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 12  
 13 **UNITED STATES DISTRICT COURT**  
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

14  
 15 **Federal Trade Commission; and**  
 16 **The State of California**, ex rel  
 Attorney General Edmund G. Brown, Jr.  
 17 Plaintiffs,  
 18 v.  
 19 **Watson Pharmaceuticals, Inc., et al.**  
 20 Defendants.  
 21

Case No. CV 09-598 MRP (PLAx)

**PLAINTIFF FTC'S OPPOSITION  
 TO DEFENDANTS' JOINT  
 MOTION TO TRANSFER VENUE  
 TO THE NORTHERN DISTRICT  
 OF GEORGIA**

Date: March 30, 2009  
 Time: 10:00 a.m.  
 Judge: Hon. Mariana R. Pfaelzer  
 Room: Courtroom 12

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## SUMMARY OF ARGUMENT

1  
2 This case seeks expeditious injunctive relief to protect thousands of consumers  
3 who are being overcharged for prescription drugs as a result of defendants' illegal  
4 conduct. Plaintiffs' complaint charges that defendants entered into private collusive  
5 agreements to share the profits from delaying generic competition to the testosterone  
6 replacement drug AndroGel.

7 The FTC's and the State of California's decision to file this claim in California  
8 federal court against a California-based corporation, a New Jersey-based corporation,  
9 a Minnesota-based corporation, and a Georgia-based corporation for nationwide  
10 agreements not to compete is entirely logical. The State of California resides in this  
11 district. The FTC has an office in this district. Defendant Watson is headquartered  
12 in this district. Although Watson now asserts that its headquarters moved a couple of  
13 years ago, Watson's recent court filings, its February 2009 annual report, and even  
14 its website leave no doubt that its principal place of business is in Corona, California.

15 This district bears a substantial connection to the events giving rise to this  
16 litigation. Watson employees in Corona negotiated, drafted, and reviewed Watson's  
17 anti-competitive agreements with Solvay, and significant strategy meetings and other  
18 events occurred here. It contains key witnesses and sources of proof. Several  
19 current Watson employees located in Corona have knowledge of these events and are  
20 likely witnesses in this litigation. Several potential non-party witnesses also reside in  
21 this district. It also is where much of the harm from defendants' conduct occurs.  
22 More AndroGel consumers reside in California than any other state. Plaintiffs'  
23 choice of forum is proper and entitled to substantial deference.

24 Faced with these significant California connections, defendants instead attack  
25 the FTC and the State of California for forum shopping. But litigating in a forum  
26 connected to relevant events and evidence is not forum shopping. Moreover, the  
27 Supreme Court has made clear that a federal agency's decision to re-litigate "legal  
28

1 questions of substantial public importance” in multiple forums is a valuable way to  
2 ensure that several courts of appeals “explore a difficult question before the Court  
3 grants certiorari.” *United States v. Mendoza*, 464 U.S. 154, 160, 78 L. Ed. 2d 379,  
4 385, 104 S. Ct. 568, 572 (1984). The issue in this case – the legality of exclusion  
5 payment settlements – is an important one that has attracted the concerns of many,  
6 including the U.S. Congress and President Obama in his recent budget proposal.  
7 (Andrus Decl. ¶¶ 50-55.) If plaintiffs were merely filing in a jurisdiction with  
8 favorable precedent, they could have filed in the Sixth Circuit, which has held  
9 conduct similar to that alleged here per se illegal under the antitrust laws. *In re*  
10 *Cardizem CD Antitrust Litig.*, 332 F.3d 896, 907-08 (6th Cir. 2003). In any event, if  
11 anyone is forum-shopping here, it is defendants who are doing so. Defendants have  
12 sought to transfer to a court in Georgia – not because that forum offers greater  
13 convenience or judicial efficiency – but rather because they apparently believe that  
14 transfer to Georgia will give them a litigation advantage. (*See* Defs.’ Mot. at 1.)

15 In these circumstances, defendants have not shown that transfer to the Northern  
16 District of Georgia is appropriate. The events giving rise to this suit and the relevant  
17 sources of proof are not located primarily in Georgia. They are instead dispersed in  
18 several locations, including California, New Jersey, Minnesota, and Virginia, as even  
19 defendants admit. (Defs.’ Mot. at 8.) Where, as here, there is no single locus of the  
20 case, plaintiffs’ choice of forum should be respected.

21 The prior patent litigation among defendants in the Northern District of Georgia  
22 also does not counsel for transfer. Many antitrust cases related to prior patent  
23 settlements are heard in different courts from the patent suit. A transfer here would  
24 not conserve judicial resources because this case – which challenges defendants’  
25 agreements not to compete – rests primarily on different facts from those at issue in  
26 defendants’ patent litigation. The Georgia court was not made aware of the vast  
27 majority of the terms of defendants’ agreements. Further, that court never reached  
28 the merits of defendants’ patent dispute.

1 Nor does this case raise comity concerns or risk of conflicting judgments. A  
2 judgment holding the challenged agreements unlawful would not conflict with any  
3 action by the judge in the patent litigation. There are ample remedies that would  
4 restore competition in this market, but pose no risk of conflict with the consent  
5 agreement entered between Solvay and Par or with the stipulated dismissal of the  
6 Watson/Solvay litigation.

7 Finally, defendants suggest that the Northern District of Georgia could handle  
8 this case more quickly than this Court. Plaintiffs believe that because of the  
9 considerable harm alleged to California consumers, and this Court's extensive  
10 experience with antitrust and patent cases, this Court would be a more expeditious  
11 forum. This Court should deny transfer and move this case forward for discovery  
12 and trial.

### 13 **FACTUAL BACKGROUND**

14 In their complaint, plaintiffs describe anticompetitive agreements entered into  
15 by Watson, Par, Paddock, and Solvay. These agreements deny consumers the  
16 benefits of generic competition to Solvay's prescription drug AndroGel, which had  
17 U.S. sales of over \$400 million in 2007. California accounts for nearly 11 percent of  
18 AndroGel sales, more than any other state. (Andrus Decl. ¶ 14.)

19 In 2003, Watson and Paddock (which later partnered with Par) each filed an  
20 application with the FDA for approval to market a generic version of AndroGel. As  
21 part of their applications, Watson and Paddock each certified that its version of  
22 generic AndroGel did not infringe a formulation patent that Solvay held relating to  
23 AndroGel, and that the patent was invalid. (Compl. ¶ 45.)

24 None of these generic challengers has significant operations in the Northern  
25 District of Georgia. According to its numerous corporate filings and its website,  
26 Watson's headquarters are in Corona, California, where it employs over 1,300  
27 people. (Andrus Decl. ¶ 17.) Watson's Corona site is also home to one of the  
28 company's largest manufacturing operations, its research and development efforts,

1 and other administrative and operational support functions. (*Id.*) Paddock's  
2 principal place of business is in Minneapolis, Minnesota. (Compl. ¶ 16.) Par's  
3 principal place of business is in Woodcliff Lake, New Jersey. (*Id.* ¶ 15.)

4 In August 2003, Solvay filed patent infringement suits against Watson and  
5 Paddock in the Northern District of Georgia. By mid-2006 the litigation had been  
6 pending for three years before Judge Thrash, without any substantive rulings in the  
7 case. (Ex. J, K, Roberti Decl.) Around that time, Solvay became concerned that  
8 Watson could launch its generic AndroGel product before the end of the patent  
9 litigation. (Compl. ¶ 54.) Solvay knew that if generic entry were to occur, AndroGel  
10 sales would plummet as consumers flocked to lower-priced generics. (*Id.* ¶ 50.)

