *Campos v. USPlabs, LLC, et al.*, (S.D. Cal.), Case No. 3:13-cv-02891-DMS-BLM, the two named plaintiffs are allegedly residents of the State of California. *See* Exhibit 8.

in the State of Pennsylvania and received medical treatment and died in the State of Pennsylvania. *See* Exhibit 1;

2. In *Sparling v. USPlabs, et al.*, (W.D. Tx.), Case No. 3:13-cv-00323-DCG, the Complaint alleges that Sparling, while stationed at Fort Bliss in the State of Texas, purchased Jack3d, suffered injury as a result of consuming the product, received medical treatment and subsequently died. *See* Exhibit 2;

3. In *Ogbonna v. USPlabs, LLC, et al.*, (W.D. Tx.), Case No. 3:13-cv-00347-KC, the Complaint alleges that the decedent was a resident of the State of Texas at the time of her death. Subsequent filings made on behalf of plaintiff in that matter allege that the decedent was stationed at Fort Bliss and the events giving rise to the case occurred in the State of Texas. *See* Exhibit 3 (Attached Complaint and Doc. 10 on Docket Report, Verification of Subject Matter Jurisdiction); and,

4. In *Reed v. USPlabs, LLC, et al.*, (S.D. Cal.), Case No. 3:13-cv-03135-L-NLS, there are eighteen plaintiffs, who according to the allegations of the Complaint at all relevant times resided in, purchased the products in, consumed the products in and suffered injury in fourteen different states. Specifically, the incidents allegedly giving rise to the plaintiffs claims allegedly occurred in Pennsylvania (Paul Neidigh and Jeffrey Donato), Texas (Nadia Black), New Jersey (Timothy Anderson and Michael Cenicola), Illinois (Anil D'Souza and Jason Jaramillo), Utah (Dan Anderson), Massachusetts (Chris Nee), Virginia (Melissa Miller), North Carolina (Kevin Mullen), Maryland (Torrey Hampton), Nevada (Zell Johnson), Mississippi (Lasagon Magee), Florida (John Obst), California (Jeremy Reed), and Hawaii (Joe Morris and Johnathan Asahi). *See* Exhibit 9.

Some of the plaintiffs are individuals who seek to litigate in their home state's federal forums. However, most of the plaintiffs with claims have those claims pending in a federal forum that is not in their home state. For example, *see* Exhibit 9, *Reed, et al v. USPlabs, et al*., (S.D. Cal.), Case No. 3:13-cv-03135-L-NLS, wherein of the eighteen named plaintiffs, only one is a resident of California. The other seventeen plaintiffs reside in Pennsylvania, New Jersey, Illinois, Massachusetts, Utah, Texas, North Carolina, Virginia, Hawaii, Mississippi, Maryland and Nevada.

Consolidation would pose no greater burden to the plaintiffs during pretrial proceedings as most of the plaintiffs lawsuits are not located in the state in which they currently reside anyway. Additionally, travel by counsel for most of the plaintiffs is not likely to be increased, as counsel for most of the plaintiffs would likely have to travel to Pennsylvania or Texas for multiple depositions regardless of whether transfer is effectuated, as many of the same people will need to be deposed in the individual cases. On the contrary, coordination of proceedings such as depositions could make several fact and expert witnesses available in one place at one time, thus saving the expense of multiple, separately noticed proceedings.

D. Eastern Pennsylvania Or Western Texas Are The Most Appropriate Transferee Courts

The Eastern District of Pennsylvania is well-suited to handle these actions in a multidistrict litigation for many of reasons. It is located in a major transportation hub that can handle travel from all over the country. It is centrally located to several of the currently pending cases as well as several of the cases that are expected to be tag-a-long cases, which are located in Pennsylvania, New York, New Jersey, Texas and California. As noted above, it is also the location of several of the plaintiffs' residences (and/or located near other plaintiffs' residences) and the corporate location of at least one of the defendants, GNC. The *Battuello* matter currently

pending in this district, which still in the preliminary stages, has conducted the preliminary conference, had the parties exchange initial disclosures and is the case that is most furthest in the proceedings.[5] The Eastern District of Pennsylvania is in a "major metropolitan center that is well served by major airlines, provides ample hotel and office accommodations, and offers a well developed support system for legal services." *In re WorldCom, Inc., Sec. & "Erisa" Litig.*, 226 F. Supp. 2d 1352, 1355 (J.P.M.L. 2002).

