UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-81611-CIV-MARRA

DAVID HERST, on behalf of himself and
all others similarly situated

Plaintiff,

v.

TOMMIE COPPER INC.

Defendant.
_____/

ORDER GRANTING MOTION TO TRANSFER VENUE

This Cause is before the Court upon Defendant Tommie Copper, Inc's ("Tommie Copper" or the "Company") Motion to Transfer Venue, which was filed February 1, 2016 (DE 13). Plaintiff David Herst filed a response in opposition to Defendant's Motion to Transfer Venue on February 22, 2016 (DE 16), and Defendant filed a reply and a supplemental exhibit in support of the Motion to Transfer Venue on March 3, 2016, and March 8, 2016, respectively (DE 17 & 18). The Court has carefully reviewed the briefs and the record and is otherwise fully advised in the premises. For the reasons stated below, pursuant to the first-filed rule and 28 U.S.C. § 1404(a), this Court concludes that transfer to the Southern District of New York, where a related consolidated putative class action is pending and the majority of the witnesses and the documents are located, is warranted.

I. BACKGROUND

A. The Parties

Tommie Copper is a Delaware corporation with its principal place of business in Westchester County, New York. (DE 1, Compl. ¶ 14.) The Company sells the Tommie Copper Products line,

which consists of athletic compression apparel and accessories (the "Products"). (*Id.* ¶¶ 1, 21.) The Products incorporate a proprietary copper-infused and/or copper- and zinc-infused fabric. (*Id.* ¶ 1.) Tommie Copper markets and sells the Products throughout the United States, including Florida. (*Id.* ¶ 14.)

Herst resides in West Palm Beach, Florida. (*Id.* ¶ 13.) Herst purchased one or more of the Products for personal use. (*Id.*)

B. This Action

On November 24, 2015, Herst filed this putative class action against the Company, arising out of the sales and marketing of the Products (the "Florida Action"). (DE 1, Compl.) Plaintiff asserts claims, on behalf of himself and others similarly situated, for violation of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.* (Count I), false and misleading advertising under Fla. Stat. § 817.41 (Count II), and unjust enrichment (Count III). (*Id.* at 32-34.) Plaintiff alleges that Defendant's claims and representations in numerous advertisements regarding the pain-reducing qualities of the copper-infused compression fabric on the Products are false and misleading. (*Id.* at 8-10, 15-59.)

C. The Consolidated Action in the Southern District of New York

Months before this action was filed, other plaintiffs filed a putative class action against Tommie Copper in the Southern District of New York, in *Potzner et al. v. Tommie Copper, Inc.*, Case No. 7:15-cv-03183-AT, on April 22, 2015. (DE 13, Motion to Transfer Venue at 2.) On July 31, 2015, another putative class action was filed against Tommie Copper and others in the Southern District of New York, in *Lucero et al. v. Tommie Copper, Inc., et al.*, Case No. 1:15-cv-06055-AT. (*Id.*)

On January 5, 2016, the Honorable Analisa Torres of the Southern District of New York

consolidated the *Potzner* and *Lucero* actions and appointed legal counsel (the "New York" action). In consolidating the actions, Judge Torres explained that both actions in the Southern District of New York "concern allegations that Defendants made false or misleading representations in advertising and marketing their 'copper-infused' athletic apparel" and therefore involve common questions of law and fact. (DE 13-2, Motion to Transfer Venue Reinhart Decl. Ex. A.)

On March 4, 2016, the plaintiffs in the New York Action filed a Consolidated Class Action Complaint for Damages and Injunctive Relief (the "Consolidated Complaint"). (DE 18-1, Consolidated Compl.) The eight plaintiffs in the Consolidated Complaint reside in various states; plaintiffs Bishop and Henderson are citizens and residents of the state of Florida. (*Id.* ¶¶ 25-26.) The plaintiffs seek to represent a nationwide class of all persons in the United States who purchased Tommie Copper products, as well as sub-classes of class members who purchased products in their respective states, including Florida. (*Id.*¶¶ 153-58.) The defendants are Tommie Copper, Tommie Copper Holdings, Inc., Thomas Kallish, and Montel Williams. (*Id.*¶¶ 27-32.)