11 While consumers would greatly benefit from generic competition, defendants  
12 knew that they would be better off by cooperating and sharing in Solvay's monopoly  
13 profits than by competing. In March 2006, Watson's general counsel initiated  
14 settlement talks with Solvay from his office in California. (Andrus Decl. ¶ 26.)  
15 Solvay separately held discussions with Par and Paddock. The ensuing negotiations  
16 took place mostly by phone and e-mail, among company executives and outside  
17 counsel scattered across the nation in California, Georgia, Illinois, Minnesota, New  
18 Jersey, New York, Virginia, and Washington D.C. (Andrus Decl. ¶¶ 40, 47.)

19 After several months of discussions, on September 13, 2006, Watson and Par  
20 each entered into separate settlements with Solvay in which they agreed to abandon  
21 their patent challenges and forgo competing with their low-cost generic products  
22 until 2015. On the same day as the patent settlements, Watson, Par, and Paddock  
23 also entered into lucrative co-promotion and back-up manufacturing deals with  
24 Solvay in which they would share in AndroGel's monopoly profits. Over the life of  
25 these multi-year deals, these generic firms will be paid hundreds of millions of  
26 dollars to prevent competition that would have benefitted thousands of consumers in  
27 California and across the country. (Compl. ¶¶ 6, 66, 75, 77.)

1 On September 14, 2006, the court hearing the patent litigation entered a  
 2 stipulation of dismissal in the Watson litigation and a stipulated agreement in the Par  
 3 litigation. (*Id.* ¶¶ 68, 80.) The court did not approve defendants’ co-promotion, or  
 4 back-up manufacturing agreements, as defendants did not submit them to the court.  
 5 Nor had defendants informed the court of the details of its settlement agreements.  
 6 (*Id.*)

### 7 ARGUMENT

8 Courts consider a number of factors in determining whether transfer is  
 9 appropriate under 28 U.S.C. § 1404(a): (1) the plaintiffs’ forum choice; (2) relevant  
 10 contacts in the forum; (3) the convenience of witnesses; (4) local interest in the  
 11 controversy; (5) familiarity with applicable law; (6) ease of access to sources of  
 12 proof; and (7) relative congestion in each forum. *See Jones v. GNC Franchising, Inc.*,  
 13 211 F.3d 495, 498-99 (9th Cir. 2000); *Decker Coal Co. v. Commonwealth Edison*  
 14 *Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

15 The burden is on the moving party to demonstrate that the forum chosen by  
 16 the plaintiff is inappropriate. *Commodity Futures Trading Comm’n v. Savage*, 611  
 17 F.2d 270, 279 (9th Cir. 1979). Under Ninth Circuit law, defendants’ burden is  
 18 “especially heavy” in an antitrust action “where plaintiff’s choice of forum is entitled  
 19 to particular respect,” due to the liberal antitrust venue statute.<sup>1</sup> *Los Angeles Mem’l*  
 20 *Coliseum Comm’n v. Nat’l Football League*, 89 F.R.D. 497, 500 (C.D. Cal. 1981),  
 21 *aff’d* 726 F.2d 1381 (9th Cir. 1984). Defendants have not, and cannot, meet this  
 22 heavy burden. Indeed, in this case, the relevant factors confirm that the Central  
 23 District of California is the proper forum to resolve this dispute.

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24  
 25 <sup>1</sup> *See* 15 U.S.C. § 53(b) (FTC may sue in any district where a “corporation resides  
 26 or transacts business”); *see also Sec. Investor Prot. Corp. v. Vigman*, 764 F.2d  
 27 1309, 1317 (9th Cir. 1985) (under similar federal securities law venue provisions,  
 28 “unless the balance of factors is strongly in favor of the defendants, the plaintiff’s  
 choice of forum should rarely be disturbed.”)

1 **I. Plaintiffs’ Choice of Forum is Entitled to Substantial Deference**

2 As a general rule, a plaintiff’s forum choice is accorded substantial deference.  
 3 *Decker Coal*, 805 F.2d at 843 (“strong showing of inconvenience [is required] to  
 4 warrant upsetting the plaintiff’s choice”). Where, as here, a plaintiff selects its home  
 5 forum, that choice is entitled to even greater weight.<sup>2</sup> The State of California’s  
 6 Antitrust Section has an office in Los Angeles. (Andrus Decl. ¶ 15.) This district is  
 7 also convenient for the FTC, which has a Los Angeles office and litigates frequently  
 8 here. (*Id.* ¶ 16.) Thus, the plaintiffs’ choice to enforce the antitrust laws in California  
 9 federal court against a California-based corporation (Watson) and three other  
 10 companies doing business in California is entitled to substantial deference and should  
 11 not be disturbed.<sup>3</sup> That is especially true where, as here, there is a significant  
 12 connection between the chosen forum and the claims, parties, and relevant events.<sup>4</sup>

13 Defendants do not dispute that the plaintiffs’ choice of forum ordinarily is  
 14 accorded substantial deference. (Defs.’ Mot. at 16.) Nonetheless, defendants claim  
 15 that plaintiffs’ forum choice here “should be disregarded” because (1) this district has  
 16 “no meaningful ties with the events (or parties) that gave rise to this action”

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17  
 18 <sup>2</sup> See *DirectTV, Inc. v. EQ Stuff, Inc.*, 207 F. Supp. 2d 1077, 1082-94 (C.D. Cal.  
 19 2002) (noting “strong presumption in favor of the plaintiff’s choice of forum”  
 20 where plaintiff is headquartered in the district, and denying transfer); *Los Angeles  
 Mem’l Coliseum Comm’n*, 89 F.R.D. at 500 (same).

21 <sup>3</sup> See, e.g., *New York v. Trans World Airlines*, 728 F. Supp. 162, 173 (S.D.N.Y.  
 22 1989) (denying motion to transfer state enforcement action to location where  
 23 related litigation was pending); *Delaware v. Bennett*, 697 F. Supp. 1366, 1377 (D.  
 Del. 1988) (denying transfer to forum where related litigation was pending).

24 <sup>4</sup> Contrary to defendants’ argument (Defs.’ Mot. at 17-18.), a government plaintiff  
 25 is “entitled to just as much deference in its choice of forum as any other  
 26 litigant.” *SEC v. Rose Fund, LLC*, 2004 WL 2445242, at \*2 (N.D. Cal. Jan. 9,  
 27 2004). See also *CFTC v. Savage*, 611 F.2d at 274, 279 (giving weight to CFTC’s  
 28 forum choice in C.D. Cal. even though all defendants were located in Chicago);  
*United States v. Syufy Enterprises*, 1986 WL 13358, at \*1 (N.D. Cal. Oct. 17,  
 1986) (noting “substantial weight” due DOJ Antitrust Division’s choice of forum).

1 (*Id.* at 22); (2) the Court should ignore the presence of the State of California as a  
 2 plaintiff (*Id.*); and (3) the FTC is “openly forum shopping.” (*Id.* at 18.) These  
 3 arguments are wrong as a matter of fact and law, and should be rejected.

