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**UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK**

	X	
<b>In re</b>	:	
	:	<b>04 MD 1598 (JSR)</b>
<b>EPHEDRA PRODUCT LIABILITY LITIGATION</b>	:	
	:	
	X	
<b>In re</b>	:	
	:	<b>Chapter 15</b>
<b>MUSCLETECH RESEARCH AND DEVELOPMENT INC., et al.</b>	:	<b>06 Civ. 538 (JSR)</b>
	:	
<b>Foreign Applicants in Foreign Proceedings.</b>	:	
	X	
<b>In re</b>	:	<b>Adversary Proceeding No.</b>
	:	<b>06 Civ. 539 (JSR)</b>
<b>RSM RICHTER INC., AS FOREIGN REPRESENTATIVE OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND ITS SUBSIDIARIES,</b>	:	
	:	
<b>Plaintiff,</b>	:	
<b>v.</b>	:	
<b>SHARON AGUILAR, et al.,</b>	:	
<b>Defendants.</b>	:	
	X	

**STATEMENT IN SUPPORT OF MOTION OF MUSCLETECH RESEARCH  
 AND DEVELOPMENT, INC. TO TRANSFER PERSONAL INJURY  
 TORT AND WRONGFUL DEATH CASES PURSUANT TO 28 U.S.C. § 157(b)(5)**

GN Oldco Corporation (f/k/a General Nutrition Corporation) (“GNC”),<sup>1</sup> one of the non-debtor, co-defendants of Muscletech Research and Development Inc. (“MDI”) in twenty ephedra related cases pending in the above-captioned multiple district litigation (the “MDL”) and in other state and federal courts around the country, submits this Statement in Support<sup>2</sup> of MDI’s motion to transfer twenty-nine (29) personal injury tort and wrongful death cases pursuant to 28 U.S.C. section 157(b)(5) (the “Motion”) in order to (i) consolidate piecemeal litigation pending against MDI and several non-debtor co-defendants, including retailers such as GNC; (ii) prevent exponential increase of administrative and other claims against the MDI estate and (iii) allow for the same global mediation process to take place with regard to the MDI cases as has and will take place in the similar bankruptcy proceedings involving TL Administration Inc. (f/k/a Twin Laboratories Inc.) (“TL”), Metabolife, NVE and Nutraquest.

### **GROUND FOR RELIEF**

#### Overview

The transfer of personal injury tort and wrongful death suits pursuant to 28 U.S.C. section 157(b)(5) pending against a bankrupt ephedra product manufacturer is not a new phenomenon to this Court and in the recent history of ephedra products litigation and related bankruptcy proceedings. Indeed, such transfers have occurred in the bankruptcies of TL, Nutraquest, Metabolife, and NVE and have served as key methods of centralizing various claims and facilitating consensual resolutions of these vigorously litigated cases. Moreover, such transfers, which allow for the close oversight of the cases by this Court and other bankruptcy courts are instrumental in controlling the costs and expenses of

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<sup>1</sup> All capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion.

<sup>2</sup> GNC supports the Motion for the reasons set forth therein. This Statement is intended to further support the Motion and will not restate the points raised in the Motion.

defending the actions and the related significant indemnification claims against the bankrupt ephedra product manufacturer based upon its obligation to indemnify retailers such as GNC. The lessons of the past and this Court's own experience should lead to the conclusion that similar relief is appropriate here.

By its Motion, MDI seeks to transfer all product liability lawsuits against MDI and the following non-debtor defendants: (i) Paul Gardiner and Terence Begley; (ii) the Paul Gardiner Family Trust (together with Paul Gardiner and Terence Begley, the "Gardiner Defendants"); (iii) Iovate Health Sciences Group, Inc., Iovate Health Sciences, Inc., Iovate Health Sciences Research, Inc., Iovate Health Sciences International, Inc., Iovate Health Sciences U.S.A., Inc., Iovate Health Sciences Capital, Inc. and Iovate Copyright Ltd. (the "Iovate Entities"); (iv) HVL, Inc. and Douglas Laboratories, Inc.; (v) Peak Wellness, Inc. and Miami Research Associates, Inc., and Carlon Colker, M.D. and Douglas Kalman; (vi) Stuart Lowther; and (vii) certain of the Foreign Applicants' customers that are wholesalers and retailers in the U.S., including GNC, that allegedly sold MDI's products to the plaintiffs in these lawsuits based on the research, marketing, manufacture, sale, and distribution primarily of products containing ephedra or prohormones manufactured, distributed and/or sold by MDI.

