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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STRAUS FAMILY CREAMERY, INC. and HORIZON ORGANIC HOLDING CORPORATION. Plaintiffs, vs. WILLIAM B. LYONS, JR., Secretary, California Department of Food and Agriculture, Defendant.	Case No.: C 02 1996 BZ MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a) Hearing Date: September 4, 2002 Time: 10:00 a.m. Department: G Judge: Magistrate Judge Bernard Zimmerman

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I. INTRODUCTION

In this action, Plaintiffs Straus Family Creamery, Inc. ("Straus") and Horizon Organic Holding Corporation ("Horizon") allege that the defendant's application of California's stabilization and pooling laws to plaintiffs' organic dairy operations violates plaintiffs' constitutional rights to due process and equal protection because it requires them to contribute money to a "pool" each month without regard for (1) the distinct expenses that plaintiffs must incur to comply with the organic foods laws and (2) the fact that plaintiffs cannot purchase milk from the conventional producers ("dairy farmers") who benefit from the stabilization and pooling laws. Plaintiffs also allege that the requirement that plaintiffs' proposed amendment to the pooling plan must be approved by a referendum vote of all dairy farmers violates plaintiffs' right to procedural due process because the vast majority of dairy farmers have a financial interest that is adverse to the plaintiffs.

While acknowledging that venue is proper in this court, defendant has moved to transfer this case to the Sacramento Division of the Eastern District of California with the expectation that this case will be assigned to Judge Burrell, who previously granted summary judgment in favor of the defendant in a constitutional challenge to an unrelated provision of the pooling plan. Defendant has failed to meet his burden to overcome the strong presumption in favor of plaintiffs' choice of forum. It would not be substantially inconvenient for defendant to litigate this case in San Francisco, which is merely 87 miles from Sacramento, and the balance of inconvenience does not weight in defendant's favor.

First, this court is a more convenient forum for both of the plaintiffs. A transfer to the Eastern District would merely shift the inconvenience from the defendant to the plaintiffs, which is insufficient to justify a transfer of venue.

Second, the Northern District is the most convenient forum for the witnesses. As a preliminary matter, most of the evidence that defendant proffered in support of this motion (the declaration of Kelly Krug in Support of Motion to Transfer) that identifies potential witnesses and purports to describe their knowledge and residence, is inadmissible. Moreover, even if that evidence were admissible, the declaration reveals that a change of venue to Sacramento would, for the most part, merely reduce the driving time of defendant's witnesses for a single day of testimony in court. This level of 'inconvenience' is not substantial enough to warrant upsetting the plaintiff's choice of forum, particularly in light of the fact that a transfer would simply shift the additional driving time from defendant's witnesses to plaintiffs' witnesses. Additionally, the convenience of plaintiffs' witnesses, who are primarily third-party witnesses, outweighs the convenience of defendant's witnesses, who are either (a) employees of the CDFA and agents of the defendant, whose convenience is not entitled to priority, or (b) expert witnesses, whose convenience is irrelevant in determining a motion to transfer venue. Furthermore, testimony by the majority of the witnesses identified by the defendant will be unnecessary, because their testimony would be irrelevant, inadmissible or uncontested.

Third, defendant has failed to prove that a transfer to the Eastern District is in the interest of justice or would promote judicial economy. Adjudication of this action does not require the type of complex analysis of the regulatory scheme that defendant would have the Court believe. Moreover, even if the court transferred this case to the Eastern District, there is no assurance that it would be assigned to Judge Burrell. Rather than to promote justice, the attempt to bring this action before a particular judge who previously ruled in favor of the defendant is contrary to judicial principles and is reason alone for this Court to exercise its discretion to deny the defendant's motion.

Finally, the Eastern District is not the most convenient forum for access to proof. While the CDFA may maintain certain documentary evidence that is relevant to the resolution of this case in Sacramento, plaintiff Straus maintains evidence that is relevant to this case in Marin County, including records of the expenses incurred in purchasing and processing organic milk and records of assessments and payments to the pool. The organic dairy farmers from whom plaintiffs purchase organic milk are located in Marin County, and thus the records of their expenses are also located in Marin County. Straus also maintains a number of the documents identified by defendant, and a transfer to the Eastern District would do nothing more than shift the burden of transportation from the defendant to the plaintiffs. Defendant has made no showing that it would be unduly burdensome to present the necessary evidence in San Francisco.

