UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Re: HERBAL SUPPLEMENTS MARKETING AND SALES PRACTICE LITIGATION	1:15-cv-05070 Hon. John W. Darrah
This document relates to all actions	

PLAINTIFFS' MOTION TO LIFT THE STAY PERTAINING TO TESTING OF HERBAL SUPPLEMENTS, OR IN THE ALTERNATIVE, FOR VOLUNTARY DISMISSAL PURSUANT TO RULE 41(a)(1)(A)(i) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Class Plaintiffs respectfully submit this Motion to Lift the Stay Pertaining to Testing of Herbal Supplements, Or In the Alternative, for Voluntary Dismissal Pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, and in support hereof, state:

1. On January 28, 2016, this Court entered an Order ("Testing Order") prohibiting the parties from performing *any* testing of the herbal supplements at issue in this case until further order of this Court [ECF No. 129].

2. On February 3, 2016, Plaintiffs' co-lead counsel wrote to the Court requesting relief from the Testing Order [ECF No. 134]. In this letter, co-lead counsel requested that the Court permit Plaintiffs to undertake testing at their own expense. In relevant part, the February 3 letter stated:

> Speaking on behalf of Plaintiffs' counsel, we would like to have the option of immediately continuing our efforts in analysis and testing. We take very seriously the Court's remarks at the February 2, 2016 status conference regarding cost control and reimbursement. However, we respectfully request that we be allowed to continue in our efforts to develop our case, even if the Plaintiff law firms do so at our own peril in the way of reimbursement. Obviously, we would not seek reimbursement of expenses in this

regard pending further direction of the Court. We would be grateful for the court's further direction at its earliest opportunity.

To date, the Court has not responded to the February 3, 2016 request.

3. Since the time the Court entered the Testing Order some 4.5 months ago, Plaintiffs have refrained from conducting any testing of herbal supplements. This prohibition against further scientific testing causes an unavoidable, albeit unintentional, consequence of preventing Plaintiffs from continuing to independently develop work product for the just prosecution of their case. More specifically, the restriction impedes Plaintiffs' independent development of the key elements of their case; namely, whether Defendants' herbal supplements contain the botanically sourced ingredients Defendants represent as contained in their herbal supplements, and whether Defendants' herbal supplements contain other substances or contaminants that are not disclosed on their packaging labels for those herbal supplements. Importantly, Plaintiffs' Co-Lead Counsel offered to conduct this testing at their own personal expense, irrespective of any potentially Court-approved reimbursement of other case expenses. Further, allowing Plaintiff to proceed with independent testing imposes no burden on Defendants or on this Court.

4. Since the Testing Order has been in effect, the Court directed the parties to submit the names of non-retained expert witnesses to assist the Court in determining whether DNA barcoding technology is an acceptable means of detecting and/or substantiating the botanical contents of a supplement. The joint work of the two anticipated experts to be appointed by the Court is expected to be insightful for the Court; however, Plaintiffs cannot rely on said experts to prove their case against Defendants.

5. Plaintiffs have consistently maintained that DNA barcoding is a reliable method of testing that can definitively determine whether a particular plant species is actually present in

the finished supplement. Using DNA barcoding, the Office of the New York Attorney General ("NY Attorney General") has found that the overwhelming majority of herbal supplements tested by this means have failed to contain any DNA of the primary ingredients they were represented to contain, and in many cases, contained ingredients or contaminants not disclosed on the packaging label.

6. The NY Attorney General's reliance on DNA barcoding technology during the course of its investigations into the herbal supplement industry demonstrates that DNA barcoding technology is an acceptable, and indeed worthy, method of determining whether herbal supplements are authentic and pure. The following relevant excerpts from the NY Attorney General's website speak to the usefulness and efficacy of DNA barcoding technology:

a. As evidence of the most recent proof of the NY Attorney General's continued use and commitment to DNA barcode testing, on September 10, 2015, relying on a study from the New York Botanical Garden that used DNA barcode testing to conclude that the Devil's Claw supplements from 13 manufacturers contained a cheaper related and less desirable species, the NY Attorney General issued letters demanding that these 13 dietary supplement manufacturers cease and desist from the sale, distribution or marketing of adulterated or misbranded Devil's Claw supplements:

> "The letters, sent Wednesday, are based on a study from the New York Botanical Garden that used an advanced DNA barcoding technique to conclude that the devil's claw supplements from these manufacturers contained a cheaper related species that is considered less desirable. Attorney General Schneiderman requested that the companies furnish proposals, where appropriate, for recalling any adulterated devil's claw

supplements, compensating consumers who purchased the mislabeled products, and reforming their approach to quality control."[1]

b. In addition, on September 10, 2015, the NY Attorney General also announced that it had reached a settlement with Nature's Way, a leading manufacturer of supplements, concerning its herbal supplements.[2] Specifically, as part of the settlement, Nature's Way, like GNC, also agreed to employ DNA barcode testing to verify the ingredients in its herbal supplement products.[3]

c. On May 11, 2015, the NY Attorney General and Daniel Fabricant, Ph.D., CEO of The Natural Products Association, issued the following joint statement:

> "We share a common objective of ensuring herbal products bought by consumers are authentic, pure, and sold in full compliance with consumer protection laws. Anyone who buys an herbal supplement should be able to do so with full knowledge of what is in the product and have complete confidence that every precaution was taken to ensure its authenticity and purity. While no single test or technology alone can provide complete confidence to consumers, we support the application of DNA barcoding technology as part of a multi-faceted approach to assuring authenticity and identifying substitution. This includes testing herbal/botanical ingredients prior to extraction in circumstances where DNA Barcode is available for the relevant species. Together, we look forward to jointly working with major manufacturers and retailers of herbal supplements to promote a model for product safety, authenticity, and transparency in this industry. We view this dialogue as a positive step in resolving our differences and we are hopeful that we can work in collaboration to enhance confidence and safe access for consumers."[4]

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[1] http://www.ag.ny.gov/press-release/ag-schneiderman-issues-cease-and-desist-letters-13-makers-devil%E2%80%99s-claw-supplements.

