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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.* MATTHEW CESTRA, and on behalf of the STATES of CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OKLAHOMA, RHODE ISLAND, TENNESSEE, TEXAS, VIRGINIA, WASHINGTON, WISCONSIN and the DISTRICT OF COLUMBIA, Plaintiffs, vs. CEPHALON, INC., and JOHN DOES # 1-100, FICTITIOUS NAMES Defendants.	Case No. 10-CIV-6457 (SHS) **MEMORANDUM IN OPPOSITION TO RELATOR'S MOTION TO TRANSFER**

I. INTRODUCTION

After choosing to file his original complaint and two succeeding amended complaints in this district, Relator Matthew Cestra ("Cestra" or "Relator") now seeks a new forum in the Eastern District of Pennsylvania. This request should be denied. First, there are not two competing actions because the False Claims Act's jurisdictional "first-to-file" rule bars Cestra's Fentora claims. Second, Cestra is engaged in improper forum shopping to escape Second Circuit law that he does not like.

II. BACKGROUND

Cestra filed his original complaint on August 30, 2010 in the U.S. District Court for the Southern District of New York. ECF No. 18. On March 11, 2011, he filed a First Amended Complaint, and on June 24, 2013, a Second Amended Complaint ("SAC"). ECF Nos. 25 & 39. The complaints allege that Cephalon promoted two of its drugs, Treanda and Fentora, for off-label uses. The vast majority of the allegations in the SAC relate to Treanda, not Fentora. Indeed, of the SAC's 421 substantive paragraphs, fewer than a quarter relate to Fentora.

On January 14, 2010, prior to the filing of Cestra's original complaint, another relator, Bruce Boise, filed under seal in the Eastern District of Pennsylvania, a *qui tam* False Claims Act Amended Complaint against Cephalon alleging that Cephalon promoted several of its drugs, including Fentora, for off-label uses. Civ. A. No. 08-00287 (E.D.Pa.), ECF No. 14.[1] The Boise *qui tam* complaint does not contain any allegations regarding Treanda. *Id.*

[1] The original Boise complaint was filed in 2008 and remains under seal.

On September 12, 2013, the Boise *qui tam* Amended Complaint was unsealed following the government's decision not to intervene in that case. That same day, Cestra filed the instant motion to transfer. Cephalon's motion to dismiss the SAC is pending.[2]

III. ARGUMENT

Cestra's motion to transfer purports to be based on the so-called "first-filed" presumption which gives courts the ability to transfer a later-filed case to the court where a lawsuit involving the very same parties and the very same issues is already pending in another jurisdiction. *See New York Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 113-14 (2d Cir. 2010). Cestra's motion to transfer should be denied for two independent reasons. First, neither this Court nor the proposed transferee court have jurisdiction over Cestra's Fentora claims, and thus there are not two competing actions. Second, even without the jurisdictional defect, Cestra does not meet the requirements for application of the "first-filed" presumption. Instead, his motion amounts to nothing more than a transparent effort at improper forum-shopping to avoid unfavorable case law that has developed since he filed his complaint.

A. The FCA's Statutory First-To-File Rule Bars Jurisdiction Over Cestra's Fentora Claims

For a court to invoke the first-filed presumption, it must have jurisdiction over the claims. *See Nat'l Equipment Rental, Ltd. v. Fowler*, 287 F.2d 43, 45 (2d Cir. 1961) ("[The first-filed presumption] necessarily follows from the basic proposition that the first court to obtain jurisdiction of the parties and of the issues should have priority over a second court to do so."); *Children's Network LLC v. Pixfusion LLC*, 722 F. Supp.2d 404, 409 (S.D.N.Y. 2010); *see also FMC Corp. v. AMVAC Chemical Corp.*, 379 F. Supp. 2d 733, 737 (E.D. Pa. 2005).

[2] The motion to dismiss briefing will be closed on October 4, when Cephalon files its reply brief.

Cestra's position is premised on the argument that his and the Boise actions "allege the same general conduct to illegally promote Fentora, by the same defendant, and the same theory of fraud by which that defendant is liable to the same real-party-in-interest plaintiffs (*i.e.*, the United States and the States)." ECF No. 65, at 6. However, for this very reason, and the additional reasons set forth in Cephalon's memorandum of law in support of its motion to dismiss based on lack of subject matter jurisdiction, which is incorporated herein by reference, Cestra's allegations regarding Fentora are jurisdictionally barred by the FCA's "first-to-file rule." Section 3730(b)(5) of the FCA provides that "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5); *see also United States by DOD v. CACI Int'l*, 1999 WL 55259, *1 (2d Cir. Feb. 5, 1999). Thus, because Cestra's Fentora allegations must be dismissed, there are no competing actions triggering a "first-filed" analysis, and nothing left to transfer.