Defendant has thus failed to meet his burden to justify a transfer of venue and plaintiffs respectfully request that the Court deny this motion.

II. FACTUAL BACKGROUND

A. THE COMPLAINT

In this action, plaintiffs have challenged the constitutionality of the defendant's application of the California milk stabilization and pooling laws to their organic dairy processing operations. Complaint, ¶¶ 1, 24, 26, 32, 33, 38. The issues raised by plaintiffs' complaint are whether the defendant may, consistent with plaintiffs' constitutional rights to equal protection and due process (1) require plaintiffs to pool their revenues with the conventional dairy industry, with which plaintiffs cannot participate as a matter of law. Id., ¶¶ 24(d), 32(d); (2) require plaintiffs to contribute to a milk stabilization pool that only creates a sustainable price for conventional dairy farmers, and only makes payments to conventional dairy processors. Id., ¶¶ 24(a), (b), 32(a), (b); and (3) calculate plaintiffs' required pool contributions based overwhelmingly on the value

and usage of conventional dairy products. Id., ¶¶ 24(c), 32(c). The complaint also challenges the requirement that plaintiffs submit to a state-wide dairy farmer referendum to obtain an amendment to the pooling plan to address these issues on the ground that it violates plaintiffs' right to procedural due process because the vast majority of dairy farmers are part of the conventional dairy industry and thus have a financial interest that is adverse to plaintiffs. Id., Third Claim.

The resolution of these issues is legal; there do not appear to be any material factual disputes. The prohibition against plaintiffs' use of conventional milk is a matter of law. Cal. Health & Safety Code §§ 110810 *et seq.* and California Food & Agr. Code §§ 46000 *et seq.* ("the Organic Foods Act"). The governing statutes and regulations set forth the method by which defendant calculates plaintiffs' pool obligations. The fact that only conventional dairy processors receive income from the net pool contributions is a matter of record maintained by the CDFA. The defendant has admitted that "[t]he standards governing organic milk production result in higher production costs. Organic milk producers do incur a higher cost of production," and that plaintiffs accordingly pay their organic dairy farmers a higher price. Statement of Determination and Order of the Secretary of Food and Agriculture, dated May 21, 2001. Indeed, all the costs incurred by plaintiffs and the prices that plaintiffs pay for raw organic milk, as well as the organic certification of plaintiffs and organic dairy farmers are a matter of record.

B. THE STATUTORY SCHEME GOVERNING MILK POOLING

In support of this Motion to Transfer, the defendant engages in a lengthy description of the history and purpose of the Stabilization and Pooling laws and the manner in which the CDFA calculates a processor's pool obligation each month. See Defendant's Motion to Transfer for Convenience, pp.2-7 (hereinafter "Def. Mot.") This detailed, technical, description is unnecessary for the court to determine whether it should

disturb plaintiffs' choice of venue and require plaintiffs to litigate in Sacramento. What is relevant to this motion, as explained more fully herein, is that (1) plaintiffs do not expect to dispute defendant's description of the history, purpose and substance of the Stabilization and Pooling plans, or defendant's description of the manner in which he implements those plans; and (2) defendant was able to explain the plans and their implementation without resort to any declarations by any witnesses, merely by citing to the relevant statutes and regulations.

III. ARGUMENT

A. STANDARD FOR DECIDING A MOTION TO TRANSFER VENUE

"In motions to transfer venue, there is a strong presumption in favor of plaintiff's choice of forum." Royal Queentex Enterprises v. Sara Lee Corp., 2000 U.S.Dist.LEXIS 10139 at *9 (N.D. Cal. March 1, 2000) (Jenkins, J.). "A plaintiff's choice of forum is accorded substantial weight in proceedings under § 1404(a) (so-called 'home turf' rule). Courts generally will not order a transfer unless the 'convenience' and 'justice' factors . . . strongly favor venue elsewhere." Schwarzer, Tashima, and Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* (The Rutter Group, 2002) ¶ 4:281. On a Rule 1404(a) motion to transfer, the defendant bears the burden of overcoming the presumption in favor of plaintiff's choice of venue by demonstrating that the balance of inconveniences substantially weighs in favor of transfer. Royal Queentex, at *9-10. The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum. Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834 (9th Cir. 1986). "Where transfer would merely 'shift' the inconvenience from one party to another, it should not be granted." Royal Queentex Enterprises, at * 21. This court should deny the motion to transfer because the defendant has failed to demonstrate

that the balance of inconvenience "strongly" and "substantially" weighs in favor of transfer. At most, the record shows that the transfer would "shift" the inconvenience from the defendant to the plaintiffs.

