

OCT 27 2009

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MDL 2121

PLEADING NO. 11

**BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE: FRETTED MUSICAL
INSTRUMENTS
ANTITRUST LITIGATION

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MDL DOCKET NO. 2121

**INTERESTED PARTY PLAINTIFFS KENNETH MANYIN,
RUSSELL MELTON AND JON BANDISH'S JOINT RESPONSE IN SUPPORT
OF TRANSFER TO THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

I. INTRODUCTION

Plaintiffs Kenneth Manyin, Russell Melton and Jon Bandish ("Plaintiffs")
respectfully submit this Joint Response to Plaintiff David Giambusso's Motion for
Transfer and Coordination or Consolidation Under 28 U.S.C. § 1407.¹ Plaintiffs

¹ Plaintiffs' complaints are captioned as follows: *Kenneth Manyin v. Guitar Center, Inc.* ("Guitar Center"), *Yamaha Corporation of America* ("Yamaha"), *Fender Musical Instruments Corporation* ("Fender"), *Gibson Guitar Corporation* ("Gibson"), *National Association of Music Merchants, Inc.* ("NAMM"), and *JOHN DOES 1-100* (United States District Court for the District of Columbia Docket No. 1:09-cv-01950); *Russell D. Melton v. Guitar Center, Inc., Yamaha Corporation of America, Fender Musical Instruments Corporation, Gibson Guitar Corporation, National Association of Music Merchants, Inc., and JOHN DOES 1-100* (United States District Court for the District of Columbia Docket No. 1:09-

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respectfully request that the Judicial Panel on Multidistrict Litigation (“the Panel”) issue an order pursuant to 28 U.S.C. § 1407 for transfer and coordination or consolidation in the United States District Court for the District of Columbia (“DC District”) for pretrial proceedings of all pending and later-filed actions relating to the Federal Trade Commission’s (“FTC”) Washington D.C.-based investigation into an alleged price-fixing conspiracy involving the National Association of Music Merchants, Inc. (“NAMM”) and its members. *See In the Matter of National Association of Music Merchants, Inc.* (Docket No. C-4255).²

The DC District is the most appropriate transferee forum for the filed actions in this NAMM litigation (collectively the “Related Actions”), because it is the venue of the FTC litigation, and all filed complaints stem from the allegations in the FTC complaint and consent decree. Moreover, Spector Roseman Kodroff & Willis, P.C. (“SRKW”), counsel for Plaintiff Manyin, propounded a Freedom of Information Act (“FOIA”) Request on the FTC. The FTC’s response, which withheld responsive documents, strongly suggests that there is an *ongoing* investigation in Washington D.C. by one or more federal agencies pertaining to the underlying allegations made in the Related Actions. Panel precedent has recognized the importance of transferring litigation to a district in which there is an ongoing government investigation, as such forum would be convenient given the presence of relevant documents and that defendants are already engaged in litigation there. For these reasons and others set forth below, transfer to and

cv-02002); and *Jon Bandish v. Guitar Center, Inc., National Association of Music Merchants, Inc., Yamaha Corporation of America, Fender Musical Instruments Corporation, Gibson Guitar Corporation, and JOHN DOES 1-100* (United States District Court for the District of Columbia Docket No. 1:09-cv-01984).

² Plaintiffs’ complaints concern a class of purchasers of new guitars, both acoustic and electric (“Guitars”), while all the other filed cases consist of much broader instrument classes including purchasers of fretted instruments, fretted instrument products and/or other musical instrument products.

centralization in the DC District is more appropriate than transfer to the Southern District of California or any of the other jurisdictions where cases have been filed.³

II. ARGUMENT

28 U.S.C. § 1407 authorizes the centralization of civil actions pending in different federal district courts involving common questions of fact in a single federal district court for coordinated or consolidated pretrial proceedings:⁴

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings 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. For the reasons set forth below, centralization of the filed actions in the DC District is appropriate.

A. **The Presence of a Government Investigation is a Significant Factor in the Panel's Selection of a Transferee Forum**

The Panel has held that the presence of a government investigation is a significant factor in deciding where to transfer litigation. *See In re Packaged Ice Antitrust Litig.*, 560 F. Supp.2d 1359, 1361 (J.P.M.L. June 5, 2008); *In re Sugar Industry Antitrust Litig.*, 395 F. Supp. 1271, 1274 (J.P.M.L. June 2, 1975) (“We have frequently held that the

³ To date, cases have been filed in the DC District, the Southern District of California, the Central District of California, and the Northern District of Illinois.

⁴ The degree and manner of any coordination or consolidation of transferred proceedings is within the sole discretion of the transferee court. *See, e.g., In re General Motors Corp. Secs. & Derivative Litig.*, 429 F. Supp.2d 1368, 1370 (J.P.M.L. 2006); *In re Delphi Corp. Secs., Derivative & "ERISA" Litig.*, 403 F. Supp.2d 1358, 1360 (J.P.M.L. 2005).

pendency of a related government action in a particular district is an important factor in selecting the transferee forum.”).