The claims in the Consolidated Complaint are as follows: violation of Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq*. (Count I), negligent misrepresentation (Count II), unjust enrichment (Count III), breach of express warranty under California statutory law (Count IV), breach of implied warranty under California statutory law (Count V), violation of California's Consumers Legal Remedies Act (Count VI), violation of California's False Advertising Law (Count VII), violation of California's Unfair Competition Law (Count VIII), breach of express warranty under Georgia statutory law (Count IX), breach of implied warranty under Georgia statutory law (Count X), violation of Georgia's Fair Business Practices Act (Count XI), violation of Iowa's Consumer Frauds Act (Count XII), breach of express warranty under Iowa statutory law (Count XIII), negligent misrepresentation under Iowa law (Count XIV), violation of New York's Deceptive Acts or Practices

law (Count XV), violation of New York's False Advertising law (Count XVI), breach of express warranty under New York statutory law (Count XVII), breach of implied warranty under New York statutory law (Count XVIII), breach of contract under New York law (Count XIX), breach of warranty under Ohio statutory law (Count XX), breach of implied warranty under Ohio statutory law (Count XXI), violation of Ohio's Consumer Sales Practices Act (Count XXII), breach of express warranty under Florida statutory laws (Count XXIII), breach of implied warranty under Florida statutory laws (Count XXIV), and violation of Florida's Deceptive and Unfair Trade Practices Act (Count XXV). (*See* DE 18-1, Consolidated Compl.)

II. DISCUSSION

A. First-filed Rule

Under the first-filed rule, "[w]here two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit." *Manuel v. Convergys Corp*., 430 F.3d 1132, 1135 (11th Cir. 2005). "[T]he party objecting to jurisdiction in the first-filed forum carr[ies] the burden of proving compelling circumstances to warrant an exception to the first-filed rule." *Id.* (citation and internal quotation marks omitted).

Here, there is no question that both of the two putative class actions in the Southern District of New York (which have since been consolidated) were filed before this action. The plaintiffs in *Potzner* filed their putative class action in the Southern District of New York on April 22, 2015, and the plaintiffs in *Lucero* filed their putative class action in the Southern District of New York on July 31, 2015. (DE 13, Motion to Transfer Venue at 2.) Nearly four months later, Herst filed this action on November 24, 2015. Thus, the New York Action is properly considered the first-filed suit.

Further, based upon a review of the complaints filed in the different fora, this Court

concludes that the Florida Action and the New York Action involve overlapping issues and parties. Both actions concern allegations that Defendant Tommie Copper made false and misleading representations about its copper-infused athletic apparel and therefore involve common subject matter and a common defendant. Both actions arise out of the same alleged misrepresentations in infomercials, websites, and other forms of media. In fact, it appears that the majority of allegations in this case were copied verbatim from the *Lucero* complaint. (*Compare* DE 1, Compl. *with* DE 13-2, *Lucero* Compl.)

Although the actions unquestionably involve overlapping issues and parties, Herst objects to the New York forum on the following three grounds: (1) there are no Florida plaintiffs in the New York Action, (2) there are no Florida causes of action in the New York Action, and (3) both actions are in their initial stages of litigation. These objections, however, are either moot or simply inconsequential, as further discussed below.

Herst's first and second objections are no longer factually sound since the New York Action now includes Florida plaintiffs and Florida causes of action. That is, since the filing of Herst's Response to Tommie Copper's Motion to Transfer Venue, the plaintiffs in the New York Action filed their Consolidated Complaint, which added, *inter alia*, plaintiffs Bishop and Henderson, who are citizens and residents of the state of Florida. (DE 18-1, Consolidated Compl. ¶¶ 25-26.) The Consolidated Complaint now includes claims for breach of express warranty under Florida statutory laws (Count XXIII), breach of implied warranty under Florida statutory laws (Count XXIV), and violation of Florida's Deceptive and Unfair Trade Practices Act (Count XXV). (*Id.* ¶¶ 171-94, 361-95.)

As to Herst's third objection, the fact that the New York and Florida cases are both in their initial stages of litigation is of no moment. *Stone Creek Mech., Inc. v. Carnes Co.*, No. CIV.A.

02-CV-1907, 2002 WL 31424390, at *2 (E.D. Pa. Oct. 25, 2002) (stating that the plaintiff had not cited any precedent from any circuit supporting the proposition that a court may depart from the first-filed rule solely because a second-filed action is at the same stage of development as the first-filed action); *c.f. Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985) (dismissing first-filed case where the controversy was further developed in the second-filed case).

