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 SECOND 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 Second Motion to transfer and centralize actions before a single judge in the United States District Court for the Southern District of California (San Diego) for coordinated pretrial proceedings. Alternatively, USPlabs respectfully moves this panel to transfer all related actions to the United States District Court for the Northern District of Texas. The actions consist of seventeen (17) product liability suits, 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 17 similar actions involving more than 45 plaintiffs pending before 6 different judges in 5 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 ingredients were not banned, as is evidenced by the fact that products containing the ingredients, manufactured by other companies, are still being sold in the marketplace. 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 launch other products within the same product lines. 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. The allegations in the referenced actions overlap and combine factual assertions with respect to products containing DMAA and Aegeline.

Between March 2013 and the present, at least 46 plaintiffs filed 17 separate lawsuits against USPlabs in federal court alleging that OxyElite Pro and/or Jack3d were unsafe, "adulterated," and caused injury or monetary damages.[1] Within the last month, five new lawsuits were filed by 32 plaintiffs.[2] In each the 17 pending cases, plaintiffs claim that USPlabs failed to issue adequate warnings regarding the products.

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[1] *See* Actions listed on Schedule A.

[2] *See* Exhibit 13, *Pavao, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00367-LEK-KSC; Exhibit 14, *Pantohan, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00366-LEK-KSC; Exhibit 15, *Ofisa, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00365-LEK-KSC; Exhibit 16, *Davidson, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00364-LEK-KSC; and Exhibit 17, *Carlisle, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00363-LEK-KSC.

One case is pending in the Eastern District of Pennsylvania (*Battuello*), two cases are pending in the Western District of Texas (*Sparling* and *Ogbanna*), one case is pending in the Southern District of Florida (*Rizzo*), eleven cases are pending in the District of Hawaii (*Van Houten*, *Waikiki*, *Mattson*, *Ishihara*, *Igafo*, *Akau*, *Pavao et al*., *Pantohan et al*., *Ofisa et al*., *Davidson et al*., and *Carlisle et al*.), one case is pending in the Central District of California (*Franco*), and one case is pending in the Northern District of California (*Vista*).

All seventeen cases listed in the accompanying Schedule of Actions are in the preliminary stages of litigation, even though some have upcoming deadlines. The current status of written discovery and the difficulties in scheduling and conducting depositions and other related actions render these actions still in the investigatory phase of litigation. The difficulty to date in coordinating discovery between the various actions further supports the need to centralize these pending federal court suits. While certain defendants in some cases have filed motions to dismiss, these motions are Rule 12 motions, several of which are still pending before the various courts. USPlabs avers that other actions may be pending of which it is unaware; and USPlabs has been made aware of more than one hundred other claimants for which it anticipates actions will be filed in the near future.

All claimants in the currently pending seventeen (17) cases assert personal injury claims for damages allegedly caused by the purchase and/or consumption of dietary supplements manufactured by USPlabs from two product lines, namely OxyElite Pro and Jack3d. The 17 personal injury actions consist of:

a) 13 suits by plaintiffs who allegedly consumed a variation of OxyElite Pro that contained Aegeline;[3]

[3] *See* Exhibit 4, *Rizzo v. USPlabs, LLC, et al*., (S.D. Fl.), Case No. 1:14-cv-20421-JAL; Exhibit 5, *Franco v. USPlabs, LLC, et al*., (C.D. Cal.), Case No. 14-cv-00592-R-JCG; Exhibit 6,

b) 1 suit by a plaintiff who allegedly consumed two OxyElite Pro products, one that contained Aegeline and another that contained DMAA;[4]

c) 1 suit by a plaintiff who allegedly consumed an OxyElite Pro product that contained DMAA;[5]

d) 1 suit by a plaintiff who allegedly consumed an OxyElite Pro product that contained DMAA and a Jack3d product that contained DMAA;[6] and

e) 1 suit by a plaintiff who allegedly consumed a Jack3d product that contained DMAA.[7]

In total, there are forty-six (46) personal injury plaintiffs in the 17 pending federal actions. Of the 46 plaintiffs, 44 claim to have contracted some type of liver-related illness while only two plaintiffs allege to have undergone cardiac arrest.

