

OCT 27 2009

FILED
CLERK'S OFFICE

BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

)
In Re: Fretted Musical Instruments Antitrust Litigation)

)

MDL Docket No. 2121

**FENDER MUSICAL INSTRUMENTS CORPORATION'S
RESPONSE TO PLAINTIFF'S MOTION FOR TRANSFER**

BRYAN CAVE LLP

Lawrence G. Scarborough

J. Alex Grimsley

Bryan Cave LLP

Two North Central Avenue, Suite 2200

Phoenix, Arizona 85004-4406

Tel: 602-364-7000

Fax: 602-364-7070

Attorneys for Fender Musical Instruments Corp.

October 26, 2009

OCT 27 2009

FILED
CLERK'S OFFICE**RESPONSE TO MOTION TO TRANSFER**

Pursuant to J.P.M.L. Rule 7.2(c), Defendant Fender Musical Instruments Corporation ("Fender") hereby responds to Plaintiff David Giambusso's Motion for Transfer and Coordination or Consolidation ("Motion"). Fender supports the Motion and respectfully requests, along with Plaintiff, that the actions before the Panel be transferred to the Southern District of California for coordinated or consolidated proceedings before the Honorable Larry A. Burns. The requested transfer will serve the interests of judicial efficiency and promises to more speedily and conveniently resolve these disputes.

Memorandum**Background**

Fender is aware of eighteen antitrust actions currently pending in the United States district courts alleging price fixing of musical instruments (collectively, the "Related Actions"). Seven are currently before the Panel,¹ and eleven are potential tag-along actions filed after Plaintiff moved the Panel for transfer and consolidation.² Fender is a named defendant in only one action before the Panel (Giambusso) and six potential tag-

¹ Giambusso v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 3:09-cv-2002 (S.D. Cal. Sept. 11, 2009); Hale v. Guitar Center, Inc. et al., No. 2:09-cv-6897 (C.D. Cal. Sept. 22, 2009); O'Leary v. Guitar Center, Inc. et al., No. 2:09-cv-7015 (C.D. Cal. Sept. 25, 2009); Teller v. Guitar Center, Inc., No. 1:09-cv-6104 (N.D. Ill. Sept. 30, 2009); Giles v. Guitar Center, Inc. et al., No. 3:09-cv-2146 (S.D. Cal. Sept. 30, 2009); Collins v. Guitar Center, Inc. et al., No. 3:09-cv-2151 (S.D. Cal. Sept. 30, 2009); and Keel v. Guitar Center, Inc. et al., No. 3:09-cv-2156 (S.D. Cal. Oct. 1, 2009).

² Witherspoon v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 09-cv-2178 (S.D. Cal. Oct. 2, 2009); Parikh v. Guitar Center, Inc. et al., No. CV09-07254 (C.D. Cal. Oct. 5, 2009); Ramsey v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 09-cv-2211 (S.D. Cal. Oct. 7, 2009); Mac Williamson v. Guitar Center, Inc. et al., No. 09-cv-07375 (C.D. Cal. Oct. 13, 2009); Sepulveda v. Guitar Center, Inc., No. 09-cv-2267 (S.D. Cal. Oct. 14, 2009); Paradise v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 3:09-cv-2285 (S.D. Cal. Oct. 14, 2009); Manyin v. Guitar Center, Inc. et al., No. 1:09-cv-01950 (D. D.C. Oct. 15, 2009); Cervantes v. Guitar Center, Inc. et al., No. 09-cv-07526 (C.D. Cal. Oct. 16, 2009); Bandish v. Guitar Center, Inc. et al., No. 1:09-cv-1984 (D. D.C. Oct. 19, 2009); Bohl v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 3:09-cv-2332 (S.D. Cal. Oct. 20, 2009); and Poff v. Guitar Center, Inc. et al., No. 2:09-cv-7614 (C.D. Cal. Oct. 20, 2009).

along actions (Witherspoon, Ramsey, Paradise, Manyin, Bandish, and Bohl). Five of these seven actions are pending in the Southern District of California.

The Related Actions are identical in many material respects. Each asserts that various violations of federal and state law must have occurred based on the fact of an FTC investigation into the musical instruments industry and a consent decree entered into by the National Association of Music Merchants (“NAMM”), a trade organization for musical instrument manufacturers and retailers. Plaintiffs in the Related Actions allege that NAMM, manufacturers, and retailers restrained competition in an alleged market for musical instruments and equipment by conspiring to offer instruments and equipment at fixed minimum retail prices. Plaintiffs allege that this practice damaged them because they were forced to purchase musical instruments and equipment from retailers at inflated prices. Their claims under the Sherman Act and various state laws each arise from this basic set of facts.