Hence, for the reasons discussed above, and after consideration of the factors relevant to its analysis under 28 U.S.C. § 1404(a) (*see* discussion *infra* Section II. B), this Court concludes that Herst has not carried his burden of showing that compelling circumstances warrant an exception to the first-filed rule. *See Evergreen Media Holdings, LLC v. Paul Rock Produced, LLC*, No. 2:14-CV-499-FTM-29, 2015 WL 1523961, at *3 (M.D. Fla. Apr. 2, 2015) ("To determine whether compelling circumstances require an exception to the first-filed rule, courts consider the same factors used to evaluate motions to transfer venue pursuant to 28 U.S.C. § 1404(a).").

B. 28 U.S.C. § 1404(a) Analysis

Tommie Copper also moves to transfer venue pursuant to section 1404(a) of Title 28 of the United States Code, which provides in relevant part that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). To determine the propriety of transfer to a different district, courts engage in a two-step analysis under section 1404(a). *Abbate v. Wells Fargo Bank, Nat. Ass'n*, 09–62047–Civ, 2010 WL 3446878, at *4 (S.D. Fla. Aug. 31, 2010). "First, courts determine whether the action could have been brought in the venue in which transfer is sought. Second, courts assess whether convenience and the interest of justice require transfer to the requested forum." *Id.* In deciding the second step, "courts focus on a number of potential factors including: (1) the convenience of the witnesses; (2) the location of documents and other sources of

proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the ability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances." *Id.* at *5 (citing *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n. 1 (11th Cir. 2005)).

Applying the legal framework set forth above, this Court begins its analysis under 28 U.S.C. § 1404(a) by determining whether this action could have been brought in the New York forum in the first instance. *Abbate*, 2010 WL 3446878, at *4. This determination, in turn, depends on whether Tommie Copper is subject to personal and subject matter jurisdiction in the Southern District of New York, whether venue is appropriate there, and whether Tommie Copper is amenable to service of process in that district. *Meterlogic, Inc. v. Copier Sols., Inc.*, 185 F. Supp. 2d 1292, 1299 (S.D. Fla. 2002) (finding that action could have been brought in transferee court where venue, process, and jurisdiction existed in that district).

Because Tommie Copper has its principal place of business in Mount Kisco, New York, it is subject to personal jurisdiction in the Southern District of New York, venue is appropriate there, and it is amenable to service of process in that district. *See id.* at 1300 ("Because CS and TS have their principal place of business in Kansas City, Missouri, there is no question that personal jurisdiction, venue, and service of process would have been proper there."). Further, subject matter jurisdiction in this case is based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a), and the same would be true if this case were brought in the Southern District of New York. *Id.* Subject matter jurisdiction would have also existed in that district based upon 28 U.S.C. § 1332(d). Thus, Herst could have brought this action against Tommie Copper in the Southern District of New York.

Next, the Court must "assess whether convenience and the interest of justice require transfer

to the requested forum." *Abbate*, 2010 WL 3446878, at *4. The Court has carefully reviewed all factors outlined by the Eleventh Circuit in *Manuel* and concludes that transfer is warranted.

1. Convenience of the witnesses

"The convenience of both the party and non-party witnesses is probably considered the single most important factor in the analysis whether a transfer should be granted." *Osgood v. Disc. Auto Parts, LLC*, 981 F. Supp. 2d 1259, 1264 (S.D. Fla. 2013) (citation omitted). "When weighing the convenience of the witnesses, a court does not merely tally the number of witnesses who reside in the current forum in comparison to the number located in the proposed transferee forum. Instead, the court must qualitatively evaluate the materiality of the testimony that the witness may provide." *Id.* (citation and internal quotation marks omitted).

Here, most, if not all, of the witnesses reside in or near the Southern District of New York. Thomas Kallish, the founder of Tommie Copper, who is repeatedly referenced in the Complaint, resides in Bedford Hills, New York, which is within the Southern District of New York. (*See e.g.,* DE 1, Compl. ¶¶ 19,-20, 32, 41, 42, 48; *see* DE 13-1, Lavelle Decl. ¶ 6; DE 13, Mot. at 7.) In addition, nearly all of the executives and employees of Tommie Copper live and work in or near the Southern District of New York. (*See* DE 13-1, Lavelle Decl. ¶ 7.) As Herst concedes, "[t]he most significant witnesses will be the corporate representatives of Tommie Copper, Inc." (DE 16, Plaintiff's Resp. at 6.) Further, a great majority of Tommie Copper's former employees and marketing professionals and consultants are based in or near the Southern District of New York. (*See* DE 13-1, Lavelle Decl. ¶ 8.)