Vista v. USPlabs, LLC, et al., (N.D. Cal.), Case No. 3:14-cv-00378; Exhibit 8, *Waikiki v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:13-cv-00639-LEK-KSC; Exhibit 9, *Mattson v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00032-LEK-KSC; Exhibit 10, *Ishihara v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00031-LEK-KSC; Exhibit 11, *Igafo v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00030-LEK-KSC; Exhibit 12, *Akau v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00029-LEK-KSC; Exhibit 13, *Pavao, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00367-LEK-KSC; Exhibit 14, *Pantohan, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00366-LEK-KSC; Exhibit 15, *Ofisa, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00365-LEK-KSC; Exhibit 16, *Davidson, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00364-LEK-KSC; and Exhibit 17, *Carlisle, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00363-LEK-KSC.

[4] *See* Exhibit 7, *Van Houten v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:13-cv-00635-LEK-KSC.

[5] *See* Exhibit 1, *Battuello v. USPlabs, LLC, et al.*, (E.D. Pa.), Case No. 2:13-cv-04101-NIQA.

[6] *See* Exhibit 3, *Ogbonna v. USPlabs, LLC, et al.*, (W.D. Tex.), Case No. 3:13-cv-00347-KC.

[7] *See* Exhibit 2, *Sparling v. USPlabs, LLC, et al.*, (W.D. Tex.), Case No. 3:13-cv-00323-DCG.

II. PRIOR REQUEST FOR CENTRALIZATION AND NEW SUITS FILED SINCE THAT TIME WARRANTING CENTRALIZATION

In January of 2014, USPLabs filed a Motion to Transfer nine (9) actions that were then pending in seven (7) separate federal districts, three of which were class actions which are not included in this request for consolidation. On April 2, 2014, after briefing and oral argument, this panel issued an Order Denying Transfer. *See In re: OxyElite Pro and JACK3D Products Liability Litigation*, -- F. Supp. 2d --, MDL No. 2523, 2014 WL 1338474 (J.P.M.L. Apr. 2, 2014). The panel found that the then-pending lawsuits did not appear to give rise to substantially overlapping discovery, in part because some cases involved products containing 1,3-dimethylamylamine ("DMAA") while others involved products containing Aegeline. *Id*. at *1. The panel also noted that three of the then-pending cases were consumer class actions that raised a unique threshold issue with respect to a state court settlement reached in 2012. *Id*. These consumer class actions are *not* part of the pending actions before the panel; rather, all pending actions are personal injury suits, thus mooting the issue of whether consumer class actions could be properly centralized with the pending personal injury suits.

Since the time of USPLabs' original application for consolidation, twelve (12) personal injury lawsuits have been filed against USPlabs by forty (40) plaintiffs in four (4) separate federal districts. In the last month, five of these twelve lawsuits were filed by thirty-two (32) personal injury plaintiffs. These newly-filed suits all involve allegations and claims arising out of the use of variations of the same product line, OxyElite Pro. These newly-filed suits alone warrant consolidation; however, when combined with the five (5) additional personal injury suits that were previously before this panel, transfer and consolidation become critical to serve the convenience of the parties and witnesses and promote efficiency in coordinating pretrial proceedings. In total, there are forty-six (46) personal injury plaintiffs in the 17 pending federal

actions. As previously noted, of the 46 plaintiffs, 44 claim to have contracted some type of liver-related illness while only two plaintiffs allege to have undergone cardiac arrest.

