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MDL 2121

**BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

In re:

MDL Docket No. 2121

FRETTED MUSICAL
INSTRUMENTS ANTITRUST
LITIGATION

PLEADING NO. 23

**MOVANT DAVID GIAMBUSO'S REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR TRANSFER TO THE
SOUTHERN DISTRICT OF CALIFORNIA**

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I. INTRODUCTION

On October 7, 2009, Plaintiff David Giambusso (“Movant”) moved for transfer and consolidation of the seven (7) related antitrust actions pending at that time to the Southern District of California. At least twenty-eight (28) actions have now been filed, eleven (11) of which are pending in the Southern District of California.

No party opposes centralization. Some responding plaintiffs, however, have proposed the District of Columbia¹ and the Central District of California² as preferable transferee forums. The responding defendants that are common to all of the actions support transfer to the Southern District of California,³ as do other plaintiffs in a tag-along action who served a separate motion pursuant to 28 U.S.C. § 1407 on October 23, 2009.⁴

The Southern District of California remains the preferred forum for the conduct of pretrial proceedings, where (1) the first-filed action is pending; (2) the largest number of cases are pending; (3) the common defendant – National Association of Music Merchants, Inc. (“NAMM”) – is located with accompanying documents and witnesses; and (4) there is no indication that the Southern District of California is any less capable of efficiently managing the litigation.

II. ARGUMENT

A. The District of Columbia Has No Meaningful Nexus To The Litigation.

The response filed by Plaintiffs Kenneth Manyin, Russell Melton and Jon Bandish (“Manyin Plaintiffs”) proposes transfer to the District of Columbia, based largely on the fact

¹ See, 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 (proposing the District of Columbia).

² See, Response of Plaintiffs Allen Hale *et al.* to David Giambusso’s Motion for Transfer and Coordination or Consolidation under 28 U.S.C. §1407 (proposing Central District of California).

³ See, Fender Musical Instruments Corporation’s Response To Plaintiff’s Motion For Transfer; Response of Defendants Guitar Center, Inc., Guitar Center Stores, Inc., National Association of Music Merchants, Inc., and Gibson Guitar Corp. to Plaintiff David Giambusso’s Motion for Transfer to the Southern District of California.

⁴ See, Walter Witherspoon d/b/a Racy Brothers Enterprizes, et al.’s Motion to Transfer and Consolidate or Coordinate To The Southern District of California, captioned “*In Re: National Association of Music Merchants, Musical Instruments and Equipment Litigation.*”

that the Federal Trade Commission (“FTC”) is located there and its investigation may be potentially ongoing. Specifically, the Manyin Plaintiffs state: “...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 Related Actions.” Response, pg. 4.

The documents obtained by Movant’s counsel from the FTC indicate otherwise. Included in that production are copies of the August 24, 2009 letters from the FTC’s Director of Bureau of Competition, Richard A. Feinstein, to counsel for all defendants named in one or more of the related cases stating that “the investigation has been closed.” Counsel for Yamaha, Gibson, Fender and Guitar Center are recipients of this letter, specifically addressed to them. Indeed, every company who had been served with a subpoena in *In The Matter of National Association of Music Merchants, Inc.*, Docket No. C-4255, appears to have received a virtually identical letter.

In any event, even were there to be an ongoing investigation, or the FTC decides at a later point to re-open it, the mere existence of that investigation is not a determinative factor. *See, e.g. In re Elec. Carbon Prod. Antitrust Litig.*, 259 F. Supp.2d 1374 (J.P.M.L.2003) (choosing district with presence of the parties and significant judicial experience over location of active government investigation and grand jury).⁵

Here, the Southern District of California has the most significant and meaningful nexus to the litigation. NAMM – the entity that is subject of the FTC Consent Order and the defendant named in every action filed to date – is located there. The existence of a prior investigation out of the FTC’s offices in Washington D.C., on the other hand, does not raise

⁵ The cases cited by the Manyin Plaintiffs do not aid them. *In re Packaged Ice Antitrust Litig.*, 560 F.Supp.2d 1359, 1361 (J.P.M.L. June 5, 2008) involved the existence of an active grand jury investigation. *In re Sugar Industry Antitrust Litig.* 395 F.Supp. 1271, 1274 (J.P.M.L. 1975) involved the active existence of a government action, raising the obvious need for coordination. *In re Toilet Seat Antitrust Litig.* 387 F.Supp. 1342, 1344 (J.P.M.L. 1975) also involved an active government case, requiring coordination.

issues of coordination, and does not translate into efficiencies if the litigation is centralized there.