B. THE COURT SHOULD DENY DEFENDANT'S MOTION TO TRANSFER

1. It Would Not Be Substantially More Convenient for the Parties to Litigate in the Eastern District

Litigation of this action in the Northern District is more convenient for both of the plaintiffs. Straus is located in Marin County, and Horizon conducts substantial business in Marin County for which its representatives regularly travel to this area. See Declaration of Albert Straus, ¶ 5 (hereinafter "Straus Decl."); Declaration of Charles Marcy, ¶ 3 (hereinafter "Marcy Decl."); Declaration of Irene Roederer-Laing, ¶ 2 (hereinafter "Roederer-Laing Decl.") . It is also much easier and more economical for Horizon's representatives to travel to San Francisco than to Sacramento because of the greater availability of flights and lower airfares. Roederer-Laing Decl., ¶¶ 3-4. By contrast, only one party, the defendant, would find it more convenient to litigate the action in the Eastern District.

Defendant's attempt to discount the convenience of the plaintiffs, and inflate the importance of defendant's own convenience, on the ground that the relevant witnesses and proof are located predominantly in the Eastern District, is without legal or factual merit. Def. Mot., p. 9:10-16, 9:19-24. First, "the location of witnesses and proof are accounted for by other factors," and counting them also in connection with defendant's convenience would improperly magnify their importance. Williams v. Bowman, 157 F.Supp.2d 1103, 1107-1108 (N.D. Cal. 2001) (Walker, J.). Second, contrary to defendant's claim, information regarding Straus's costs, including the cost of purchasing

milk from the organic dairies located in Marin County, is not only relevant, but is integral to this action. Complaint, ¶¶ 15, 19, 24(b), (c), 32(b), (c). Regardless of whether the CDFA implements the challenged regulations in the Eastern District, defendant imposes the challenged fees on plaintiff Straus in this District, Straus pays the fees from this District, and Straus incurs the expenses and suffers the other consequences that it alleges render the pooling laws unconstitutional in this District.

Finally, if the convenience of any party is entitled to greater weight, it is Straus's convenience that should receive priority. Straus is a small family business that would be interrupted by litigation in a less convenient forum. See Royal Queentex Enterprises, supra, at * 18 (fact that plaintiff was a small company whose business would be disrupted to a greater extent than defendant by an inconvenient forum weighs against transfer.); Williams, supra, at 1107-1108. Mr. Albert Straus is the only individual with authority to represent Straus at hearings, and is also integral to the day-to-day operations of the business. Straus Decl., ¶¶ 2-3. A requirement that Mr. Straus travel to Sacramento for this action would disrupt the operation of plaintiff's business to a greater extent than attending hearings in nearby San Francisco. Id., ¶ 5. By contrast, the defendant has numerous agents within the CDFA who could attend hearings on his behalf.[1]

[1] The court should also disregard the defendant's unsupported argument that the Eastern District has a substantial interest in this action because some of the state's conventional and organic dairies are located in the Eastern District. Def. Mot., p.9:21-24. Besides being irrelevant to a determination of the convenience of the parties, as defendant repeatedly asserts, the scheme at issue has statewide application. Moreover, to the extent a judicial district has any special interest in a case that implicates businesses within its district, it would be the Northern District that has the most substantial interest in this action. Straus is located in the Northern District and the majority of Horizon's business in California is in the Northern District. See Marcy Decl., ¶ 1; Straus Decl., ¶ 1. The plaintiffs challenge the constitutionality of the stabilization and pooling laws as applied to plaintiffs' organic dairy operations.

In sum, defendant has not met his burden to show that his inconvenience substantially outweighs the convenience of the plaintiffs.

2. It Would Not be Substantially More Convenient for the Witnesses to Appear in the Eastern District

One of the most important factors in determining whether to grant a motion to transfer venue is the convenience of the witnesses. "The Court will consider not only the number of witnesses located in the respective districts, but also the nature and quality of their testimony." Royal Queentex Enterprises, at * 18-19. In balancing the convenience of the witnesses, primary consideration is given to third party, as opposed to employee witnesses. Id. The convenience of expert witnesses is irrelevant. Williams, 157 F.Supp.2d at 1109. The defendant has not met his burden to establish that the convenience of the witnesses who can provide admissible testimony relevant to the resolution of the issues before the court weighs in favor of a transfer to the Eastern District.