An earlier denial of centralization does not foreclose a second motion for centralization. *See In Re: Plavix Mktg., Sales Practices and Prods. Liab. Litig.* (No. II), MDL No. 2418, 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013). As this panel has recognized, centralization may be proper "where a significant change in circumstances has occurred." *Id.* (citing *In re: Glaceau VitaminWater Mktg. & Sales Practices Litig. (No. II)*, 764 F. Supp. 2d 1349, 1350 (J.P.M.L. 2011) (centralizing three actions after prior denial of centralization of two actions, where it "seem[ed] likely that additional related actions could be filed"); *In re FedEx Ground Package Sys., Inc., Emp't Practices Litig. (No. II)*, 381 F. Supp. 2d 1380, 1381 (J.P.M.L .2005) (centralizing fifteen actions after prior denial of centralization of seven actions, citing the fact that the litigation had "grown considerably"). Here, the circumstances have changed significantly from the first request for centralization, namely:

1) 12 new suits have been filed in 4 separate federal districts;

2) 40 new plaintiffs have filed suit;

3) The consumer class actions are not part of the Schedule of Actions, mooting the issue of whether such actions should be centralized with personal injury actions;

4) Plaintiffs have now alleged punitive damages with overlapping allegations of DMAA and Aegeline-containing products, evidencing the fact that discovery will be overlapping between the two ingredients;[8]

[8] *See* Exhibit 13, Complaint, pp. 75-78, in *Pavao, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00367-LEK-KSC; Exhibit 14, Complaint, pp. 85-88, in *Pantohan, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00366-LEK-KSC; Exhibit 15, Complaint, pp. 85-88, in *Ofisa, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00365-LEK-KSC; Exhibit 16, Complaint, pp. 83-86, in *Davidson, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00364-LEK-KSC; and Exhibit 17, Complaint, pp. 81-84, in *Carlisle, et al. v. USPlabs, LLC, et al.*, (D. Hi.), Case No. 1:14-cv-00363-LEK-KSC.

5) 44 of the 46 plaintiffs before this panel allege liver-related injuries or illnesses;

6) Certain plaintiffs have objected to cross-noticing depositions in related actions, evidencing the need for centralization before a single transferee court;[9]

7) At least one plaintiff has issued written discovery regarding both DMAA and Aegeline even though that plaintiff allegedly consumed only product(s) containing DMAA;[10]

8) The 32 plaintiffs in the 5 suits filed last month all filed Notices of Related Actions, in which the plaintiffs, who allegedly consumed Aegeline products, certified that their actions are related to at least one action in which the plaintiff claims to have consumed a DMAA product. In these Notices of Related Actions, the plaintiffs expressly recognized the overlapping nature of the DMAA and Aegeline-based products, stating that the suits "deal with the same product lines, allegations of personal injury or death, will require overlapping discovery, and deal with most of the same defendants";[11] and

9) Plaintiffs' counsel have put USPlabs on notice of "hundreds" of additional personal injury claims that are anticipated to be filed.[12]

Based on these change in circumstances, centralization is proper for all of these personal injury claims.

III. 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

[9] *See* Exhibit 20, Objection to Cross-Notice.

[10] *See* Exhibit 19, Discovery Requests to USPlabs. Throughout both the Interrogatories and Request for Production, the plaintiffs seek information and documents, respectively, for "products containing DMAA and/or Aegeline." *See* Exhibit 19.

[11] *See e.g.*, Exhibit 21, Notice of Related Cases filed August 15, 2014.

[12] *See* Exhibit 18, Notice of Claims.

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 and Will Be at the Heart of Substantially Overlapping Discovery in the 17 Pending Actions

The seventeen (17) actions 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 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.

Moreover, this panel has repeatedly consolidated matters that involve affiliated or generic products and rejected arguments against centralization based on ingredients being chemically different and/or causing different injuries. *See, e.g., In re Pamidronate Prods. Liab. Litig.*, MDL No. 2120, unpublished Transfer Order at 1 (J.P.M.L. Dec. 2, 2009) (centralizing cases against at least five defendants that "[a]ll . . . share factual questions relating to generic equivalents of Aredia, a brand name prescription drug" because "[p]laintiffs in all actions challenge the safety of these generic equivalents . . . ."); *In re Yasmin and Yaz (Drospirenone) Mktg., Sale Practices and Prods. Liab. Litig.*, MDL No. 2100, 655 F. Supp. 2d 1343, 1343 (J.P.M.L. 2009) centralizing actions that "[a]ll . . . share factual questions relating to at least one of the drospirenone-containing oral contraceptives Yaz and Yasmin, which are manufactured by Bayer"); *In re Gadolinium Contrast Dyes*, 536 F. Supp. 2d 1380, 1381-82 (J.P.M.L. 2008) (centralizing claims against at least five different defendants that "share questions of fact arising out of the allegation that gadolinium based contrast dyes may cause nephrogenic system fibrosis in patients with impaired renal function" and rejecting argument that "the actions do not share sufficient questions of fact because each of the contrast agents is chemically and pharmacologically different"); *In re Bextra & Celebrex Mktg., Sales Practices and Prods. Liab. Litig.*, MDL No. 1699, 391 F. Supp. 2d 1377, 1379 (J.P.M.L. 2005) (centralizing cases involving two drugs manufactured by same company; rejecting arguments against centralization based on