[2] Incidentally, Nature's Way has implemented a DNA certification program, known as TRU-ID, which Nature's Way describes as ". . .an independent testing program that uses cutting-edge DNA biotechnology to ensure the authenticity of our herbal products. With TRU-ID validation, you can be sure that the herbs listed on our labels actually match what is in our products." See http://www.naturesway.com/Our-Story accessed on 6/22/16.

[3] *Id.*

[4] www.ag.ny.gov/.../new-york-attorney-general-and-natural-products- association-agree-collaborate-promote.

d. Announcing its agreement with GNC in March 2015, to implement new standards in authenticating herbal supplements, the NY Attorney General cited approvingly the efficacy of DNA barcoding:

> "[T]he FDA does not mandate the use of DNA-based technologies, like barcoding, to authenticate herbal supplements. Instead, the FDA allows companies to support their claims through other methodologies. Given the existence of chemically-similar natural or synthetic substitutes, the Attorney General's Office remains concerned that these alternate methodologies do not provide adequate assurances of the authenticity of herbal supplements. Current FDA regulations allow for low levels of inadvertent contamination, including from allergens, and there is no federal testing required to confirm that contamination falls below relevant safety thresholds."[5]

e. In February 2015, the NY Attorney General directed four major retailers—GNC, Walmart, Target, and Walgreens—to halt the sale of certain herbal supplements following DNA barcode tests that failed to detect plant materials listed on the labels of the majority of products tested and also detected DNA associated with ingredients or contaminants not listed on the label: "The testing revealed that all of the retailers were selling a large percentage of supplements for which modern DNA barcode technology could not detect the labeled botanical substance."[6]

7. Given the cited evidence as to the efficacy and reliability of DNA barcode testing, upon which the NY Attorney General continues to rely, Plaintiffs urge this Court to reconsider its prior order and lift the prohibition on testing of herbal supplements. Such testing has been viewed as a sound basis in determining precisely the crux of the issues presented in

[5] www.ag.ny.gov/.../ag-schneiderman-announces-agreement-gnc-implement- landmark-reforms-herbal-supplements.
[6] www.ag.ny.gov/.../ag-schneiderman-asks-major-retailers-halt-sales-certain- herbal-supplements-**dna**-tests.

this litigation. Further delay in Plaintiffs' ability to continue with discovery and scientific testing (specifically, DNA barcoding) will cause undue prejudice to Plaintiffs in prosecuting their claims on behalf of the putative class.

8. Further, Plaintiffs produced to the Court a declaration (ECF No. 132-1) from a world-renowned scientist and botanist who is among the most experienced scientists in the field of plant identification using DNA and chemical based testing – Dr. Damon Little. Among other things, Dr. Little informed the Court that he has personally performed DNA testing on finished supplements, which defendants contend cannot be done, and has had a high degree of success.[7] In connection with that testing, he has written several peer reviewed scientific articles which detail his findings. Significantly, it is Dr. Little's opinion that the tests used by Defendants are not sufficient as a means of plant identification, because, among other things, they cannot definitively determine the origin of the compounds in an herbal supplement.

9. Accordingly, in order to continue a fair and just prosecution of the putative class' claims, Plaintiffs formally request that this Court lift its prior stay of testing so as to permit Plaintiffs the fullest opportunity to prosecute their claims against Defendants in a timely, appropriate manner, using sound and reasonable scientific technology, including DNA barcoding technology.

10. Should the Court deny Plaintiffs' Motion to Lift the Discovery Stay Pertaining to Testing of Herbal Supplements, with the highest respect for this Court and in substantial consultation with the Plaintiffs' Steering Committee, Plaintiffs respectfully request, in the alternative, a voluntary dismissal without prejudice pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure ("FRCP"). In the absence of independent testing, Co-Lead Counsel do not believe they can adequately represent their clients and the interests of the

[7] ECF No. 132-1, p. 9, para. 16.

putative class. Voluntary dismissal by plaintiffs of putative class action litigation, as a matter of right pursuant to Rule 41(a)(1), is not unprecedented and indeed, is permitted by the express language of Rules 23 and 41. *Crook v. WMC Mortgage Corp.,* 2006 WL 2873439 (S.D. Ill.) (Lead plaintiffs of putative class action that had not yet been certified were entitled to an absolute right to voluntarily dismiss litigation pursuant to Rule 41(a)(1) (even after litigation was removed to federal district court in Illinois and even though defendants had already filed a section 2-619 motion to dismiss prior to removal) because defendants had not yet filed an answer or motion for summary judgment).

11. Rule 41(a) of the FRCP provides:

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2 and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

12. Pursuant to the plain language of Rule 41(a)(1), Plaintiffs have an absolute right to a voluntary dismissal because Defendants have neither served an answer to Plaintiffs' consolidated and amended complaint nor filed a motion for summary judgment, and discovery has not begun.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant its Motion To Lift The Stay Pertaining to Testing of Herbal Supplements, Or In the Alternative, a Voluntary Dismissal Pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure.

Dated: June 24, 2016

Respectfully submitted,

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Co-Chairs of the Lead Counsel Committee

CERTIFICATE OF SERVICE

I hereby certify that, on June 24, 2016, a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered attorneys.

/s/ Robert A. Clifford