In this action, plaintiffs challenge the constitutionality of the stabilization and pooling statutes and regulations as applied to their organic processing operations on the ground that (a) they do not account for the increased costs of processing organic dairy products, including the cost of purchasing organic milk, and do not provide a sustainable price for organic producers; and (b) they require plaintiffs to subsidize the conventional dairy industry in which plaintiffs cannot participate. Contrary to defendant's assertion, because plaintiffs have challenged the law as applied to their businesses, the expenses incurred by plaintiffs and their producers, are directly relevant to this action. Complaint, ¶¶ 13-15.[2] In order to establish the claim that they incur increased expenses as organic

[2] See Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998) (an as-applied challenge contends that a law is unconstitutional as applied to a litigant's particular activity, even though

processors, including the increased expense of purchasing raw organic milk, and that the minimum price set by defendant does not create a sustainable price for organic producers, plaintiffs intend to rely upon the testimony of a number of witnesses who are primarily third-party witnesses and are located in the Northern District, including:

1. Lynda Morgan. Ms. Morgan is the Office Manager of Straus Family Creamery, which is located in Marshall California. Marshall, California is approximately 55 miles closer to San Francisco than to Sacramento. Ms. Morgan resides in Petaluma, California, which is approximately 50 miles closer to San Francisco than to Sacramento. Ms. Morgan is expected to testify regarding the expenses incurred by Straus, including its monthly pooling fees, producer payments, and operation expenses. See Declaration of Lynda Morgan in Opposition to Motion to Transfer.

2. Joe Tresch. Mr. Tresch is the owner of an organic dairy farm located in Petaluma, California. Mr. Tresch resides at the dairy, which is approximately 50 miles closer to San Francisco than to Sacramento. Straus purchases a substantial percentage of its raw organic milk from Mr. Tresch's dairy. Mr. Tresch is expected to testify regarding the expenses he incurs in producing organic milk and the price that he must be paid for his raw milk in order to make his dairy financially viable. Mr. Tresch is also expected to testify regarding his contractual relationship with Straus. Mr. Tresch formerly operated a conventional dairy farm and he is also expected to testify regarding the differences between organic and conventional dairy production, including the differences in expenses

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the law may be capable of valid application to others.); Garneau v. City of Seattle, 147 F.3d 802 (9th Cir. 1998) (affirming district court's dismissal of takings and substantive due process claim where plaintiffs failed to produce evidence of economic impact of challenged regulations on their businesses); Cornwell v. Hamilton, 80 F.Supp.2d 1101, 1108 (S.D. Cal. 1999) (reviewing individual plaintiff's unique circumstances to determine whether law of general application violated the Equal Protection clause as applied to her.)

and yield and the costs associated with converting to organic production. See Declaration of Joe Tresch in Opposition to Motion to Transfer.

3. Albert Straus. In addition to being the chief executive officer of Straus Family Creamery, Inc., Mr. Albert Straus is also a part owner of Blake's Landings Farm, located in Marshall, California. Mr. Straus resides in Marshall, California, which is approximately 55 miles closer to San Francisco than to Sacramento. Blake's Landing Farm converted from conventional to organic production in 1993. Straus purchases raw organic milk from Blake's Landings Farm. Mr. Straus is expected to testify regarding the expenses incurred in producing organic milk and the price that Blake's Landings Farm must receive for its milk in order for the dairy to remain financially viable. Mr. Straus is also expected to testify regarding the contractual relationship between Straus Family Creamery and Blake's Landings Farm. Finally, Mr. Straus will testify regarding the difference between organic and conventional dairy production, including the differences in expenses and yield and the costs associated with converting to organic production. See Straus Decl., ¶¶ 1-5.

4. Robert Vallejo. Mr. Vallejo is the manager of day-to-day operations of Blake's Landings Farms. Mr. Vallejo resides in Marshall, California. Mr. Vallejo is expected to testify regarding the dairy's operations before and after converting to organic production. See Declaration of Robert Vallejo in Opposition to Motion to Transfer.

5. James Kehoe. Mr. Kehoe is employed as the Dairy Manager at St. Anthony's Farm, which is located in Petaluma, California. Mr. Kehoe is expected to testify regarding the expenses incurred in producing organic milk and the price that St. Anthony's must receive for its milk in order for the dairy to remain financially viable. See Declaration of James Kehoe in Opposition to Motion to Transfer.