Herst, on the other hand, is not likely to be an important witness since the allegations concern the veracity of the Company's claims and representations about its apparel. Although Herst maintains that witness testimony can be obtained in New York or via video or teleconference, the

testimony of the Tommy Copper corporate representatives will likely be central to the case and better presented through live testimony at trial. Other than himself, Herst has not identified a single witness who is located in the Southern District of Florida. Accordingly, the convenience of the witnesses factor heavily weighs in favor of transfer to the Southern District of New York.

2. Location of the evidence

Herst does not appear to dispute that the majority of the documents and sources of proof are located at Tommie Copper's headquarters in the Southern District of New York. Herst merely suggests that the documents and sources of proof are readily available as a result of litigation brought by the Federal Trade Commission, which, incidentally, was brought in the Southern District of New York. (DE 16-2, Plaintiff's Resp., Ex. B.) Nevertheless, the documents and sources of proof are located in the New York forum, and thus this factor weighs in favor of transfer.

3. Convenience of the parties

The Southern District of New York is more convenient for Tommie Copper, which has its headquarters in the New York forum. While this forum is more convenient for Herst, who resides in West Palm Beach, Florida, this Court notes that the inconvenience of litigating in New York would be mitigated by sharing discovery and other resources with the plaintiffs in the Consolidated Complaint. Overall, the Court finds that convenience of the parties factor does not strongly weigh for or against transfer.

4. Locus of operative facts

The locus of operative facts factor weighs in favor of transfer because the alleged misrepresentations that form the basis of the Complaint originated in the Southern District of New York, where Tommie Copper's headquarters is located. For purposes of this 28 U.S.C. § 1404(a) transfer analysis, "[m]isrepresentations are deemed to occur in the district where the

misrepresentations are issued or the truth is withheld, not where the statements at issue are received." *In re Collins & Aikman Corp. Sec. Litig*., 438 F. Supp. 2d 392, 397 (S.D.N.Y. 2006). Thus, this factor weighs in favor of transfer.

5. Availability of process to compel witnesses to attend

Tommie Copper suggests that Herst might seek to depose former employees of Tommie Cooper and/or outside marketing and advertising consultants and firms that provided services to the Company. As Tommie Copper argues, the proposed transferee court would have subpoena power over these individuals and firms, while the Southern District of Florida would not. Other than these generalizations, however, neither party has identified a specific non-party witness who would be unavailable to testify in the respective districts. Therefore, this Court finds that the availability of process factor is neutral or only slightly weighs in favor of transfer. *Motorola Mobility, Inc. v. Microsoft Corp*., 804 F. Supp. 2d 1271, 1278 (S.D. Fla. 2011) ("Neither party has identified any particular witness who will be unavailable to testify in the respective Districts. Accordingly, this factor does not weigh in favor of, or against, transfer.").

6. Relative means of the parties

Herst argues that transfer is inappropriate because Defendant Tommie Copper is a large commercial entity with the financial ability to litigate in Florida, while Plaintiff Herst is an individual with lesser financial means. Herst emphasizes that the cost of even one trip to New York would exceed the amount of his claim. There is no doubt that Tommie Copper's financial means are superior to Herst's means. However, Herst can save significant time and money by sharing discovery and resources with the eight plaintiffs in the New York Action. Therefore, under the facts of this case, this factor does not heavily weigh for or against transfer.

7. Forum's familiarity with governing law

This action involves Florida causes of action. Herst asserts claims for violation of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.*, false and misleading advertising under Fla. Stat. § 817.41, and unjust enrichment under Florida common law. (DE 1, Compl. at 32-34.) This forum is undoubtedly more familiar with applying Florida law. Nevertheless, the related action pending in New York already includes a claim for violation of Florida's Deceptive and Unfair Trade Practices Act, false advertising claims under the laws of other states, and an unjust enrichment claim. This Court has no doubt that Judge Torres in the Southern District of New York is more than capable of adjudicating the Florida claims pending in this action and the related action. Further, transferring this action to the New York forum will avoid inconsistent rulings on the application of Florida law to the facts of this case.[1] Hence, under the particular circumstances of this case, this factor does not heavily weigh against transfer. *See Summers-Wood L.P. v. Wolf*, No. 3:08-CV-60/RV/MD, 2008 WL 2229529, at *3 (N.D. Fla. May 23, 2008) ("[A]lthough it is perhaps judicially desirable to have cases decided by a court familiar with the substantive law to be applied, any advantage to be gained by having a local court decide the case is not generally considered a highly significant one" in the transfer analysis).