"the presence of unique questions of fact relating to each drug"); *In Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL No. 1407, 173 F. Supp. 2d 1377, 1379 (J.P.M.L. 2001) ("Notwithstanding differences among the actions in terms of named defendants, specific products involved, legal theories of recovery, status as class actions, and/or types of injury alleged, all actions remain rooted in complex core questions concerning the safety of Phenylpropaolimine (PPA)"); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, 990 F. Supp. 834, 836 (J.P.M.L. 1997) (centralizing actions involving "alleged defects in three prescription drugs" because "the core issues presented in the litigation involve the causal connection between use of the three diet drugs (singly or in combination) and the alleged incidences of series side effects").[13] In this instance, centralization is proper because of: (1) the plaintiffs' overlapping allegations relative to DMAA and Aegeline, (2) the presence of plaintiffs who allegedly consumed products containing both ingredients; and (3) the overwhelming presence of alleged liver-related illnesses due to consumption of both DMAA and/or Aegeline.

[13] *See also In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, MDL No. 1871, 528 F. Supp. 2d 1339, 1340-41 (J.P.M.L. 2007) (centralizing cases that "arise from allegations that certain diabetes drugs manufactured by GSK-Avanida and/or two sister drugs containing Avandia (Avandamet and Avandaryl)-caused an increased risk of heart attack and other physical injury, and that GSK failed to provide adequate warnings concerning that risk"); *In re Kugel Mesh Hernia Patch*, 493 F. Supp. 2d 1371, 1372 (J.P.M.L. 2007) (centralizing actions that involve "allegations of defects in various models of hernia patches manufactured and sold by" three defendants; "[a]ll actions can thus be expected to share factual questions concerning such matters as the design, manufacture, safety, testing, marketing and performance of these patches"); *In re Human Tissue Prods. Liab. Litig.*, MDL No. 1763, 435 F. Supp. 2d 1352, 1354 (J.P.M.L. 2006) (rejecting argument against centralization that the actions "involve different tissue implants, several different defendants, and likely different damages," because "[t]he alleged improprieties regarding the illegal harvesting, flawed processing and/or inappropriate distributing of human tissue forms the factual backdrop of all actions presently before the panel").

Moreover, as seen in the pending *Deepwater Horizon* multidistrict litigation, a transferee judge can effectively use his or her significant discretion to employ a variety of techniques and methods to control and coordinate consolidated litigation, especially where the litigation involves a variety of issues, including product liability claims arising out of different products. In the *Deepwater Horizon* litigation, this panel consolidated and transferred numerous claims, including personal injury, property damage and economic loss, arising out of the fire and explosion on the *Deepwater Horizon* and the subsequent release of oil. A subset of the personal injury claims were based on individuals' alleged exposure to oil, dispersants, or a mixture of oil and dispersants. These plaintiffs claimed a wide range of injuries from headaches to respiratory illnesses to burns. Moreover, these plaintiffs' claims arose out of alleged exposure to multiple types of dispersants applied by various companies, including different variations of a dispersant called Corexit.

In consolidating these arguably disparate claims, the panel emphasized:

> While these actions will require some amount of individualized discovery, in other respects they overlap with those that pursue only economic damage claims. The transferee judge has broad discretion to employ any number of pretrial techniques – such as establishing separate discovery and/or motion tracks – to address any differences among the cases and efficiently manage the various aspects of this litigation. *See, e.g., In re Lehman Brothers Holdings, Inc., Securities & Employee Retirement Income Security Act (ERISA) Litigation*, 598 F. Supp. 2d 1362, 1364 (J.P.M.L. 2009).