4 **A. This district has substantial connections to plaintiffs’ claims**

5 Defendants are wrong when they argue that this district has no meaningful ties  
 6 to the “events (or parties) that gave rise to this action.” (Defs.’ Mot. at 22.) A clear  
 7 nexus to this district exists because Watson is headquartered here, a number of  
 8 relevant events occurred here, potential witnesses reside here, and consumers in this  
 9 district are harmed by defendants’ anticompetitive conduct. For this reason as well,  
 10 plaintiffs’ choice of forum is entitled to substantial deference. *See Strigliabotti v.*  
 11 *Franklin Res., Inc.*, 2004 WL 2254556, at \*3-4 (N.D. Cal. Oct. 5, 2004) (affording  
 12 weight to plaintiffs’ forum choice because defendants and potential witnesses resided  
 13 in district and events giving rise to claims occurred in district).

14 **1. Defendant Watson is headquartered in this district**

15 Plaintiffs filed suit in Watson’s home district. The presence of a defendant’s  
 16 headquarters in the chosen forum is a reason to deny this transfer motion. *See, e.g.*,  
 17 *Allflex USA, Inc. v. Avid Identification Sys., Inc.*, 2007 WL 2701331, at \*20 (C.D.  
 18 Cal. Jan. 11, 2007) (denying transfer where defendant resided in plaintiff’s chosen  
 19 forum); *Strigliabotti*, 2004 WL 2254556, at \*4 (plaintiffs “brought suit on  
 20 defendants’ home turf”) (internal quotations omitted).<sup>5</sup> Faced with this law, Watson  
 21 tries to change the inconvenient facts, claiming that “since at least September 2007,  
 22 Watson’s principal place of business has shifted to Morristown, New Jersey.”  
 23 (Carmichael Decl. ¶ 4.)

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24  
 25 <sup>5</sup> *See also, e.g., Syufy Enterprises*, 1986 WL 13358, at \*2; *Greater Yellowstone*  
 26 *Coalition v. Bosworth*, 180 F. Supp. 2d 124, 126, 129 (D.D.C. 2001) (where one of  
 27 three defendants located in D.C., and two in Montana, denying motion to transfer  
 28 to D. Mont.); *Radisson Hotels Int’l, Inc. v. Westin Hotel Co.*, 931 F. Supp. 638,  
 640, 642 (D. Minn. 1996) (where one of three defendants located in Minnesota and  
 two in Seattle, denying transfer to W.D. Wash).

1 Watson needs to get its story straight. Less than two months ago, it twice told  
 2 this Court that its home was here in Corona, California (not New Jersey). (Andrus  
 3 Decl. ¶¶ 24, 59-60, Exs. D, E.) (“Watson Pharmaceuticals, Inc., . . . [has] its principal  
 4 place of business in California, [and] is a citizen of . . . California”). Watson told  
 5 numerous other federal courts the same thing. In July 2008, for example, a Watson  
 6 executive submitted a sworn declaration in federal court in Delaware stating that  
 7 Watson has its “principal place of business at 311 Bonnie Circle, Corona, California.”  
 8 (*Id.* ¶ 61, Ex. F.) And on at least eight different occasions since September 2007 – the  
 9 date Watson now claims it moved its principal place of business to New Jersey –  
 10 Watson has affirmed in answers filed in federal courts around the country that its  
 11 “principal place of business” is in Corona (not New Jersey). (*Id.* ¶¶ 62-69 , Exs. G-  
 12 N.) Indeed, in one answer filed in federal court in New Jersey, Watson not only  
 13 admitted that its “principal place of business” is in Corona, it denied that its  
 14 “commercial headquarters” is in New Jersey. (*Id.* ¶ 68, Ex. M.)

15 Watson has conveyed the same message outside the court system. In its most  
 16 recent SEC filings (as recently as March 11, 2009), Watson identifies its “principal  
 17 executive offices” in Corona, California. (*Id.* ¶ 20, Exs. B, C.) Its website  
 18 prominently lists Corona as Watson’s “corporate headquarters” and states that 1,330  
 19 employees work at the Corona headquarters. (*Id.* ¶ 17, Ex. A.) Watson’s corporate  
 20 press releases are issued from Corona, and the press, in turn, often identifies Watson  
 21 as a Corona, California company. (*Id.* ¶¶ 18-19.) The Court should ignore Watson’s  
 22 attempt to redefine its connection to California for purposes of its transfer motion.

## 23 2. Significant relevant events took place in this district

24 Defendants’ claim that “this forum bears no relation to the underlying events”  
 25 (Defs.’ Mot. at 11), is wishful thinking. Several important events underlying this  
 26 dispute occurred in this district. *First*, current and former Watson employees –  
 27 including Watson’s former chairman and CEO, Allen Chao, and Watson’s Senior  
 28 Vice President and General Counsel, David Buchen – executed the company’s overall

1 AndroGel strategy from their positions in this district. (Andrus Decl. ¶¶ 25-26.)  
 2 *Second*, Watson employees located in this district negotiated, drafted, and reviewed  
 3 Watson's anticompetitive agreements with Solvay. Though defendants focus on two  
 4 in-person meetings that took place in Texas and Georgia, (Defs.' Mot. at 11),  
 5 significant negotiations took place over the phone, such as Mr. Buchen's suggestion  
 6 that Watson co-promote AndroGel for Solvay. (Andrus Decl. ¶ 26.) *Third*, Watson's  
 7 former CFO, Charles Slacik, signed Watson's agreements with Solvay in Corona.  
 8 (*Id.* ¶ 29.) *Fourth*, Watson's discussions regarding launch timing for generic  
 9 AndroGel took place among California-based executives. (*Id.* ¶¶ 25, 30.) *Fifth*, part  
 10 of Watson's research and development of its generic version of AndroGel was  
 11 coordinated out of the Corona facility. (*Id.* ¶ 31.) *Sixth*, the first clinical trials of  
 12 AndroGel were conducted at Harbor-UCLA Medical Center in Torrance, CA. These  
 13 trials formed the basis for one of the validity challenges made by the generic firms to  
 14 Solvay's formulation patent. (*Id.* ¶ 32.)<sup>6</sup>

### 15 3. Potential witnesses are located in this district

16 As noted above, several current Watson employees located in this district have  
 17 personal knowledge of relevant events and may be witnesses in this litigation. To  
 18 date, plaintiffs have identified as potential witnesses: Watson's Senior VP & General  
 19 Counsel, David Buchen; two Watson employees who report to Buchen and helped  
 20 negotiate and draft Watson's illegal agreements with Solvay; and the President of  
 21 Watson's Generic Division, Thomas Rusillo. (Andrus Decl. ¶¶ 26-28, 30.) All are  
 22 located in Watson's Corona headquarters. (*Id.*) Through discovery in this case,  
 23 plaintiffs may well identify additional Corona-based Watson employees with  
 24  
 25

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26  
 27 <sup>6</sup> Watson's R&D efforts and the UCLA clinical trials are relevant to plaintiffs'  
 28 patent-related allegations. *See* Compl. ¶¶ 86-92 (Solvay's patent was unlikely to  
 prevent generic competition); *see also* discussion *infra* Section II.B.1.

1 knowledge of relevant events.<sup>7</sup> In addition, the State of California may call one or  
 2 more state government witnesses to present evidence as to the harm caused by  
 3 defendants' conduct.