The principal defendants in the Related Actions are NAMM, retailer Guitar Center, Inc. (“Guitar Center”) and various manufacturers, including Fender. Fender is a manufacturer of musical instruments. It is headquartered in Scottsdale, Arizona, which is only 370 miles from the San Diego federal courthouse where nine of the eighteen Related Actions—including five of the seven in which Fender is a named defendant—are pending. Its manufacturing headquarters are in Corona, California, less than 100 miles from San Diego. There are at least 46 Fender dealers within 100 miles of San Diego.

NAMM and Guitar Center also are located within a convenient distance of San Diego. NAMM’s headquarters are located in Carlsbad, California, approximately 40 miles from the federal courthouse. Guitar Center’s headquarters are in Westlake Village, California, approximately 160 miles from the courthouse. NAMM and Guitar Center officers and employees will likely be key witnesses in the Related Actions, and most relevant documents are likely to be found at their headquarters.

Argument

I. THE ACTIONS BEFORE THE PANEL SHOULD BE TRANSFERRED AND CONSOLIDATED OR COORDINATED.

Civil actions pending in different districts but involving common questions of fact may be transferred and consolidated or coordinated for pre-trial proceedings in one district if transfer will “be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407(a). Transfer is appropriate in order to, among other things, prevent duplication of discovery efforts, eliminate the possibility of inconsistent pre-trial rulings, and streamline the pre-trial process. *See, e.g., In re Urethane Antitrust Litig.*, 333 F. Supp. 2d 1379, 1381 (J.P.M.L. 2004) (transferring antitrust actions alleging common scheme to fix prices).

The Related Actions, including the seven currently before the Panel, each assert that various violations of federal and state law must have occurred based on the fact of an FTC investigation into the musical instruments industry and a consent decree entered into by NAMM. Each alleges that NAMM, Guitar Center, and manufacturers fixed prices in an alleged market for musical instruments and equipment, and that plaintiffs thus paid inflated prices for musical instruments and equipment and were injured by the alleged antitrust violations. Each asserts claims under the Sherman Act, supported by factual allegations and quotations from the FTC investigation that are substantially similar and in many instances identical. Finally, each purports to define a class of plaintiffs that overlaps, partially if not entirely, with the classes defined by the others. In light of these plain similarities, the actions before the Panel involve common issues of fact and should be transferred and consolidated or coordinated under 28 U.S.C. § 1407(a). *See, e.g., In re Urethane Antitrust Litig.*, 333 F. Supp. 2d at 1380 (transferring antitrust actions alleging common scheme to fix prices because actions involved common questions of fact).

Transfer will promote “the convenience of parties and witnesses and . . . the just and efficient conduct” of the actions. 28 U.S.C. § 1407(a). There are only three

defendants in the seven actions before the Panel, and one or more of these defendants are also defendants in each of the potential tag-along actions. Requiring these same three entities to defend essentially the same suit seven times in multiple fora would be needlessly burdensome. See, e.g., In re Urethane Antitrust Litig., 333 F. Supp. 2d at 1381 (transferring 16 related actions naming three common defendants). Moreover, each action will involve, at least in part, the same discovery, the same witnesses, and the same key evidence. The Panel favors transfer in order to avoid “duplicative discovery.” Id. at 1380. Finally, conducting pre-trial proceedings in multiple fora will unnecessarily burden judicial resources and risk inconsistent pre-trial rulings, favoring transfer to a single district. Id. at 1381 (transferring actions to avoid inconsistent rulings, “especially with respect to class certification matters”).

The factors set forth in 28 U.S.C. § 1407(a) and the Panel’s precedent each favor transfer to a single district for pre-trial proceedings.

II. THE ACTIONS SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF CALIFORNIA.

When considering to which district related actions ought to be transferred, the Panel considers the location of the first-filed action; the location where the most related actions are pending; the location of key evidence and witnesses; the convenience of the parties and counsel; and the docket pressures of the potential fora. See, e.g., In re Publ’n Paper Antitrust Litig., 346 F. Supp. 2d 1370, 1372 (J.P.M.L. 2004) (transferring to “geographically convenient” location); In re Parcel Tanker Shipping Servs. Antitrust Litig., 296 F. Supp. 2d 1370, 1371 (J.P.M.L. 2003) (transferring to district where documents and witnesses would be found); In re Hotel Tel. Charge Antitrust Litig., 341 F. Supp. 771, 773 (J.P.M.L. 1972) (transferring to district of first filing); In re Urethane Antitrust Litig., 333 F. Supp. 2d at 1381 (transferring to district with sufficient resources).

The Southern District of California is the ideal district in which to conduct pre-trial proceedings. First, NAMM and Guitar Center are both headquartered in California and

are within driving distance of the federal courthouse; Fender is headquartered in Arizona, some 300 miles away. The defendants, witnesses, and evidence are thus within a convenient distance of the Southern District of California and, as plaintiffs are scattered across the country, no group of plaintiffs has a significant interest in litigating in any particular district. These factors favor transfer to the Southern District of California. In re Publ'n Paper Antitrust Litig., 346 F. Supp. 2d at 1372 (“We also observe that this district is a geographically convenient location, given the location of principal defendants and potential defendants and witnesses”); In re Parcel Tanker Shipping Servs. Antitrust Litig., 296 F. Supp. 2d at 1371 (transferring actions to district where defendant was located and documents and witnesses were likely to be found). Moreover, all defendants and nine of the named plaintiffs in the Related Actions favor the Southern District of California, and no plaintiff has moved for transfer to another district. The Panel favors transfer to districts supported by a majority of the parties. See In re Currency Conversion Fee Antitrust Litig., 176 F. Supp. 2d 1379, 1381 (J.P.M.L. 2001) (transferring to district endorsed by “responding defendants and at least some plaintiffs”).