Subsequent to transfer and consolidation, the transferee judge, the Honorable Carl Barbier, created four different pleading bundles, with subparts in certain bundles, to effectively manage the discovery and related pretrial proceedings for different types of claimants. *See* Pre-Trial Order No. 11, Rec. Doc. 569, MDL No. 2179 (Case No. 2:10-md-2179, EDLA). Judge Barbier consolidated all dispersant-related claims into a single pleading bundle and has effectively and efficiently managed the pretrial proceedings for these various dispersant-related

claims. *Id*. Just as Judge Barbier has employed creative and effective mechanisms to coordinate pretrial proceedings for varying claims, a transferee judge can likewise employ similar methods to address any individualized or nuanced differences between the claims and/or actions that are currently before the panel.

Finally, in the most recent cases filed against USPlabs last month, 32 plaintiffs in 5 separate personal injury suits asserted allegations for punitive damages. Although these plaintiffs claimed to have consumed a version of OxyElite Pro that contained Aegeline, these plaintiffs' punitive damage allegations are based on products containing both DMAA and Aegeline. Specifically, these plaintiffs allege a pattern of behavior on the part of USPlabs related to products containing both DMAA and Aegeline.[14] It is anticipated that other personal injury plaintiffs will seek leave to add identical punitive damage allegations. These allegations will require significant overlapping discovery between products containing DMAA and Aegeline.

Indeed, these plaintiffs readily concede the overlapping nature of their claims with plaintiffs who consumed DMAA-containing products. All plaintiffs in these actions filed Notices of Related Cases, identifying six pending actions, one of which involves the use of DMAA. In each Notice of Related Cases, plaintiffs stated:

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[14] *See* Exhibit 13, Complaint, pp. 75-78, in *Pavao, et al. v. USPlabs, LLC, et al*., (D. Hi.), Case No. 1:14-cv-00367-LEK-KSC; Exhibit 14, Complaint, pp. 85-88, in *Pantohan, et al. v. USPlabs, LLC, et al*., (D. Hi.), Case No. 1:14-cv-00366-LEK-KSC; Exhibit 15, Complaint, pp. 85-88, in *Ofisa, et al. v. USPlabs, LLC, et al*., (D. Hi.), Case No. 1:14-cv-00365-LEK-KSC; Exhibit 16, Complaint, pp. 83-86, in *Davidson, et al. v. USPlabs, LLC, et al*., (D. Hi.), Case No. 1:14-cv-00364-LEK-KSC; and Exhibit 17, Complaint, pp. 81-84, in *Carlisle, et al. v. USPlabs, LLC, et al*., (D. Hi.), Case No. 1:14-cv-00363-LEK-KSC.

> All of these cases deal with the same product lines, allegations of personal injury or death, will require overlapping discovery, and deal with most of the same defendants.[15]

As an example of the overlapping discovery in these cases, a plaintiff in one case has sought written discovery related to products containing both DMAA and Aegeline despite the fact that the plaintiff in question allegedly consumed only a DMAA-containing product.[16] In sum, transfer and consolidation of the cases before this panel would remove the inevitable overlapping discovery between these cases.

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.

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[15] *See e.g.*, Exhibit 21, Notice of Related Cases filed August 15, 2014.

[16] *See* Exhibit 19, Discovery Requests to USPlabs. Throughout both the Interrogatories and Request for Production, the plaintiffs seek information and documents, respectively, for "products containing DMAA and/or Aegeline." *See* Exhibit 19.

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. *See In re: Natrol, Inc., Glucosamine/Chondrotin Mktg & Sales Pracs. Litig*., MDL No. 2528, -- F. Supp. 2d --, 2014 WL 2616783, at *1 (J.P.M.L. June 10, 2014) (rejecting argument that claims arising out of use of dietary supplement were not complex and stating that "[i]n our view, extensive common expert discovery and one or more *Daubert* hearings likely will be required.").