4 Potential non-party witnesses also reside in this district. *See Amini Innovation*  
 5 *Corp v. JS Imports Inc.*, 497 F. Supp. 2d 1093, 1111 (C.D. Cal. 2007) (location of  
 6 non-party witnesses given more weight than location of party witnesses). Watson's  
 7 former chairman and CEO, Allen Chao, had the final say on Watson's AndroGel  
 8 strategy, including its agreements with Solvay. (Andrus Decl. ¶ 25.) Mr. Chao has  
 9 retired from Watson and appears to reside in this district. (*Id.*) Watson's former  
 10 CFO, Charles Slacik, who signed Watson's agreements with Solvay, has also left  
 11 Watson and also appears to reside in this district. (*Id.* ¶ 29.) Two doctors affiliated  
 12 with UCLA who were involved in clinical trials evaluating AndroGel, Dr. Ronald  
 13 Swerdloff and Dr. Christina Wang, were deposed in Solvay's patent litigation against  
 14 Watson and Paddock and could testify about patent-related issues in this case. (*Id.*  
 15 ¶¶ 32-33.)<sup>8</sup> Finally, Valeant Pharmaceuticals, which entered a co-promotion  
 16 agreement with Par in 2005, is headquartered in this district. (*Id.* ¶ 34.) Par has  
 17 argued to the FTC that its agreement with Valeant is comparable to its agreement with  
 18 Solvay, and Valeant employees could testify to related facts at trial. (*Id.*)<sup>9</sup>

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19  
 20 <sup>7</sup> Defendants apparently define the universe of potential trial witnesses from the  
 21 investigational hearings taken during the FTC's investigation. (Defs.' Mot. at 7-8.)  
 22 But the FTC does not interview every potential witness during its investigations,  
 23 which are conducted only to determine whether the Commission has "reason to  
 believe" that a violation of the FTC Act has occurred. *See* 15 U.S.C. § 45(b).

24 <sup>8</sup> None of the 39 depositions conducted in Solvay's patent litigations against the  
 generic firms took place in Georgia, but four took place in California. (*Id.* ¶ 37.)

25 <sup>9</sup> Other potential non-party witnesses reside in other California districts. ICOS,  
 26 which previously co-promoted AndroGel with Solvay, is located in San Francisco.  
 27 (*Id.* ¶ 36.) Depomed Pharmaceuticals, which entered a co-promotion agreement  
 28 with Watson that Watson has suggested is comparable to its deal with Solvay, is  
 headquartered in Menlo Park. (*Id.* ¶ 35.)

1 Neither of the principal cases defendants cite to support transfer based on  
2 witness location are relevant here. (Defs.’ Mot. at 12-13.) Both of these decisions  
3 rest on the court’s conclusion that “none of the facts giving rise to [the] suit” and “no  
4 known source of proof” was located in plaintiffs’ chosen forum. *In re Volkswagen of*  
5 *Am. Inc.*, 545 F. 3d 304, 308 (5th Cir. 2008); *In re TS Tech USA Corp.*, 551 F.3d  
6 1315, 1321 (Fed. Cir. 2008) (“None of the companies . . . no identified witnesses . . .  
7 and no evidence is located within the venue.”) In contrast, this case presents ample  
8 connections of both the facts and evidence with this district.

9 **4. Consumers in this district are harmed by defendants’ conduct**

10 Defendants’ suggestion that plaintiffs’ enforcement action lacks a connection  
11 with this district ignores the heart of plaintiffs’ claims: that defendants’ unlawful  
12 conduct costs consumers hundreds of millions of dollars a year. There is no dispute  
13 that Solvay sells AndroGel in California, or that California consumers would benefit  
14 from lower-priced generic entry. Indeed, more AndroGel consumers reside in  
15 California than in any other state, including Georgia. Available data shows that in  
16 2008, California consumers accounted for nearly 11 percent of AndroGel purchases,  
17 compared to about 4 percent for Georgia consumers. (Andrus Decl. ¶ 14.)

18 Courts have denied motions to transfer in similar circumstances. For example,  
19 in *Kroger Co. v. Sanofi-Aventis*, No. 06-163 (S.D. Ohio July 26, 2007), plaintiffs  
20 alleged that pharmaceutical firms had entered an anticompetitive agreement in an  
21 attempt to settle patent litigation brought in the Southern District of New York.  
22 Defendants moved to transfer to New York, arguing that the Southern District of  
23 Ohio had little connection to the events at issue. The court disagreed. It found that  
24 “the people of the Southern District of Ohio have a significant interest in the outcome  
25 of these cases” because “the corporations and the people of Ohio have been impacted  
26 by the unavailability of a less expensive generic equivalent of Plavix.” *Kroger*, slip  
27 op. at 8 (Andrus Decl. Ex. V.) Courts in California have similarly concluded that a  
28 strong public interest in the relief sought weighs against transfer. *See, e.g., Jonathan*

1 *Browning, Inc. v. Venetian Casino Resort, LLC*, 2007 WL 4532214, at \*6 (N.D. Cal.  
 2 Dec. 19, 2007) (“California has a strong public interest in deciding controversies  
 3 involving its citizens.”)

4 **B. The State of California’s presence as a plaintiff cannot be ignored**

5 Defendants urge this Court to ignore California’s presence as a co-plaintiff in  
 6 this lawsuit based on the speculation that the “addition of the CA AG is a last-minute  
 7 transparent attempt by the FTC” to support venue in this district. (Defs.’ Mot. at 22.)  
 8 The date the California AG’s office first contacted defendants is irrelevant to the  
 9 question of whether California’s choice to sue with the FTC in California should be  
 10 respected, and defendants provide no legal authority to the contrary. *See Ellis v.*  
 11 *Costco Wholesale Corp.*, 372 F. Supp. 2d 530, 542, n.5 (N.D. Cal. 2005) (holding that  
 12 even where local plaintiff joined suit after initial complaint was filed, there was “no  
 13 basis” to ignore plaintiff’s interests in the transfer analysis).

14 Moreover, the only support defendants offer for their accusation is that  
 15 defendants did not meet with the California Attorney General’s office before the suit  
 16 commenced.<sup>10</sup> But it is hardly novel for states to file enforcement actions without  
 17 meeting with the parties in advance, particularly when filing jointly with the FTC.  
 18 (See Andrus Decl. ¶ 13.)<sup>11</sup> The State of California has a long commitment to  
 19 prosecuting anticompetitive agreements, such as those alleged here, that delay or limit  
 20 the marketing of generic drugs. (Decl. of Kathleen Foote in Support of State of  
 21 California’s Opp’n to Defs.’ Joint Mot. to Transfer Venue to N.D. Ga., at ¶ 3.)

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22  
 23  
 24 <sup>10</sup> Contrary to defendants’ claim, the FTC routinely shares investigative materials  
 25 with state law enforcers; and the states routinely ask that their request for  
 information not be shared with the parties. (See Andrus Decl. ¶ 11).

26 <sup>11</sup> See *FTC v. Inova Health Sys. Found.*, No. 08-460 (E.D. Va. filed May 12, 2008)  
 27 (FTC and Virginia co-plaintiffs); *FTC v. Ovation Pharm., Inc.*, No. 08-6379 (D.  
 28 Minn. filed Dec. 16, 2008) and *Minnesota v. Ovation Pharm., Inc.*, No. 08-6381  
 (D. Minn. filed Dec. 16, 2008) (both cases pending before same judge).