6. Calvin Dotti. Mr. Dotti is employed at Cotati Large Animal Veterinary Hospital, which is located in Cotati, California, which is approximately 50 miles closer to San Francisco than Sacramento. Mr. Dotti is the veterinarian that treats the dairy cows at Blake's Landing Farm. Mr. Dotti is expected to testify regarding the differences in medical treatment of organic and conventional dairy cows and the effects of the limitations on medical treatments for organic cows on their productivity.[3] See Declaration of Calvin Dotti in Opposition to Motion to Transfer.

The defendant has failed to meet his burden to show that the convenience of his witnesses outweighs the convenience of the plaintiffs' witnesses. First, most of the evidence in the declaration that purports to support defendant's argument, is inadmissible. See Plaintiffs' Objection to Declaration of Kelly Krug in Support of Motion to Transfer, filed herewith. Second, unlike the plaintiffs, the defendant has not identified a single third-party percipient witness. More than half of the witnesses identified by defendant would be testifying as experts rather than from their own perceptions. See Declaration of Kelly Krug in Support of Motion to Transfer ("Krug Decl."), ¶ 7(d), (e), (h), (j), (k), (l), (n), (o). Accordingly, their convenience is irrelevant. Williams, at 1109. The remaining seven (7) witnesses are all employees of the CDFA and agents of the defendant (Krug Decl., ¶ 7(a), (b), (c), (f), (g), (i), (m)), whose convenience is not entitled to primary consideration. Williams, at 1109. Third, defendant has not shown that traveling the 87 miles from Sacramento to San Francisco, is unduly burdensome. See California Road Atlas & Driver's Guide (Thomas Bros. Maps), p.E. Indeed, the Federal Rules of Civil Procedure acknowledge that it is not unduly

[3] Plaintiffs also expect to call Mr. L.J. ("Bees") Butler as an expert witness. However, because he is an expert, and not a percipient witness, his convenience is not relevant to the determination of the motion to transfer venue. See Williams, 157 F.Supp.2d at 1109.

burdensome for a witness to travel even 100 miles, and in some cases, anywhere within the state, in order to testify. Federal Rules of Civil Procedure, Rule 45(b)(2), 45(c)(3)(A)(iii), 45(c)(3)(B)(iii).[4]

Finally, testimony by the majority of defendant's witnesses will either be unnecessary or inadmissible. Specifically:

1. The proposed testimony of Robert Horton, David Ikari, Donald Shippelhoute, Eric Erba, Glenn Gleason and Tom Kimball, regarding the "history and purpose" of the milk stabilization and pooling laws and/or the manner in which defendant calculates the minimum price and pooling obligation under those laws is inadmissible and unnecessary. See Krug Decl., ¶ 7(a), (b), (c), (g), (n), (o). First, these witnesses could not properly testify to the history and purpose of the laws at issue because (a) that is a question of law to be determined by the court based solely upon the language of the statutes and regulations and, if necessary, the published legislative history and (b) assertions of legislative history and intent are not evidence to be presented at trial, but are legal argument. Schlothan v. Territory of Alaska, 276 F.2d 806, 815 (9th Cir. 1960) (plaintiff had no right to subpoena members of legislature to testify regarding statute; legislative history is not appropriate as evidence at trail, but only as part of briefing).[5]

[4] Under California law, a witness may be required to travel anywhere in the state to testify. Cal. Code of Civ.Proc. § 1989.

[5] See also FDIC v. Jackson-Shaw Partners No. 46, Ltd., 1994 U.S.Dist.LEXIS 21477 at *23 & n.4 (N.D.Cal. August 12, 1994) (Williams, J.); FMC Corp. v. Vendo Co., 196 F.Supp.2d 1023, 1029 (E.D.Cal. 2002) (questions of statutory construction and legislative history present legal questions.); Bennett v. Yoshina, 98 F.Supp.2d 1139, 1155 (D.Hawaii 2000) (statements by non-legislators of legislative intent are inadmissible hearsay; even after-the-fact statements by legislators are not admissible because they are not contemporaneous with the legislative acts at issue), citing, American Constitutional Party v. Munro, 650 F.2d 184 (9th Cir. 1981) and Gunther v. The County of Washington, 623 F.2d 1303, 1318 (9th Cir. 1979).