Second, the Southern District of California is home to half of the Related Actions, including the first-filed action.³ Nine of the eighteen Related Actions, including five of the seven in which Fender is named as a defendant and four of the seven actions currently before the Panel, are pending in the Southern District of California.⁴ The Panel has

³ Giambusso v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 3:09-cv-2002 (S.D. Cal. Sept. 11, 2009).

⁴ Giambusso v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 3:09-cv-2002 (S.D. Cal. Sept. 11, 2009); Giles v. Guitar Center, Inc. et al., No. 3:09-cv-2146 (S.D. Cal. Sept. 30, 2009); Collins v. Guitar Center, Inc. et al., No. 3:09-cv-2151 (S.D. Cal. Sept. 30, 2009); and Keel v. Guitar Center, Inc. et al., No. 3:09-cv-2156 (S.D. Cal. Oct. 1, 2009); Witherspoon et al. v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 09-cv-2178 (S.D. Cal. Oct. 2, 2009); Ramsey v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 09-cv-2211 (S.D. Cal. Oct. 7, 2009); Sepulveda v. Guitar Center, Inc., No. 09-cv-2267 (S.D. Cal. Oct. 14, 2007); Paradise v. Nat'l Ass'n of Music Merchants, Inc. et al., No. 3:09-cv-2285 (S.D. Cal. Oct. 14, 2009); and Bohl v. Nat'l Ass'n of Music Merchants, Inc. et al.,

expressed a preference for transferring actions to the district where the most actions are pending and to the district of the first filing. See In re Parcel Tanker Shipping Servs. Antitrust Litig., 296 F. Supp. 2d at 1380 (transferring actions to district where “almost half” of related actions were pending); In re Hotel Tel. Charge Antitrust Litig., 341 F. Supp. at 773 (transferring “virtually identical” actions, over strong opposition, to district of first filing). Both factors converge here and favor transfer to the Southern District of California.

Third, as Plaintiff points out, the Southern District of California has far fewer multidistrict cases pending than other potential transferee districts—only four, versus eight in the District of Columbia, 13 in the Central District of California, and 20 in the Eastern Division of the Northern District of Illinois. [Motion at 8; Distribution of Pending MDL Dockets (9/10/09), http://www.jpml.uscourts.gov/Docket_Information/PendingMDL-September-09.pdf] The Panel favors transfer to a district with resources capable of handling the litigation. In re Urethane Antitrust Litig., 333 F. Supp. 2d at 1381 (transferring actions to district “equipped with the resources that this complex antitrust docket is likely to require”).

In sum, the factors considered by the Panel all favor transfer of these actions to the Southern District of California. Fender agrees with Plaintiff that the actions should be transferred to the docket of the Honorable Larry A. Burns, who is presiding over the first-filed action before the Panel (Giambusso). Judge Burns is presiding over two Related Actions (Giambusso and Sepulveda), is experienced in complex litigation matters, and is not currently handling any other multidistrict proceedings. See In re Municipal Derivatives Antitrust Litig., 560 F. Supp. 2d 1386, 1387–88 (J.P.M.L. 2008) (transferring to judge already presiding over two actions and who “is not currently presiding over a

No. 3:09-cv-2332 (S.D. Cal. Oct. 20, 2009). The district in which the second-highest number of Related Actions is pending is the Central District of California, in which only six actions have been filed.

multidistrict litigation docket”). Further, the local rules of the Southern District of California provide for transfer of related actions to the judge presiding over the lowest-numbered case. S.D. Cal. CivLR 40.1(h). Since Judge Burns is presiding over Giambusso, the lowest-numbered of the Related Actions, any actions transferred to the Southern District of California should be transferred to his docket pursuant to the local rules.


Relief Requested

For the foregoing reasons, Fender respectfully requests the Panel to transfer the seven actions presently before it to the Southern District of California for coordinated or consolidated pre-trial proceedings before the Honorable Larry A. Burns.

DATED this 26th day of October, 2009.

Respectfully submitted,

BRYAN CAVE LLP

By:  For Alex Grimsley w/ permission

Lawrence G. Scarborough

J. Alex Grimsley

Bryan Cave LLP

Two North Central Avenue, Suite 2200

Phoenix, Arizona 85004-4406

Tel: 602-364-7000

Fax: 602-364-7070

Attorneys for Fender Musical Instruments Corp.