1 Federal and state law enforcement cooperation should be encouraged, not condemned,  
2 as defendants would have it.

3 **C. Government litigation in multiple forums ensures the thorough**  
4 **development of important questions of law**

5 Defendants seek to avoid the clear import of this case's significant connections  
6 to California by insisting that the FTC is merely forum-shopping. (Defs.' Mot. at 18.)  
7 Defendants rely principally on statements made by now-FTC Chairman Leibowitz, to  
8 the effect that the FTC will continue to litigate exclusion payment settlements in other  
9 jurisdictions, despite the FTC's loss of one case in the Eleventh Circuit. But a federal  
10 agency's choice to re-litigate "legal questions of substantial public importance" in  
11 other forums should neither be discouraged nor condemned. *See Mendoza*, 464 U.S.  
12 at 160. Indeed, as the Supreme Court observed, "allowing litigation in multiple  
13 forums" by the government ensures that important questions of law are thoroughly  
14 developed. *Id.* at 163. In *Mendoza*, the Supreme Court concluded that the  
15 government is not required to accede to the first unfavorable final adjudication on a  
16 particular issue, because to do so would "deprive [the] Court of the benefit it receives  
17 from permitting several courts of appeals to explore a difficult question before [the]  
18 Court grants certiorari." *Id.* at 160.

19 The Ninth Circuit's recent decision in *United States v. AMC Entm't, Inc.*, 549  
20 F.3d 760 (9th Cir. 2008), recognizes the same principle: A government agency need  
21 not accept "an adverse determination . . . by any of the Circuit Courts of Appeals as  
22 binding on the agency for all similar cases throughout the United States." *Id.* at 771-  
23 72 (internal quotation omitted). In *AMC*, the Justice Department had initiated a series  
24 of nationwide suits – including actions in the First, Third, Fifth, Sixth, Ninth, and  
25 D.C. Circuits – alleging violations of the Americans with Disabilities Act. *Id.* at 763-  
26 67. The Ninth Circuit explained that "[i]t is standard practice for an agency to litigate  
27 the same issue in more than one circuit and to seek to enforce the agency  
28 interpretation selectively on persons subject to the agency's jurisdiction in those

1 circuits where its interpretation has not been judicially repudiated.” *Id.* at 772  
2 (internal quotation and italics omitted.) The government plaintiffs’ decision to re-  
3 litigate an issue of substantial public importance here is not only “standard practice,”  
4 it is critical to the percolation of an important legal issue that may end up at the  
5 Supreme Court for review. (See Andrus Decl. ¶¶ 50-55, Exs. R, S.) (describing  
6 interest in exclusion-payment issue.)

7 The “circuit-shopping” cases defendants cite are not to the contrary. (Defs.’  
8 Mot. at 21.) In those cases, the Fifth Circuit awarded a taxpayer attorney’s fees under  
9 a specific provision of the IRS code because the government’s position either ignored  
10 a Congressional amendment to the Code, or had been uniformly rejected by the  
11 courts. *Estate of Martin Perry v. Comm’r*, 931 F.2d 1044, 1046 (5th Cir. 1991)  
12 (finding that government “ignore[d] the clear wording of a Congressional amendment  
13 to the Code); *Allbritton v. Comm’r*, 37 F.3d 183, 184 (5th Cir. 1984) (finding not a  
14 “single published opinion supporting Commissioner’s position.”) Here, in contrast,  
15 there is a conflict in the courts on the legal issue presented by this case: whether a  
16 brand drug firm presumptively is free to buy out generic competition until the  
17 expiration of any patent whose assertion is not a sham.<sup>12</sup>

18 The other cases defendants cite are inapposite.<sup>13</sup> None of these cases involves  
19 a government enforcement action. Moreover, in many of defendants’ cases, neither  
20 plaintiffs nor defendants resided within the chosen forum. For example, in *Freeman*  
21 *v. Hoffmann-La Roche Inc.*, a New Jersey plaintiff and Kansas plaintiff sued a New

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22 <sup>12</sup> Compare *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003)  
23 (holding exclusion payment agreements to be *per se* antitrust violations), *with, e.g.*,  
24 *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006) (holding that,  
25 absent a sham allegation, the mere presence of a patent permits the patent holder to  
purchase freedom from competition until patent expiration).

26 <sup>13</sup> See, e.g., *Italian Colors Rest. v. Am. Express Co.*, 2003 WL 22682482, at \*1  
27 (N.D. Cal. Nov. 10, 2003), in which plaintiffs had filed nearly identical actions  
28 against the same defendants in two previous jurisdictions. This case, in contrast, is  
plaintiffs’ only action challenging defendants’ collusive agreements.

1 Jersey defendant in New York – where none of them resided – to take advantage of  
2 favorable Second Circuit law. 2007 WL 895282, at \*2-3 (S.D.N.Y. Mar. 21, 2007).  
3 Here, however, plaintiffs did not select a forum – such as one in the Sixth Circuit – to  
4 avail themselves of the most favorable legal precedent. *See In re Cardizem, supra*  
5 note 12. Rather, the FTC and California filed suit in this district – despite no previous  
6 Ninth Circuit ruling in an exclusion payment challenge – because both a plaintiff (the  
7 State of California) and a defendant (Watson) reside here and the forum has a  
8 substantial connection to the events giving rise to this litigation. *See Costco*  
9 *Wholesale Corp. v. Liberty Mutual Ins. Co.*, 472 F. Supp. 2d 1183, 1192 (S.D. Cal.  
10 2007) (denying motion to transfer and rejecting defendant’s forum shopping  
11 allegation because the district has “some connection to [the] litigation”).

12 In fact, it is the defendants who seek to forum shop through their transfer  
13 motion. Defendants apparently believe that transfer to federal court in Georgia will  
14 enhance their likelihood of success. (*See Defs.’ Mot.* at 1.) The transfer statute,  
15 however, was designed to promote convenience, not to affect the substantive outcome  
16 of the case. *See Van Dusen v. Barrack*, 376 U.S. 612, 635-37, 11 L. Ed. 2d 945, 961,  
17 84 S. Ct. 805, 819 (1964).<sup>14</sup> Defendants’ forum-shopping is another factor weighing  
18 against transfer. *See Greater Yellowstone Coalition*, 180 F. Supp. 2d at 130.

## 19 **II. Defendants Have Not Shown That Transfer to the Northern District of** 20 **Georgia is Appropriate Here**

21 Transferring this case to the Northern District of Georgia does not make sense  
22 under any of the three grounds on which defendants rely because (1) Georgia is not  
23 the locus of relevant events and witnesses; (2) there are almost no judicial economy  
24 savings; and (3) there is no real risk of conflicting judgments.

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26 <sup>14</sup> *See also United States v. Syufy Enterprises*, 1986 WL 13358, at \*3 (N.D. Cal.  
27 Oct. 17, 1986) (“Transfer of venue is not a forum shopping instrument. Any effort  
28 to transfer a case to obtain a specific ruling of another district court is disfavored.”)  
(internal citations and quotations omitted).