B. Even If The Court Had Jurisdiction Over Cestra's Fentora Claims, The Case Should Not Be Transferred

Even if Cestra's Fentora claims were not jurisdictionally barred by the first-to-file doctrine, his motion to transfer based upon the first-filed presumption should nonetheless be denied. As Cestra himself notes, the first-to-file jurisdictional doctrine is "materially different" than the first-filed presumption. ECF No. 65, at 2 n.6. Whereas the first-to-file doctrine is an exception-free jurisdictional bar that applies where the actions are related, the first-filed rule is a presumption that applies only where the claims in the two actions are "virtually the same." *Nautilus Neurosciences, Inc. v. Fares*, No. 13 Civ. 1078(SAS), 2013 WL 3009488, at *2 (S.D.N.Y. June 14, 2013) (first-filed presumption only applies where the issues are "virtually the same"); *see also Am. Steamship Owners Mut. Protection & Indem. Ass'n, Inc. v. Lafarge N. Am.,*

Inc., 474 F. Supp. 2d 474, 486 (S.D.N.Y. 2007) (noting that "the first issue is whether virtually the same issue or issues are being decided between the parties" and denying motion to transfer where "[t]he two actions are . . .not coextensive although they overlap on one of the two issues at stake."). Moreover, it has two significant exceptions which apply here.

First, the Cestra and Boise complaints are not "virtually the same." Issues are "virtually the same" only when "the questions being answered in the first-filed suit would decide the second action" and "where the evidence necessary to prove one cause of action would [also] establish the other." *Nautilus Neurosciences,* 2013 WL 3009488, at *2 (quotation omitted); *accord Mfrs. Hanover Trust Co. v. Palmer Corp.*, 798 F. Supp. 161, 166-67 (S.D.N.Y. 1992) (first-filed doctrine applied only where underlying facts of each case "both involve[d] the same witnesses and parties"). The vast majority of Cestra's case involves the drug Treanda, which is not at issue in the Boise action. Further, the Boise action also involves the drugs Nuvigil, Provigil and Amrix, and an additional party, Takeda Pharmaceuticals North America. Thus, the first-filed rule does not apply because the Treanda claims are not "virtually the same" as the Boise claims, which involve completely different drugs, and thus completely different witnesses, documents and other evidence.

Second, even to the extent that the presumption applies, the "balance of convenience" exception weighs in favor of keeping the action in this Court. It is Cestra who chose this forum, and at the time he filed, he did not find it inconvenient. Nor is it inconvenient for Cephalon, whose main office is a short train ride away. *See, e.g., TIG Ins. Co. v. Century Indem. Co.*, 08 CIV. 7322 (JFK), 2009 WL 1564112, at *2-3 (S.D.N.Y. June 4, 2009) (denying motion to transfer to Eastern District of Pennsylvania, noting that "several courts have denied transfer from New York to Philadelphia, or vice versa, based on a claim of inconvenience, given the short

distance and the ease of travel between the two cities," and citing cases declining transfers between the two forums).

Cestra cites to a Cephalon motion to dismiss in the *Travelers Indemnity Co. v. Cephalon, Inc.*, No. 12-CV-4191 (E.D. Pa.), action in support of his argument that judicial economy weighs in favor of transferring the instant case to the Pennsylvania District Court. As Cephalon made clear in its brief in the *Travelers* action, "***the same dispute*** is before two different district courts." Simmer Decl., Exh. D at 1, ECF No. 66-5 (emphasis added). The Cestra and Boise actions do not involve the same dispute, and thus, there are no economies to be gained by transferring the Cestra action to the Eastern District of Pennsylvania.

Third, Cestra's motion should fail for the independent reason that he is engaged in forum shopping. Motions to transfer are disfavored in the Second Circuit where, as here, the plaintiff is simply looking for better law. *See Spar, Inc. v. Information Res., Inc.*, 956 F.2d 392, 395 (2d Cir. 1992) (affirming denial of plaintiff's motion to transfer under 28 U.S.C. § 1406 because plaintiff was forum shopping for more favorable statute of limitations). "Once a plaintiff has commenced its action . . . its opportunity to search for a more conducive forum ordinarily is concluded." *Id.*; *see also In re Ski Train Fire in Kaprun, Austria, on November 11, 2000*, 224 F.R.D. 543, 547 (S.D.N.Y. 2004) (denying plaintiffs' motion to transfer as not in the interests of justice where plaintiff's evidence that other forum would cure jurisdictional defect was based on "weak evidence").

The "special circumstances" exception to the first-filed presumption exists for precisely this reason. "Special circumstances" exist where a party is engaged in forum shopping. *See Employers Ins. of Wausau*, 522 F.3d at 275-76; *Children's Network*, 722 F. Supp.2d at 410; *Dornoch Ltd. ex rel. Underwriting Members of Lloyd's Syndicate 1209 v. PBM Holdings, Inc.*,

666 F. Supp. 2d 366, 370-71 (S.D.N.Y. 2009) (denying motion to dismiss and alternative motion to transfer pursuant to first filed rule where, among other reasons, "forum shopping was, if not the primary, at least one motivating factor behind PBM Nutritional's decision to bring suit in Virginia."); *see also Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 424 n.4 (2d Cir. 1965) (noting that forum shopping is a basis that would justify departure from the first-filed rule); *EEOC v. Univ. of Pennsylvania*, 850 F.2d 976 (3d Cir. 1988) ("Bad faith and forum shopping have always been regarded as proper bases for departing from the rule").[3]