Moreover, the Judicial Panel on Multidistrict Litigation has referred actions to the district several times because of its expertise in handling these matters. *See In re: Domestic Drywall Antitrust Litig.*, 2013 WL 1619517 (J.P.M.L. Apr. 8, 2013) (noting Judge Baylson is an "experienced transferee judge who we are confident will steer this litigation on a prudent course."); *In re: Nat'l Football League Players' Concussion Injury Litig.*, 2012 WL 361691 (J.P.M.L. Jan. 31, 2012) (noting six actions pending in that district before Judge Brody "who has the experience to guide this litigation on a prudent course."); *In re: Blood Reagents Antitrust Litig.*, 2009 WL 2905460 (J.P.M.L. Aug. 17, 2009) (noting multiple actions pending); *see also In re: Niaspan Antitrust Litig.*, 2013 WL 5239728 (J.P.M.L. Sept. 17, 2013); *In re: Suboxone Antitrust Litig.*, 2013 WL 2565184 (J.P.M.L. June 6, 2013); *In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig.*, 2009 WL 1740569 (J.P.M.L. June 17, 2009); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 990 F. Supp. 834, 835 (J.P.M.L. 1998). The Honorable Judge Eduardo C. Robreno is eminently qualified, having spent fourteen years in public/private practice and having served twenty-one years on the federal

[5] *Battuello* was filed in July 2013 in the Eastern District of Pennsylvania. *See* Exhibit 1. While *Sparling* was the first of the federal cases to be filed in March 2013, jurisdictional motions are still pending in that matter, no preliminary conference has been held and the initial disclosures have not yet been exchanged. *See* Exhibit 2.

bench. Additionally, as a Senior Judge he is an experienced MDL jurist. For these reasons, the Eastern District of Pennsylvania is also a convenient and appropriate choice as transferee forum.

Alternatively, USPlabs, the primary defendant in these actions, is located in Texas, where two of the actions are already pending. Because the Western District of Texas is centrally located, two actions are pending there, and the primary defendant is located in nearby Dallas, along with the majority of documentary evidence and many of the witnesses (including corporate employees and experts), that Court is another convenient choice for a transferee court. Although the supplements allegedly caused harm in other locations such as Hawaii, they allegedly originated in Texas. Consequently, the neighboring district is the "psychological center of gravity." *In re: Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 2010 WL 3166434 (J.P.M.L. Aug. 10, 2010). Because the Honorable Kathleen Cordone is presiding over the *Ogbanna* matter, she has gained some familiarity with the action that would enable her to preside over the multidistrict litigation. *See In re "Factor VIII or IX Concentrate Blood Products" Prod. Liab. Litig.*, 853 F. Supp. 454, 455 (J.P.M.L. 1993) (noting the judge's familiarity with the issues favor transfer).

[continued on the next page]

III. CONCLUSION

For all the foregoing reasons, USPlabs respectfully requests that this Panel issue an Order centralizing and transferring the actions, including any after-filed related individual or class action cases to be transferred as tag-along actions, for coordinated pretrial proceedings to the Eastern District of Pennsylvania or, alternatively, the Western District of Texas, pursuant to 28 U.S.C. § 1407.

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Respectfully submitted,

BREWER & LORMAND, P.L.L.C.

/s/ Pamela J. Lormand
Pamela J. Lormand
1100 Poydras Street, Suite 2900
New Orleans, Louisiana 70163
Telephone: 504-585-7341
Facsimile: 504-910-9933
plormand@brewerlormand.com

ARNOLD & PORTER, LLP

/s/ Angel A. Garganta
Angel A. Garganta
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: 415-471-3285
Facsimile: 415-471-3400
angel.garganta@aporter.com

Counsel for USPlabs, LLC