1           **A. Georgia is not the locus of relevant events and witnesses**

2           The events giving rise to this suit and the relevant sources of proof are  
3 contained in many venues across the United States. Under these circumstances,  
4 courts have held that transfer is not warranted. For example, in *Ellis v. Costco*  
5 *Wholesale Corp.*, 372 F. Supp. 2d 530 (N.D. Cal. 2005), the court denied a motion to  
6 transfer where the relevant events and evidence in the case were spread across four  
7 judicial districts in three states. Each of the venues “pose[d] advantages and  
8 disadvantages in the convenience [of] litigating the present nationwide action.” *Id.* at  
9 545. However, because none of the alternate venues predominated over the plaintiff’s  
10 choice, “[n]one of the three alternative forums satisfie[d] defendant’s burden to  
11 overcome the presumption in favor of a plaintiff’s choice of forum.” *Id.*<sup>15</sup>

12           Relevant events giving rise to this litigation similarly occurred in many states,  
13 including California, Georgia, New Jersey, Minnesota, Virginia, Texas, Illinois, New  
14 York, and Washington, D.C. For example, a number of the key terms in Par’s  
15 agreement with Solvay, including compensation terms (*see* Compl. ¶¶ 72-75.), were  
16 negotiated among Par employees in New Jersey and Solvay employees in Georgia.  
17 (Andrus Decl. ¶ 42.) Negotiations between Par and Paddock (*see* Compl. ¶¶ 77-78.)  
18 took place in New Jersey and Minnesota. (Andrus Decl. ¶ 43.) Watson’s principal  
19 negotiators were located in California and New Jersey. (*Id.* ¶ 38.) Because the key  
20 negotiations and planning meetings took place in several states, there is no clear  
21 “center of gravity” in which the events arose, and plaintiffs’ choice of forum should  
22 not be disturbed. *See Waste Distillation*, 775 F. Supp. at 766.

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25 <sup>15</sup> *See also, e.g., Waste Distillation Tech., Inc. v. Pan Am. Res. Inc.*, 775 F. Supp.  
26 759, 766 (D. Del. 1991) (finding “no center of gravity” where events and  
27 witnesses located in multiple districts); 17 James Wm. Moore *et al.*, Moore’s  
28 Federal Practice ¶ 111.13 (“When the alleged wrongful acts took place in a number  
of different districts, it may be impossible to conclude that the operative facts took  
place in one district as opposed to another.”)

1 Although defendants assert that “witness convenience weighs heavily in favor  
2 of the Northern District of Georgia” (Defs.’ Mot. at 12.), the facts belie this claim.  
3 Potential witnesses in this litigation reside in many locations, including California,  
4 Georgia, New Jersey, Minnesota, Virginia, and Brussels, Belgium. For example,  
5 Par’s former chief executive, Scott Tarriff, and chief negotiator, Paul Campanelli, are  
6 located in New Jersey. (Andrus Decl. ¶ 44.) Relevant Paddock witnesses are located  
7 in Minnesota. (*Id.* ¶¶ 37, 43.) Executives from Besins, Solvay’s partner on  
8 AndroGel, reside in Virginia. (*Id.* ¶ 7; *see* Compl. ¶¶ 33, 40, 48.) Senior Solvay  
9 executives ultimately responsible for approving Solvay’s agreements with the generic  
10 companies reside in Europe. (Andrus Decl. ¶ 41.)

11 Wherever this case is heard, many witnesses will have to travel. Travel to  
12 California is not significantly more burdensome for the non-Georgia witnesses than  
13 travel to Georgia. For example, airfares from Brussels, Newark, Minneapolis, and  
14 Virginia to Los Angeles and Atlanta, respectively, are comparable. (Andrus Decl.  
15 ¶ 48.) *See, e.g., R. Griggs Group Ltd. v. Consolidated Shoe, Inc.*, 1999 WL 226211,  
16 at \*5 (N.D. Cal. Apr. 9, 1999) (“[T]he Spanish employees of Copic . . . can reach  
17 California without much more difficulty or expense than . . . Virginia.”). Moreover,  
18 most of the witnesses in this case are principals of large corporations with the ability  
19 to litigate anywhere in the country.<sup>16</sup> Solvay, Watson, and Par all have litigated cases  
20 in California courts. (Andrus Decl. ¶¶ 80-82, Exs. Y, Z, AA.)

21 Finally, regardless of where the conduct occurred, the effects of the  
22 defendants’ conduct are not centered in Georgia. They are felt nationwide, including  
23 California. Where defendants’ conduct affects every state in the country, plaintiffs’  
24 choice of forum is given greater deference than where effects are solely local. In

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25 <sup>16</sup> *See, e.g., Costco Wholesale Corp.*, 472 F. Supp. 2d at 1193 (“[b]oth plaintiff and  
26 defendant are large corporations capable of litigating in virtually any federal  
27 district court in the country”); *Radisson Hotels*, 931 F. Supp. at 642 (Seattle-based  
28 “Westin is a large corporation with multi-national operations; it is not unreasonable  
to expect it to travel to Minnesota to defend its [interests].”)

1 *Kroger*, the court explained:

2 An antitrust action against a multinational pharmaceutical company could  
3 hardly be deemed localized; indeed, the effects of Defendant’s alleged  
4 anticompetitive behavior were felt nationwide. . . . In light of the widespread  
5 effects of Defendants’ alleged conduct, the Court is not persuaded that  
6 Plaintiffs’ choice of forum warrants less deference on the basis that no  
7 anticompetitive behavior occurred in Ohio.

8 *Kroger*, No. 06-163, slip op. at 5; *see also Greater Yellowstone Coalition*, 180 F.  
9 Supp. 2d at 129 (in case about cattle grazing rights near Yellowstone National Park,  
10 D.C. court denying transfer to D. Mont. and noting “national significance” of case).

11 **B. The prior patent litigation does not require transfer**

12 The existence of defendants’ prior patent litigation in Georgia does not  
13 mandate transfer. Contrary to defendants’ suggestion, it is not uncommon for  
14 antitrust claims related to patent litigation to be heard in a different forum from the  
15 patent litigation. Indeed, federal courts not only hear such claims in a different  
16 forum, but have denied motions to transfer those claims to the patent forum. *See, e.g.,*  
17 *Rymed Techs., Inc. v. ICU Med., Inc.*, No. 07-1199 MRP (C.D. Cal. May 21, 2008)  
18 (denying transfer of unfair competition claims to forum where related patent claims  
19 were pending) (Andrus Decl. Ex. W.); *see also Kroger*, No. 06-163 (Andrus Decl. Ex.  
20 V.) (denying transfer of antitrust claims based on collusive settlement).

21 Most of the antitrust cases to date challenging collusive agreements related to  
22 drug patent settlements have been heard in a different court from the patent case –  
23 including the *Kaiser* case tried in this district.<sup>17</sup> Indeed, in two instances, the Judicial

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25 <sup>17</sup> *See Kaiser Found. Health Plan Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1039-  
26 41 (9th Cir. 2009) (patent litigation took place in N.D. Ill.; MDL antitrust  
27 proceedings took place in S.D. Fla. with a subsequent trial in C.D. Ca.); *see also*  
28 *Cardizem CD Antitrust Litig.*, 332 F.3d at 902-03 (patent litigation in S.D. Fla;  
antitrust challenge in E.D. Mich.); *In re Ciprofloxacin Hydrochloride Antitrust*  
*Litig.*, 544 F.3d 1323, 1328-29 (Fed. Cir. 2008) (patent litigation in S.D.N.Y.;

1 Panel on Multidistrict Litigation assigned the antitrust case to a different court despite  
2 parties' arguments that the cases should be sent to the court that heard the patent  
3 litigation. (Andrus Decl. ¶¶ 75-76, Exs. T, U.) Similarly, the FTC's recent case  
4 against Cephalon was transferred not to the district in which related patent litigation  
5 had been pending (the District of New Jersey), but to the district where Cephalon was  
6 headquartered and in which prior private plaintiffs had filed class actions. *FTC v.*  
7 *Cephalon, Inc.*, 551 F. Supp. 2d 21 (D.D.C. 2008).