B. Caseload Statistics Do Not Materially Favor the District of Columbia.

The Manyin Plaintiffs also cite caseload statistics in an attempt to demonstrate that the District of Columbia compares favorably to the Southern District of California. Although the Panel considers caseload statistics, they are not determinative. *See In re Xybernaut Corp. Securities Litig.*, 403 F.Supp.2d 1354, 1355 (J.P.M.L. 2005) (favorable statistics was merely one of the several factors considered in determining the most appropriate transferee forum); *In re Veeco Instruments Inc. Securities Litig.*, 387 F.Supp.2d 1365, 1366 (J.P.M.L. 2005) (same). As the Panel has observed:

“And while a comparison of civil action dockets in the districts under consideration as possible Section 1407 transferee districts is a relevant factor for the Panel to take into account when making its determination, this factor is minimal here because of the relatively small difference in workload statistics for the two districts.”

In re Amtel, Inc. Securities Litig., 447 F.Supp. 266, 468 (J.P.M.L. 1978); *citing In re Career Academy Antitrust Litig.*, 342 F.Supp. 753, 754 (J.P.M.L. 1972).

Similarly, the Manyin Plaintiffs' caseload comparisons between the District of Columbia and the Southern District of California do not reveal material differences demonstrating the Southern District of California is: (1) any more congested than the District of Columbia, or (2) any less equipped or capable to efficiently manage this litigation.

C. Other Plaintiffs and The Common Defendants Support Transfer to the Southern District of California.

Weeks after the filing of the within Motion, Plaintiffs Walter Witherspoon d/b/a Racy Brothers Enterprizes and Lil Walt Production served an independent motion for transfer of the same actions that are the subject of this MDL. That separate motion, now since revised, seeks the same relief requested by the within Motion, and is therefore supportive of the Southern District of California.

In addition, the defendants that are common to all of the actions, Guitar Center, Inc. and NAMM, have responded with support for the Southern District of California.

D. The First-Filed Action, And The Largest Number Of Actions, Remain Pending In The Southern District of California.

In addition to being the district where the first-filed *Giambusso* action is pending, the Southern District of California also has pending the largest number of actions subject to transfer – currently eleven (11) of the twenty-eight (28). The Panel has considered these to be significant factors in deciding upon an appropriate transferee forum. *See, Apple Iphone 3G Products Liability Litig.*, 630 F.Supp.2d 1382, 1383 (J.P.M.L. 2009) (district where most actions were filed, including the first-filed action, was the preferred forum); *In re Marine Hose Antitrust Litig.*, 531 F.Supp.2d 1381, 1382. (J.P.M.L. 2008) (same); *In re Orleans Homebuilders, Inc., v. Fair Labor Standards Act Litig.*, 559 F.Supp.2d 1411-1412 (J.P.M.L. 2008) (same); *In re Webkinz Antitrust Litig.*, 582 F.Supp.2d 1380, 1381 (J.P.M.L. 2008) (same).

Finally, Plaintiffs in the later-filed actions pending in the Central District of California, while supporting centralization, contend that District is better suited based almost exclusively on the fact that a common defendant Guitar Center, Inc. and a defendant named is a subset of cases (Yamaha) are located there. Guitar Center's headquarters is only approximately 120 miles closer to the courthouse⁶ in the Central District of California than it is from the Southern District of California courthouse location. Yamaha's headquarters is only 80 miles closer. The locations of Guitar Center and Yamaha in the Central District of California, therefore, will not provide any materially greater convenience to the parties or to the Court such to overcome the significant factors favoring the Southern District of California.

⁶ The Central District of California courthouse location is the Spring Street United States Courthouse, where several related actions are pending before the Honorable George W. Wu.

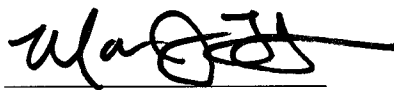
III. CONCLUSION

For all the foregoing reasons, and those discussed in his underlying Motion, Movant respectfully requests that all of the related cases and subsequently filed tag-along actions be transferred to the Southern District of California for consolidated pretrial proceedings before the Honorable Larry A. Burns.

Dated: November 3, 2009

Respectfully submitted,

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