In that context, the Panel has also recognized the benefits of coordination between the transferee forum and the venue of a government investigation, as evidenced in *In re Toilet Seat Antitrust Litig.*, 387 F. Supp. 1342, 1344 (J.P.M.L. Jan. 17, 1975):

It is apparent that a great deal of coordination will be necessary between the discovery which all plaintiffs seek here and the proceedings in the United States' actions. Tremendous success has been achieved in other multidistrict litigation, such as the *Government Auto Fleet Litigation*, through the cooperation of all the judges and parties involved in coordinating discovery in the private treble damage actions with that in the Government criminal and civil actions. Because neither of the Government actions is subject to transfer under Section 1407, such coordination in this litigation can best be achieved by transferring all actions to the [venue of the government action].

The proper transferee forum is the DC District because the FTC action, which lies at the heart of the Related Actions, was conducted in Washington D.C., and the documents obtained in the FTC action (but not yet disclosed) are also located in the DC District. Furthermore, there are strong indications that an FTC investigation of defendants in the Related Actions is ongoing, with subpoenas having been issued to at least Yamaha, Gibson, Fender, and Guitar Center, each of whom are defendants in the Related Actions. Thus, it will critical to coordinate the ongoing DC District investigation(s) with the Related Actions. Transferring the Related Actions to the DC District will best allow for this coordination.

B. The DC District Has the Necessary Resources to Manage This Multidistrict Litigation

As of September 30, 2008, of the proposed forums, the DC District has the fewest pending cases per judge (271 per judge, compared to 327 pending per judge in the Southern District of California).⁵ The DC District had far fewer filings than the Southern District of California in the 12-month period ending September 30, 2008 (2,980 filed cases, compared to 7,723).⁶ Additionally, the DC District has fewer pending actions than the Southern District of California (4,061 compared to 4,252).⁷ Further, the DC District has significantly fewer filings per judge than the Southern District of California (200 compared to 594).⁸ Finally, the DC District has fewer civil filings per judge than the Southern District of California (163 compared to 204).⁹ *See* U.S. District Court – Judicial Caseload Profile (<http://www.uscourts.gov/cgi-bin/cmsd2008.pl>).

These statistics illuminate the congestion in the Southern District of California and other proposed venues in contrast to the DC District. The above statistical differences between the DC District and the other potential forums weigh heavily in favor of transfer to the DC District.

C. The DC District is Easily Accessible to Parties and Witnesses

A proposed transferee forum's accessibility to parties and witnesses is a factor to which the Panel has given significant weight. *See, e.g., In re Trasyol Products Liab.*

⁵ The Central District of California has 436 pending cases per judge and the Northern District of Illinois has 391 pending cases per judge.

⁶ The Central District of California has 15,144 filed cases, 500% more than the DC District, in the 12-month period ending September 30, 2008. The Northern District of Illinois is also substantially busier, with 8,591 filed cases in the 12-month period ending September 30, 2008.

⁷ The Central District of California has 12,221 pending cases and the Northern District of Illinois has 8,605 pending cases.

⁸ The Central District of California has 540 filings per judge and the Northern District of Illinois has 391 filings per judge.

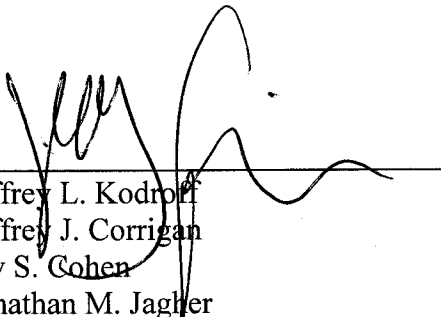
⁹ The Central District of California has 433 civil filings per judge and the Northern District of Illinois has 349 civil filings per judge.

Litig., MDL No. 1928, 2008 U.S. Dist. Lexis 28719, at *3 (J.P.M.L. Apr. 7, 2008) (selecting transferee district based, in part, on its “accessible metropolitan location”); *In re Mirapex Products Liab. Litig.*, 493 F. Supp.2d 1376, 1377 (J.P.M.L. 2007) (choosing transferee forum, in part, because it was “easily accessible”). Washington D.C. is certainly “easily accessible” with two major international airports (Reagan Washington National Airport is four miles from the courthouse and Dulles International Airport is approximately twenty-five miles from the courthouse); a high-speed rail station (Union Station provides Amtrak train service between Washington D.C. and Boston) and numerous lodging options. The D.C. Metro system also provides efficient subway service to and from all points within the metropolitan D.C. area. Washington D.C. compares very favorably with the other proposed forums in terms of accessibility.

III. CONCLUSION

For the foregoing reasons, the DC District is the most appropriate forum for centralization of the Related Actions because it will best promote the just and efficient conduct of these actions. It is the situs of the underlying FTC action and it is more convenient, more accessible, and thus better suited than the other proposed jurisdictions to effectively and efficiently manage this litigation.

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