8 **1. Transfer would not conserve judicial resources**

9 Defendants' judicial economy arguments ignore that the heart of this antitrust  
10 case is not defendants' patent dispute, but their agreements to share the profits from  
11 delaying competition to AndroGel. This Court can find defendants' agreements  
12 illegal under the antitrust laws without directly assessing the likely outcome of the  
13 underlying patent litigation. The complaint includes numerous allegations that would  
14 permit this Court to conclude – without separately weighing the merits of the patent  
15 case – that the agreements are anticompetitive. Moreover, the terms and effects of  
16 defendants' collusive agreements were not the subject of defendants' patent case, and  
17 plaintiffs were not parties to that action. These differences between an antitrust  
18 litigation and a related patent suit are material, as the *Kroger* court recently held in  
19 denying transfer of similar antitrust litigation.

20 In *Kroger*, the Ohio district court rejected defendants' argument that the  
21 existence of related patent litigation in the Southern District of New York required  
22 transfer: “[t]he instant litigation includes a significant claim distinct from the patent  
23 issue: the allegedly collusive agreement between BMS/Sanofi and Apotex.” *Kroger*,  
24 No. 06-163, slip op. at 10 (Andrus Decl. Ex. V.). The court held that the legality of  
25 the agreement was not at issue in the patent infringement case, and that no special  
26 technical knowledge about the patent was necessary to resolve the issue. (*Id.*) It also

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antitrust challenge in E.D.N.Y.); *Tamoxifen Citrate Antitrust Litig.*, 466 F.3d at  
193-94 (patent litigation in S.D.N.Y.; antitrust challenge in E.D.N.Y.).

1 held that judicial economy was not a particularly important factor in the transfer  
 2 analysis where the plaintiffs in the action were not party to the patent litigation in  
 3 New York. (*Id.* at 11.) The Ohio court’s analysis applies here as well.

4 Even if this Court considers the patent merits, there would be little to no  
 5 judicial economy in transfer.<sup>18</sup> Judge Thrash entered no substantive orders in  
 6 defendants’ patent litigation in the three years it was pending. (Roberti Decl., Exs. J,  
 7 K.) Although defendants completed claim construction briefing and partial summary  
 8 judgment motions by January 2006, the court held no hearings, and the motions  
 9 remained undecided when the parties settled. *Id.* The briefs defendants submitted to  
 10 Judge Thrash over three years ago would be equally available to this Court.<sup>19</sup>

11 **2. Transfer is not necessary to eliminate a risk of**  
 12 **conflicting judgments**

13 Transfer is not necessary here to avoid exposing defendants to the risk of  
 14 conflicting judgments. Plaintiffs ask this Court to find defendants’ agreements not to  
 15 compete illegal under the antitrust laws. Judge Thrash made no ruling on that  
 16 subject. Indeed, he had no knowledge of even the basic facts as to the nature of these  
 17 agreements. Defendants did not make him aware of the related agreements through  
 18

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19 <sup>18</sup> Defendants’ concerns about coordinating this case with the “management of the  
 20 patent litigations” (Defs.’ Mot. at 16) are misplaced. The confidentiality of  
 21 appropriate third party documents can be ensured by entering into a protective  
 22 order in this action, rather than transferring the case to Georgia.

23 <sup>19</sup> In any event, the Northern District of Georgia would not likely assign this case  
 24 to Judge Thrash as related to the prior patent litigation. (Defs.’ Mot. at 15, n.6.)  
 25 Under the rules for that district, a later-filed case is only related to an earlier-filed  
 26 case if the earlier case is still pending before the court, which defendants’ prior  
 27 patent litigation is not. *See KEG Tech., Inc. v. Laimer*, No. 08-393, slip op. at 4  
 28 (N.D. Ga. Sept. 9, 2008) (Andrus Decl. Ex. X.) (discussing Rule 905-2(a)(1)-(3) of  
 the Internal Operating Procedures for Northern District of Georgia, and holding  
 that a terminated case is no longer considered pending even when court entered a  
 consent order).

1 which they share the profits from delaying generic competition.<sup>20</sup> The stipulated  
 2 consent agreement he entered among Solvay, Par, and Paddock did not incorporate  
 3 the terms of these profit-sharing agreements. (Roberti Decl., Ex. A.)<sup>21</sup>

4 Plaintiffs simply seek adequate equitable relief to remedy the competitive  
 5 effects of defendants' illegal conduct. (Compl. at pp. 29-30.) There are ample  
 6 remedies available to this Court that would provide effective relief, and would not  
 7 conflict with the Solvay/Paddock stipulated consent agreement. For example, this  
 8 Court could:

- 9 • Require Solvay to license a third party to market a generic version of  
 10 AndroGel. The consent agreement does not prevent Solvay from  
 11 licensing its product, and in fact permits Par/Paddock to enter prior to  
 12 2015 if another generic testosterone gel product is offered for sale;
- 13 • Order any relief against Watson, which is not a party to the consent  
 14 agreement;
- 15 • Enter prospective injunctive relief against each defendant that prevents it  
 16 from engaging in similar conduct in the future;

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18 <sup>20</sup> Watson's stipulation of dismissal does not contain any of the terms of its  
 19 settlement agreement, and does not mention its co-promotion deal with Solvay.  
 20 (Roberti Decl., Ex. B.) Paddock's consent agreement with Solvay does not  
 21 mention its partner Par's co-promotion agreement or back-up manufacturing  
 22 agreement with Solvay. (Roberti Decl., Ex. A.) The consent otherwise mentions  
 23 only general terms of the settlement agreement. (Roberti Decl., Ex. A at 16-20.)  
 The patent litigation dockets also do not show that the agreements were submitted

24 <sup>21</sup> The primary operative terms of the consent agreement provide that Par and  
 25 Paddock (1) will not practice the formulation patent until the earliest of several  
 26 dates, including the date that "Generic Testosterone Gel Product . . . is offered for  
 27 sale in the Territory" (§ 6); and that (2) Par and Paddock acknowledged validity  
 28 and infringement of the relevant patent (§§ 2-5, 7-8) and are estopped during the  
 patent term from marketing and selling their product. (§ 10.) (Roberti Decl., Ex.  
 A.) But the injunction itself incorporates no compensation terms.

- 1 • Declare defendants' anticompetitive agreements illegal, which would not
- 2 require the defendants to act in a way inconsistent with the consent; and
- 3 • Require Par, Paddock and Solvay to request Judge Thrash to modify the
- 4 consent agreement. This remedy would not conflict with the stipulated
- 5 consent agreement, which would remain in force unless and until Judge
- 6 Thrash modified it.<sup>22</sup>

7 Even an order by this Court declaring Solvay's and Par/Paddock's private  
 8 settlement agreement illegal and void under the antitrust laws would not conflict with  
 9 the consent agreement. According to defendants, the consent agreement has terms  
 10 "materially identical to those of the settlement agreements." (Defs.' Mot. at 13.) But  
 11 the Par/Paddock settlement agreement by its own terms terminates if "a competent  
 12 United States court" enters a final non-appealable order declaring the agreement  
 13 illegal. (Andrus Decl. Ex. BB; *see also* Ex. CC.) A final order declaring that  
 14 agreement invalid would end any conflict with the consent agreement, even under  
 15 defendants' reading.