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. There are 46 plaintiffs and numerous defendants in the federal actions before this panel. There are suits in 6 different federal districts in 7 district courts from

Hawaii to Florida to Pennsylvania. 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.

Otherwise, the parties will face the burdensome task of responding to multiple sets of similar discovery requests, and fact witnesses will face duplicative depositions in multiple actions. These depositions will involve many of the same questions related to the same issues, including but not limited to company information, marketing history, sales history, FDA investigation(s) and the like. Corporate and expert witnesses will face the possibility of duplicative depositions in multiple jurisdictions with the possibility of inconsistent or different evidentiary and discovery rulings by the federal courts presiding over these cases. All of these problems can be avoided by centralization.

This is highlighted by the fact that USPlabs has sought to cross notice the depositions of its witnesses in these matters, for the convenience of the parties and the witnesses, and some of these plaintiffs' counsel have objected for no reason other than they do not want to "share" deposition dates with the other plaintiffs' counsel despite the fact that the same issues and questions will be asked by all.[17] Moreover, certain plaintiffs' counsel have proposed allowing each party to have seven (7) hours with a particular witness, opening up the door for multi-day depositions for a single witness. Clearly, coordinated discovery is necessary not only to promote judicial economy and the convenience of the parties and witnesses but to avoid duplicative discovery sought only to inconvenience and harass third party witnesses, expert witnesses and party witnesses. Moreover, centralization is necessary to avoid different pretrial rulings on issues that are critical to all cases. In particular, given the complex scientific issues that underlie

[17] *See* Exhibit 20, Objection to Cross-Notice.

plaintiffs' allegations with respect to the USPlabs' products, there will be *Daubert* challenges and dispositive motions in every case. There will also be disputes related to the scope of discovery, deposition protocol, and confidentiality of testimony and documents. These issues should be considered and adjudicated by a single court to avoid inconsistent and/or duplicative rulings.

C. Consolidation Serves The Convenience Of Parties And Witnesses

Transfer of the above-referenced actions to San Diego, California or Dallas, Texas serves the convenience of parties and witnesses because the proposed transferee courts are geographically central locations for those cases currently pending. There are two pending cases in California and two pending cases in Texas. Two primary defendants are located in California and USPlabs is located in the Northern District of Texas. Transfer to one of these venues will undoubtedly ease the access to documents and witnesses that plaintiffs will likely seek. Centralization in the Southern District of California (San Diego) makes sense for the convenience of the parties and witnesses because of its proximity to San Diego's airport and to two primary defendants (S.K. Laboratories and Vita-Tech International). San Diego provides a central location for lawsuits that span from Hawaii to Florida to Pennsylvania. Moreover, San Diego's airport offers daily, nonstop flights to all cities in which there are pending cases before this panel.

In addition to these locations being more convenient for the parties and witnesses, 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 cases. For example, the plaintiffs in the *Franco* and *Vista* actions are residents of California, and

the plaintiffs in the Hawaii actions are residents of Hawaii. These plaintiffs claim to have purchased and/or consumed USPlabs' products in California and Hawaii, respectively.

Consolidation would pose no greater burden to the plaintiffs during pretrial proceedings because the majority of discovery will be focused on USPlabs, located in Texas, and GNC, located in Pennsylvania. As a result, 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. Southern California or Northern District of Texas Are the Most Appropriate Transferee Courts

The Southern District of California 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 noted above, it is near the location of multiple plaintiffs' residences and near the corporate location of at least two of the defendants, S.K. Laboratories and Vita-Tech International. The *Franco* and *Vista* matters are currently pending in California, and the Southern District of California "is relatively convenient for parties, witnesses and counsel located in or near southern California and is readily accessible to parties located elsewhere." *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, 802 F. Supp. 2d 1367, 1368 (J.P.M.L. 2011). For these reasons, the Southern District of California is 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 Northern District of Texas is centrally

located, two actions are pending in the nearby Western District of Texas, and the primary defendant is located in 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).

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 cases to be transferred as tag-along actions, for coordinated pretrial proceedings to the Southern District of California or, alternatively, the Northern District of Texas, pursuant to 28 U.S.C. § 1407.

Respectfully submitted,

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