8. Plaintiff's choice of forum

Generally, the plaintiff's choice of forum is given considerable deference. *Robinson v.*

[1] Herst's reliance on the opinion in *In re Glaceau Vitaminwater Mktg. & Sales Practice Litig.*, No. 11-md-2215 (DLI) (RML) (E.D.N.Y. July 10, 2013), which is attached to Herst's Response (DE 16-1), is unavailing. There, the transferee court's recommendation to remand the various related cases to the respective transferor courts was made in the context of its consideration of the plaintiffs' motions for class certification. In this case, on the other hand, this Court is guided by the principles of the first-filed rule and all of the factors relevant to 28 U.S.C. § 1404(a) analysis.

Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996) (plaintiffs' choice of forum should not be disturbed unless it is clearly outweighed by other considerations). However, the plaintiff's choice of forum is given less than normal deference in the following two situations: (1) where the suit is a class action and (2) where the operative facts underlying the action occurred outside the district in which the action is brought. *Balloveras v. Purdue Pharma Co.*, No. 04-20360-CIV-MORENO, 2004 WL 1202854, at *1 (S.D. Fla. May 19, 2004). As the United States Supreme Court has explained, "where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

Here, Herst's choice to file suit in this forum is entitled to little deference because the alleged misrepresentations that form the basis of the Complaint originated in the Southern District of New York. Further, while this putative class action was brought on behalf of a putative class of Florida-only consumers, the plaintiffs in the related action in the Southern District of New York seek to represent a nationwide class of all persons in the United States who purchased Tommie Copper products. Herst's choice of forum is entitled to less deference because there is a putative nationwide class action potentially involving hundreds of class members from numerous different states pending in the transferee court.

9. Trial efficiency and the interests of justice

A primary consideration in addressing the "interests of justice" factor is "the desire to avoid multiplicity of litigation." *Florida v. Jackson*, No. 3:10-CV-503-RV-MD, 2011 WL 679556, at *3

(N.D. Fla. Feb. 15, 2011). Where "[t]here is thus a real risk that different judges in different divisions will be making separate and potentially inconsistent findings of fact and conclusions of law in closely-related actions," transfer is appropriate to promote judicial economy and consistency. *Id.*

Here, this action is related to a consolidated action involving nearly identical allegations and issues pending in the transferee court. Both actions concern allegations that Defendant Tommie Copper made false and misleading representations about its copper-infused athletic apparel in infomercials, website material, and social media. Indeed, it appears that the majority of allegations in this case were copied verbatim from one of the complaints filed in the New York Action. (*Compare* DE 1, Compl. *with* DE 13-2, *Lucero* Compl.) Transferring this action to the Southern District of New York would promote judicial economy and consistency of rulings. Moreover, the majority of the witnesses and the relevant documents are located in or near the Southern District of New York, making trial in New York more expeditious and less expensive. Thus, this last factor weighs heavily in favor of transfer.

In summary, four factors heavily weigh in favor of transferring this case to the Southern District of New York, namely, the conveniences of the witnesses, the location of the evidence, the locus of the operative facts, and the interests of justice and trial efficiency. Any inconvenience and/or financial expense incurred by Herst in litigating this action in the transferee court would be significantly mitigated if Herst were to share resources with the other eight plaintiffs in the related action pending in the transferee court. Moreover, this Court is confident in the transferee court's ability to adjudicate the state law causes of action in this case, particularly because identical and/or similar claims are pending in the transferee court. Finally, Herst's choice of litigating in this forum is entitled to little deference because the alleged misrepresentations that form the basis of the

Complaint originated within the Southern District of New York and were received by hundreds of potential plaintiffs in numerous different states. Thus, after weighing and balancing all of the factors, the Court concludes that transfer to the Southern District of New York is appropriate.

III. CONCLUSION

Accordingly, for the reasons discussed above, this Court concludes transfer of this action to the Southern District of New York is appropriate. Herst has not carried his burden of showing that compelling circumstances warrant an exception to the first-filed rule. Further, transfer is warranted under 28 U.S.C. § 1404(a) because the action could have been brought in the transferee court, and convenience and the interest of justice require transfer to the requested transferee court.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Tommie Copper, Inc's Motion to Transfer Venue (DE 13) is **GRANTED**.
2. The Clerk of the Court is directed to **TRANSFER** this case to the United States District Court for the Southern District of New York.
3. Upon transfer, the Clerk shall **CLOSE** this case.
4. Any pending motions are **DENIED** as moot.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 14th day of July, 2016.

KENNETH A. MARRA
United States District Judge