Second, the legislative history and purpose of the stabilization and pooling laws is well known and has been described by the legislature, as well as the courts – it is not a disputed question of fact for which evidence is required or proper. See e.g. Cal. Food & Agr. Code §§ 61802 62701; Ponderosa Dairy v. Lyons, 259 F.3d 1148, 1151-1152 (9th Cir. 2000) (describing history and purpose of statutes); Malcom v. Payne, 281 F.3d 951, 961 (9th Cir. 2001), citing, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395, 71 S.Ct. 745 (1951) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous.").

Third, as defendant apparently acknowledges in his brief, the formulas and methods by which the defendant determines the minimum prices and pool obligations are set forth in the statutes and regulations to which defendant directed the court, and thus present questions of law that are not the proper subject of testimony. See Def. Mot., pp.2-7. Contrary to defendant's contention, plaintiffs' claims do not raise "factual issues" regarding the manner in which defendant sets minimum prices and pooling obligations. Plaintiffs' challenge the constitutionality of defendant's application of the minimum prices and pooling obligations to plaintiffs given the undisputed manner in which defendant sets the minimum prices and pooling obligations, as established by defendant's regulations.[6] Def. Mot., p.10:9-11; Complaint, ¶¶ 10, 13, 16-18.

Even if the circumstances surrounding the enactment of the stabilization and pooling laws, the purpose of those laws, and the manner in which defendant calculates the minimum prices and pooling obligations were proper subjects of testimony, those

[6] Notably, the defendant did not believe that he required declarations from these witnesses in order to describe the manner in which defendant calculates the minimum prices and pool obligations for purposes of his motion. Defendant also objected to references in the plaintiffs' complaint to the manner in which defendant calculated the minimum prices and pooling obligation as "improper legal conclusions." See Answer, ¶¶ 9, 10, 11.

facts are not disputed and would likely be the subject of stipulation. Witness testimony on these issues will almost certainly be unnecessary.

2. The proposed testimony of Candace Gale, Greg Lawley and Tom Kimbal regarding statewide cost of production studies conducted by the CDFA is similarly unnecessary and duplicative. Krug Decl., ¶ 7(f), (h), (n). Contrary to defendant's assertion, the complaint does not raise "factual issues" regarding the "average costs involved in producing various types of milk on a state-wide basis." Def. Mot., p.10:9-11. Plaintiffs do not dispute the defendant's computation of the "average costs" of production, which defendant publishes each year in a booklet entitled "California Cost of Milk Production." Rather, plaintiffs' complaint raises the legal question of whether the disparity between the "average costs" of production, and the cost of producing organic milk, renders the application of the stabilization and pooling laws unconstitutional as applied to plaintiffs. See e.g., Foti, 146 F.3d at 635 (as applied challenge requires only that plaintiff prove law unconstitutional as applied to plaintiff's particular circumstances). Moreover, defendant fails to explain why he requires three witnesses, all of whom "participated in gathering information regarding dairies located in California" to testify regarding the cost of production of dairy products. Id.

3. The convenience of expert witnesses William Shiek and Sharon Hale is irrelevant. Williams, 157 F.Supp.2d at 1109. Moreover, their proposed testimony regarding the "potential impact of excluding organic farmers from the Pool Plan" is irrelevant to this action. Krug Decl., ¶ 7(d), (e). Plaintiffs have not sought to "exclude organic farmers from the Pool Plan." Id. Rather, plaintiffs, who are not farmers, have sought an injunction to prevent the defendant from imposing the monthly pool obligation on the plaintiffs' processing businesses in the unconstitutional manner alleged. See Foti,

146 F.3d at 635 ("a successful as-applied challenge does not render the law itself invalid but only the particular application of the law.")

4. The proposed testimony of Karen Dapper regarding "the relative size and value of California's conventional milk production compared to the organic processors [sic] production and value" will almost certainly be unnecessary. Even if this fact were relevant, there is no dispute that the organic dairy industry is a relatively miniscule part of the overall dairy industry in California. This fact, too, if relevant, would likely be the subject of a stipulation.

5. Finally, the convenience of experts Bill Bordessa, Jay Gould and Jim Tillison is irrelevant. Moreover, as a resident of Fresno, a transfer to the Sacramento court would reduce Mr. Bordessa's travel by a few miles at the most. See Williams, 157 F.Supp.2d at 1107 (explaining that the argument that the Eastern District is a more convenient forum because the parties reside in the Eastern District is factually incorrect and misleading given the relative distances between Fresno and Sacramento on one hand, and Fresno and San Francisco on the other).