#### Mediation Process

GNC, unfortunately as an experienced participant in these types of proceedings, supports MDI's request for transfer of the Pending Cases, and the consolidation of the cases before this Court. The simple and practical reasons for the transfer requested by MDI are familiar to this Court. In essence, it is in the best interest of all of MDI's creditors, including retailers and personal injury claimants, that the ephedra claims be resolved through a global mediation process. The success of that process can only be assured by participation of the primary stakeholders and contributors, including ephedra

personal injury claimants, MDI, MDI's insurers, the retailers, with indemnification claims, non-debtor manufacturers and the Gardiner Entities and Iovate Entities, against whom the MDI estate and others may have claims. Absent a transfer, considerable funds and resources will ultimately be expended by the non-debtor defendants, such as GNC, in defending piecemeal litigation, all of which will be charged to the MDI estate pursuant to indemnification arrangements. Moreover, there will be a shotgun approach by individual ephedra plaintiffs and others to tap the resources of the Gardiner and Iovate Entities when such resources should be available to all creditors of the MDI estate for the purpose of achieving a global resolution of this proceeding and the foreign proceeding in Canada.

GNC currently is involved in approximately half of the remaining MDI ephedra cases and is indemnified by MDI in those actions pursuant to, among other things, GNC's standard Purchase Order which provides in pertinent part:

12. INDEMNITY. The Seller agrees to indemnify the Buyer from and against all liability, loss and damage including reasonable counsel's fees resulting from the sale or use of the products or any litigation based thereon, and such indemnity shall survive acceptance of the goods and payment therefore by the Buyer.

Because GNC, and others, have indemnification claims against the MDI estate, it is surely more economical and efficient for the Pending Cases to be transferred to this Court, as statutorily mandated, so that unnecessary additional indemnification claims are not incurred and so that a global resolution to the cases can be negotiated.

The model for resolution of ephedra related claims of the various plaintiff tort creditors is well known to this Court. A critical element in resolving the Nutraquest (Cytodyne) cases and the TL uninsured or underinsured cases, and attempting to resolve the Metabolife and NVE bankruptcy proceedings has been the transfer of product liability cases pursuant to 28 U.S.C. §157(b)(5). Such transfers were consistently granted in each of these cases.

One rationale for transferring the Pending Cases to this Court is that the equitable and efficient results of a global mediation is clear and now time tested. The plaintiffs in the Pending Cases must be centralized to forge a successful mediation process. The plaintiffs' leadership in this proceeding has recognized that fact. On the other hand, plaintiffs will be less motivated to participate in a global mediation process in the MDI bankruptcy proceedings if the Pending Cases are not transferred to this Court and remain scattered across the country.

In the present action, MDI is obligated to indemnify GNC for any claim, demand, liability, or obligation relating directly or indirectly to the manufacture, sale, distribution, or use of ephedra, as provided in GNC's Purchase Order. Accordingly, any defense costs, settlement payments, or adverse judgments incurred by GNC are obligations of MDI's estate. Thus, the pending cases which contain claims against GNC, actually are directed squarely at MDI and MDI's product and must be transferred to this Court pursuant to 28 U.S.C. §157(b)(5).

## CONCLUSION

For the reasons set forth herein and in the Motion, it is in the best interest of MDI, its bankruptcy estate, its creditors, non-debtor defendants and the plaintiffs to have the Pending Cases transferred to this Court as mandated by 28 U.S.C. §157(b)(5).

Dated: May 1, 2006

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