Here, Cestra is plainly engaged in forum shopping. Although Cestra chose this forum, it is evident by his response to Cephalon's motion to dismiss that he has come to conclude that the law in the Second Circuit is not favorable to him. After Cestra initiated suit in this forum, the Second Circuit issued a precedent-setting opinion in *United States v. Caronia* holding that "the simple promotion of a drug's off-label use by pharmaceutical manufacturers and their representatives" is protected by the First Amendment. 703 F.3d 149, 162 (2d Cir. 2012). Therefore, as Cephalon addresses in its motion to dismiss, Cephalon's alleged off-label promotion of Treanda and dissemination of information about the Rummel Study, as well as its promotion of Fentora, were protected by the First Amendment. ECF No. 52, at 15-17. In addition, the district court in *United States ex rel. Polansky v. Pfizer, Inc.*, No. 04-704, 2009 WL 1456582, at *5 (E.D.N.Y. May 22, 2009), held that "a relator cannot circumscribe the Rule 9(b) pleading requirements by alleging a fraudulent scheme in detail and concluding, that as a result of the fraudulent scheme, false claims must have been submitted." Cestra's response

[3] *FMC Corp. v. AMVAC Chem. Corp.*, 379 F. Supp. 2d 733,747 n.25, 754 (E.D. Pa. 2005) ("Courts condone neither forum shopping nor forum avoidance," and the first-filed rule "should not apply when at least one of the filing party's motives is to circumvent local law."); *see also Svete v. Wunderlich*, No. 2:07-CV-156, 2009 WL 3028995, at *5 (W.D. Ohio Sept. 16, 2009) (denying plaintiff's motion to transfer where it appeared plaintiff was "engaged in forum shopping").

acknowledges that *Polansky* is the only decision in this circuit on the issue, and makes plain that he disagrees with *Polansky*'s conclusion. *See* ECF No. 67, at 13.

Cestra's attempts to spin the special circumstances exception by arguing that *Boise* was not engaged in forum shopping turns the exception on its head. *See* ECF 65, at 7. Cestra proclaims, without citation, that "[t]he forum shopping analysis envisioned by the "special circumstances" exception applies *only* to the motivation of the first-filing plaintiff." *Id.* at n.9 (emphasis in original). However, in the majority of the cases that Cestra cites in support of his motion to transfer, the first-filing plaintiff is the *defendant* in the second-filed action.[4] Cephalon is not seeking to flee the Second Circuit. Cestra is. Thus, the relevant question is whether *Cestra* is engaged in forum shopping. The first-filed rule was not intended to provide plaintiffs with a second bite at the apple.

IV. CONCLUSION

For the foregoing reasons, Cestra's motion to transfer the case and stay pending deadlines should be denied.

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[4] *See Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599 (5th Cir. 1999); *EEOC v. Univ. of Pennsylvania*, 850 F.2d 969 (3d Cir. 1988); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, South Atlantic & Gulf Coast Dist. of the ILA*, 751 F.2d 721 (5th Cir. 1985); *First City Nat'l Bank & Trust Co. v. Simmons*, 878 F.2d 76 (2d Cir. 1989); *Wyler-Wittenberg v. Metlife Home Loans, Inc.*, 899 F. Supp. 2d 235 (E.D.N.Y. 2012); *Children's Network, LLC v. Pixfusion LLC*, 722 F. Supp. 2d 404 (S.D.N.Y. 2010); *MasterCard Int'l, Inc. v. Lexcel Solutions, Inc.*, No. 03 Civ. 7157, 2004 WL 1368299 (S.D.N.Y. June 16, 2004); *Kellen Co., Inc. v. Calphalon Corp.*, 54 F. Supp. 2d 218 (S.D.N.Y. 1999); *GT Plus, Ltd. v. JA-RU, Inc.*, 41 F. Supp. 2d 421 (S.D.N.Y. 1998); *Mfrs. Hanover Trust Co. v. Palmer Corp.*, 798 F. Supp. 161 (S.D.N.Y. 1992).

Those cases involving the *plaintiff's* attempts to transfer are distinguishable. Two of those cases allowed the second-filed suit to proceed, *see Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952); *Columbia Pictures Indus., Inc. v. Schneider*, 435 F. Supp. 742 (S.D.N.Y. 1977), and the remaining two did not involve either the FCA's first-to-file bar or forum shopping on the plaintiff's part. *See Emp'rs Ins. of Wausau v. Fox Entm't Group, Inc.*, 522 F.3d 271 (2d Cir. 2008); *Remington Prods. Corp. v. Am. Aerovap, Inc.*, 192 F.2d 872 (2d Cir. 1951).

Respectfully submitted,

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Dated: September 27, 2013

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CERTIFICATE OF SERVICE

I, Eric W. Sitarchuk, hereby certify that I served a true and correct copy of the above by the Court's ECF system on September 27, 2013, which delivered copies to all counsel of record.

/s/Eric W. Sitarchuk
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