In sum, defendant has not shown that the convenience of the witnesses would be substantially greater if this case were litigated in the Eastern District. Even assuming *arguendo* that the testimony of all seven employee witness identified by defendant was relevant and admissible, the convenience of these individuals does not outweigh the convenience of the third party witnesses identified by plaintiffs, particularly where, as here, there is no showing that traveling to San Francisco would be unduly burdensome for defendant's witnesses. Royal Queentex, at * 19; Allergan Sales, Inc. v. Pharmacia & Upjohn, Inc., 1997 U.S.Dist.LEXIS 7650 (S.D. Cal. April 2, 1997) (Huff, J.) (denying motion to transfer venue to the Central District because, although witnesses may be

located there, defendant made no showing that it would be unduly burdensome for the witnesses to testify in San Diego).

3. A Transfer to the Eastern District Would Not Serve the Interests of Justice or Judicial Economy

The court should reject defendant's attempt to transfer this case to the Eastern District in hopes that the matter will be assigned to Judge Burrell, who granted summary judgment in favor of the defendant in an unrelated constitutional challenge to a different part of the pooling regulations. The premise of defendant's argument is that a transfer would promote judicial efficiency because the case before Judge Burrell required "extensive study" of "complex regulatory programs" in which regulators take into account "massive amounts of . . . information" which they run through "complex formulas," so that he is now "well-versed in the intricate inner-workings of this complex regulatory system." Def. Mot., p.14:3-17. This premise is factually unsupported and fundamentally flawed. First, the inadmissible declaration of Kelly Krug, which purports to support this claim, merely states that, in 1997, Judge Burrell "familiarize[d] himself with the implementation of the pooling regulations." Krug Decl., ¶ 8; Objection to Declaration of Kelly Krug, filed herewith.

A review of both Judge Burrell's decision and the Ninth Circuit's decision affirming Judge Burrell's ruling, belies defendant's assertion and explains the disparity between defendant's brief and the declaration of Kelly Krug. See Declaration of Aviva Cuyler in Opposition to Motion to Transfer, Exhibit A; Ponderosa Dairy, 259 F.3d at 1151-1152. The fact is that Judge Burrell disposed of the case without ever having to become ""well-versed in the intricate inner-workings" of a "complex regulatory system." Judge Burrell dismissed the plaintiffs' Equal Protection claim based on insufficient pleadings; he granted summary judgment in the defendant's favor on the Commerce

Clause challenge based exclusively on a previous Ninth Circuit decision interpreting *federal* law, which "found that Congress, in enacting § 144 of the Farm Bill, intended to protect the milk composition requirements from Commerce Clause limitations;" and he dismissed the Privileges and Immunities claim on the ground that the amendments to the pooling plan that were at issue in Ponderosa, (but that are not at issue in this case) did not, on their face, classify producers based on residency or citizenship. Id., 259 F.3d at 1153, 1155, 1156-1157; Cuyler Decl., Exhibit A. Notably, Judge Burrell's decision contains a few sentences, at most, that describe the pooling system, and the Ninth Circuit was able to clearly and concisely describe the relevant factors of this 'complex regulatory system,' in just four (4) paragraphs (which, incidentally, included the history and purpose of the stabilization and pooling laws for which defendant claims he requires five (5) separate fact witnesses). Cuyler Decl., Ex. A; Ponderosa, 259 F.3d at 1151-1152.

Second, there is no assurance that the case would be assigned to Judge Burrell, even if this court granted the motion to transfer. To the contrary, assignment to Judge Burrell is unlikely, at best, given the fact that the Sacramento court is staffed with four district court judges and three senior district court judges.[7] Cases in that court are assigned at "random" by means of an automated case assignment system whereby assignments are literally determined by the draw of a card. See Local Rules of the Eastern District, Appendix A, Sections(a), (e)(3).

Finally, it does not serve the interest of justice to allow the defendant to transfer this case for the express purpose of obtaining a specific judge who previously ruled in his favor in a different case. Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) ("judge shopping clearly constitutes 'conduct which abuses the judicial process.'")

[7] The Eastern District also has four magistrate judges.

Obviously, if Judge Burrell had ruled against the Secretary in the Ponderosa Dairy case, the defendant would not be seeking to transfer this case to his court.