16 Defendants' comity concerns consequently are unfounded. The federal court  
 17 system does not bar one federal court from considering a matter that might have some  
 18 relationship to a judgment entered elsewhere. "[C]ourts do have the power to  
 19 determine the res judicata effect of other courts' orders." *Arata v. Nu Skin Int'l, Inc.*,  
 20 96 F.3d 1265, 1269 n.2 (9th Cir. 1996). Traditional comity concerns arise only when  
 21 "there is in fact a true conflict" between the laws of the forum and foreign  
 22 jurisdiction. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99, 125 L. Ed.  
 23 2d 612, 640-41, 113 S. Ct. 2891, 2910-11 (1993).<sup>23</sup>

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25 <sup>22</sup> Moreover, only the parties to the consent agreement have standing to enforce it.  
 26 *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 750, 44 L. Ed. 2d 539,  
 27 557, 95 S. Ct. 1917, 1932 (1975).

28 <sup>23</sup> *Cf. Sandpiper Vill. Condo. Ass'n, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831,  
 844-48 (9th Cir. 2005) (state case did not conflict with prior settlement agreement).

1 The cases defendants cite in support of their comity argument are inapposite  
 2 because they are addressed primarily to actions to set aside prior judgments. *See*,  
 3 *e.g.*, *Treadaway v. Acad. of Motion Picture Arts & Scis.*, 783 F.2d 1418, 1419-20 (9th  
 4 Cir. 1986) (action brought in D. Ariz. under Rule 60(b) to set aside C.D. Cal.  
 5 bankruptcy sale).<sup>24</sup> This action, however, is not an attack on, or an attempt to “undo,”  
 6 the Northern District of Georgia consent agreement. The requested relief will not  
 7 require defendants to act “in direct contravention” of the terms of that agreement.<sup>25</sup>

8 The other cases defendants cite also do not support transfer here. The  
 9 *Cephalon* transfer decision rested on the risk of inconsistent judgments between the  
 10 FTC’s action and prior pending class actions filed in another district. *Cephalon*, 551  
 11 F. Supp. 2d at 29. This concern is not present here, because the FTC, the State of  
 12 California, and the class plaintiffs all filed their claims in this district.<sup>26</sup>

13 Finally, there could be no possible conflict between the present proceedings  
 14 and the dismissal of the Watson case. Watson and Solvay merely dismissed their  
 15 case without prejudice and filed a stipulation that the Georgia court would retain  
 16 jurisdiction to enforce the terms of the settlement. (Roberti Decl., Ex. B.) None of  
 17 the terms of the settlement or profit-sharing agreements were embodied in the  
 18 stipulation. (*Id.*) A judgment here that the collusive terms of the Solvay/Watson  
 19 agreement are anticompetitive would not prevent the Georgia court from retaining

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20 <sup>24</sup> *See also Zdrok v. V Secret Catalogue, Inc.*, 2001 WL 35902107 at \*5-6 (C.D.  
 21 Cal. July 30, 2001) (action brought in one district to set aside default judgment in  
 22 other district); *Lundborg v. Phoenix Leasing, Inc.*, 91 F.3d 265, 268, 273 (1st Cir.  
 1996) (action to “undo” prior state court judgment).

23 <sup>25</sup> *Cf. Goulart v. United Airlines, Inc.*, 1994 WL 544476, at \*3 (N.D. Cal. Sept. 28,  
 24 1994) (where relief in later-filed action would require defendants to act “in direct  
 25 contravention” of earlier consent decree, second court should decline jurisdiction).

26 <sup>26</sup> Defendants miscite *Coady*, which also does not apply. *Coady v. Ashcraft &*  
 27 *Gerel*, 223 F.3d 1, 10-11 (1st Cir. 2000) (Defs.’ Mot. at 13.) (explicitly not  
 28 deciding whether the district court originally erred in refusing to transfer, and  
 leaving open the possibility of denying transfer despite a potential for incompatible  
 rulings).

1 jurisdiction over any dispute between Solvay and Watson for breach of the terms of  
2 their settlement agreement. Nor would it interfere with further litigation of the patent  
3 dispute. *See Reed Elsevier v. Innovator Corp.*, 105 F. Supp. 2d 816, 818-20 (S.D.  
4 Ohio, 2000) (denying motion to transfer where subsequent litigation alleged different  
5 claims than those governed by prior settlement agreement, and where action for  
6 breach of the settlement agreement was pending in the other forum).

### 7 **III. Other Factors Weigh Against Transfer**

8 Other factors that courts commonly consider in deciding transfer motions,  
9 including familiarity with applicable state law, ease of access to sources of proof, and  
10 relative court congestion, also weigh against transfer.

11 First, the presence of California state law claims weighs against transfer.  
12 When state law claims are being heard in federal court, it is generally preferable that  
13 they be heard in the forum most familiar with the state laws at issue. *See Van Dusen*,  
14 376 U.S. at 645; *Jonathan Browning*, 2007 WL 4532214, at \*6 (“The Northern  
15 District of California is more familiar with the relevant California state laws that  
16 govern the state claims. This factor does not favor transfer . . . .”) Here, the State of  
17 California has advanced claims under California’s Cartwright and Unfair  
18 Competition Acts. This Court is better placed than the Northern District of Georgia  
19 to hear these claims. Defendants cite cases for the proposition that this factor is not  
20 by itself dispositive, but it clearly weighs against transfer.

21 Second, sources of proof may be easily accessed in this district. While courts  
22 have traditionally considered the location of documentary evidence in deciding  
23 transfer motions, modern technology has reduced the importance of this factor. *See*,  
24 *e.g.*, *Getz v. Boeing Co.*, 547 F. Supp. 2d 1080, 1084 (N.D. Cal. 2008) (noting that  
25 electronic evidence may be reproduced anywhere). This is especially true where, as  
26 here, the parties have previously produced a number of relevant documents during a  
27 pre-complaint investigation. *See Rose Fund*, 2004 WL 2445242, at \*4 (defendants  
28 produced pre-complaint documents to SEC).

1 Finally, efficiency considerations weigh against transfer. Plaintiffs seek  
2 expeditious treatment of this case. But transfer to the Northern District of Georgia  
3 would not necessarily lead to faster resolution. As noted above, the district court in  
4 Georgia presided over defendants' patent litigation for over three years before the  
5 case settled, without ruling on any substantive motions. In addition, this Court has  
6 substantial experience in hearing complex cases involving some of the potential  
7 antitrust and intellectual property issues presented by this case. Finally, this district  
8 as a whole deals at least as efficiently with cases through to trial as does the Northern  
9 District of Georgia. The most recent available statistics show that this district has a  
10 median time to trial of 22.0 months for civil cases, compared to 30.5 months for the  
11 Northern District of Georgia.<sup>27</sup> *See, e.g., Getz*, 547 F. Supp. 2d at 1085 (weighing  
12 median time to trial). Defendants may question this Court's ability to handle this  
13 case as expeditiously as the Georgia court, but plaintiffs do not. Plaintiffs request  
14 expeditious treatment of their claim for injunctive relief, in light of the substantial  
15 and ongoing harm to consumers from defendants' conduct.

16  
17 Dated: March 16, 2009

18 Respectfully submitted,

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26  
27 <sup>27</sup> *See* Administrative Office of U.S. Courts, Federal Court Management Statistics,  
28 *available at* <<http://www.uscourts.gov/fcmstat/>>. Median time to disposition for  
civil cases was comparable between the two districts in 2008, at 7.0 months for this  
district and 6.7 months for the Northern District of Georgia.