Neither of the cases upon which defendant relies held that a transfer would be warranted simply because a particular judge had previously ruled on a case that involved the statutory scheme at issue. In A.J. Industries, Inc. v. United States Dist. Ct., 503 F.2d 384 (9th Cir. 1974), the United States District Court for the Central District of California granted the defendant's motion to transfer the case to Delaware, partially in consideration of the fact that there was a related lawsuit pending between the same parties in the Delaware court. The Ninth Circuit held that the transfer was proper because the plaintiff could have raised its claims in a counterclaim in the action that was already pending in Delaware. Id., at 388-389. The court explained that "[t]he ability to raise the subject matter of the transferred suit by counterclaim in a pending action in the transferee forum is significant because it insures that a plaintiff will not be transferred to a forum where it has not already appeared and is not already engaged in litigation with the defendant." Id. The parties in this case are not already engaged in litigation in the Eastern District.

In Republic of Bolivia v. Philip Morris Companies, Inc., 39 F.Supp.2d 1008 (S.D. Tx. 1999), upon which defendant relies, the court *sua sponte* transferred a lawsuit brought by the Republic of Bolivia to the District of Columbia because the single-judge Texas court did not have the resources to try the complex issues of international law and policy involved in the case, which had no connection to Texas, while "proceedings brought by the Republic of Guatemala are currently well underway in that Court [District of Columbia] in a related action, and there is a request now before the Judicial Panel on Multidistrict Litigation to transfer to the United States District Court for the District of Columbia all six tobacco actions brought by foreign governments, ostensibly for consolidated treatment." Id., at 1009. Unlike Republic of Bolivia, this court is fully

capable of understanding and adjudicating this constitutional challenge involving California law, brought by a resident of this District; there are no actions pending before Judge Burrell that challenge the same provisions of the law based on the same Constitutional provisions; and there is no claim that this action should be consolidated with any other action pending before Judge Burrell.

4. Defendant has not Shown that Access to Proof would be Unduly Burdensome in the Absence of a Transfer

Defendant's final argument in support of this motion is that he maintains records regarding (a) the cost of dairy farming; (b) the manner in which defendant sets minimum prices; (c) the hearing on plaintiffs' petition to amend the pooling plan; and (d) the legislative history of the challenged statutes. This is not sufficient to support granting the motion.

First, at most, defendant will need to transport only a fraction of the documents he identifies. The majority of the documents relating to the hearing on plaintiffs' petition to amend the pooling plan are irrelevant to this action, which is not an administrative appeal. Even the full record of that one-day hearing comprises less than half of a file box. See Cuyler Decl., ¶ 4. The legislative history documents are irrelevant and inadmissible as explained above. See Section B(2), supra. Moreover, even if admissible, "they could not appropriately be produced as evidence at trial, but only as appendices or supplements to briefs." Schlothan, 276 F.2d at 815. It would be no more onerous to file these documents in San Francisco than in Sacramento.

Second, defendant has failed to establish that transporting the records 87 miles from Sacramento to San Francisco, would be unduly burdensome. Allergan Sales, Inc., supra, 1997 U.S.Dist.LEXIS 7650 (denying motion to transfer venue to the Central

District because, although documents may be located there, defendant made no showing that it would be unduly burdensome for the documents to be presented in San Diego).

Third, "[a]bsent any other ground for transfer, the fact that records are located in a particular district is not itself sufficient to support a motion to transfer." Royal Queentex, supra, at *21-22, citing, STX, Inc. v. Trik Stik, Inc., 708 F.Supp. 1551, 1556 (N.D.Cal. 1988). Accordingly, a transfer to the Eastern District would not be proper even assuming *arguendo* that all of the records identified by defendant would be properly presented at a trial of this action.

Finally, plaintiff Straus maintains records that are relevant to this action, including the records regarding (a) its expenses as an organic dairy processor; (b) defendant's application of the minimum prices and pooling plan to plaintiff; and (c) documents relating to the hearing on plaintiffs' petition to amend the pooling plan. Straus Decl., ¶ 6. Additionally, records regarding the cost of production of plaintiffs' milk producers are located at the businesses of those third party witnesses in the Northern District. Thus, a transfer to the Eastern District would merely shift the burden of transporting records from the defendant to the plaintiffs and the plaintiffs' witnesses.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the court deny defendant's Motion to Transfer for Convenience.

Dated: August 14, 2002

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