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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Zounds Hearing Franchising, LLC, an Arizona
limited liability company; and Zounds Hearing
Inc., a Delaware corporation,

Plaintiffs,

v.

Edward T. Bower and Barbara Bower, husband
and wife; and Lend Me Your Ears, Inc., an Ohio
corporation;

Defendants.

No. CV-16-01462-PHX-NVW
(Consolidated)

ORDER

[Re: No. CV-16-01462-PHX-NVW]

Zounds Hearing Franchising, LLC, an Arizona
limited liability company; and Zounds Hearing
Inc., a Delaware corporation,

Plaintiffs,

v.

Frank R. Graziano and Mary E. Graziano,
husband and wife; and FNM Enterprises, Inc., an
Ohio corporation,

Defendants.

No. CV-16-01465-PHX-SRB

1 Zounds Hearing Franchising, LLC, an Arizona
2 limited liability company; and Zounds Hearing
3 Inc., a Delaware corporation,

4 Plaintiffs,

5 v.

6
7 Glenn Harbold, an individual; and Perfect Clarity
8 LLC, an Ohio limited liability company,

9 Defendants.

No. CV-16-01467-PHX-NVW

10
11 Zounds Hearing Franchising, LLC, an Arizona
12 limited liability company; and Zounds Hearing
13 Inc., a Delaware corporation,

14 Plaintiffs,

15 v.

16 Lawrence R. Woerner and Nancy Woerner,
17 husband and wife; Susan Steigerwald and David
18 Steigerwald, husband and wife; Lawrence W.
19 Woerner and Rosemarie Woerner, husband and
20 wife; and WOCO Franchise LLC, an Ohio
21 limited liability company,

22 Defendants.

No. CV-16-01470-PHX-DLR

23 Before the Court is Defendants' Motion to Consolidate the four cases captioned
24 above. (Doc. 16.) For the reasons that follow, the Motion will be granted.

25 **I. BACKGROUND**

26 Zounds Hearing, Inc. supplies Zounds-brand hearing aid devices. Zounds Hearing
27 Franchising, LLC allows franchisees to operate hearing aid centers under the Zounds
28 trade name. Both companies identify Arizona as their principal place of business. They
will be individually and collectively referred to as "Zounds."

1 Zounds entered into franchise agreements with four Ohio companies and their
2 owners: (1) Lend Me Your Ears, Inc., owned by Edward T. Bower and Barbara Bower,
3 (2) FNM Enterprises, Inc., owned by Frank R. Graziano and Mary E. Graziano, (3)
4 Perfect Clarity, LLC, owned by Glenn Harbold, and (4) WOCO Franchise, LLC, owned
5 by Lawrence R. Woerner, Susan Steigerwald, and Lawrence W. Woerner. Each
6 agreement allows the respective franchisee to operate hearing aid centers in Ohio under
7 the Zounds trade name.

8 On May 11, 2016, the franchisees jointly brought a lawsuit against Zounds and
9 other parties in Ohio state court. *Edward T. Bower, et al. v. Zounds Hearing*
10 *Franchising, LLC, et al.*, Cuyahoga C.P. CV-16-863098. The lawsuit alleges, among
11 other things, that Zounds violated Ohio law by failing to disclose certain information
12 relevant to the franchise agreements. Accordingly, the franchisees seek to rescind the
13 agreements and recover damages.

14 On May 12, Zounds responded to the Ohio lawsuit by filing four separate actions
15 in this Court, captioned above. Each action corresponds to one of the four franchise
16 agreements. All four actions rely on a clause present in all the agreements. The clause,
17 according to Zounds, requires the franchisees to mediate their dispute with Zounds in
18 Arizona before bringing a lawsuit. Accordingly, Zounds asks this Court for a judgment
19 (1) declaring that mediation in Arizona is a condition precedent to the Ohio lawsuit and
20 (2) staying or dismissing the Ohio lawsuit until such mediation occurs.

21 The franchisees move to consolidate the four actions filed by Zounds pursuant to
22 Federal Rule of Civil Procedure 42(a). (Doc. 16.) Zounds opposes consolidation but
23 does not object to the actions being decided by the same judge. (Doc. 18.)

24 **II. ANALYSIS**

25 Rule 42(a) authorizes the Court to consolidate actions that “involve a common
26 question of law or fact.” Fed. R. Civ. P. 42(a). The Court has “broad discretion under
27 this rule to consolidate cases pending in the same district.” *Inv’rs Research Co. v. U.S.*
28 *Dist. Court for Cent. Dist. of California*, 877 F.2d 777, 777 (9th Cir. 1989). In

1 determining whether to consolidate, the Court “weighs the saving of time and effort
2 consolidation would produce against any inconvenience, delay, or expense that it would
3 cause.” *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984).

4 Here, consolidation is appropriate. All four actions filed by Zounds share a
5 common factual background. In each, Zounds seeks declaratory judgment with respect to
6 franchisees who sued Zounds for failing to make disclosures required by Ohio law.

7 In addition, all four actions present the same legal issue: whether the mediation
8 clause in the franchise agreements requires the franchisees to mediate in Arizona before
9 initiating litigation. Moreover, the franchisees intend to move to dismiss all four actions
10 based on another common legal issue: whether the mediation clause should be interpreted
11 by the Ohio court instead of this Court because the Ohio lawsuit was filed first. Thus,
12 consolidating these actions would benefit the Court as well as the parties, without causing
13 any undue inconvenience, delay, or expense.

14 Zounds opposes consolidation for two reasons. First, Zounds says the parties
15 agreed not to consolidate, by way of a clause in the franchise agreements:

16 THE PARTIES AGREE THAT . . . ANY PROCEEDING BETWEEN
17 FRANCHISEE, FRANCHISEE’S GUARANTORS AND FRANCHISOR
18 OR ITS AFFILIATES/OFFICERS/EMPLOYEES MAY NOT BE
19 CONSOLIDATED WITH ANY OTHER PROCEEDING BETWEEN
FRANCHISOR AND ANY OTHER THIRD PARTY.

20 But the Court’s power to consolidate actions under Rule 42(a) depends on considerations
21 of efficiency, not the parties’ positions on the matter. Indeed, even if all parties opposed
22 consolidation, the Court could do it anyway. *See In re Air Crash Disaster at Florida*
23 *Everglades*, 549 F.2d 1006, 1013 (5th Cir. 1977) (“A court may order the consolidation
24 of cases despite the opposition of the parties.”); *Midwest Cmty. Council, Inc. v. Chicago*
25 *Park Dist.*, 98 F.R.D. 491, 500 (N.D. Ill. 1983) (“The fact that one or all of the parties
26 object, or that the issue of consolidation is raised by the court *sua sponte*, is not
27 dispositive.”); *accord In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987)
28 (noting “trial courts may consolidate cases *sua sponte*”).

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ATTACHMENT “A”

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(Consolidated)

TITLE OF FILING

**[Re: No. CV-XX-XXXXX-PHX-
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Zounds Hearing Franchising, LLC, an Arizona
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Frank R. Graziano and Mary E. Graziano,
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Zounds Hearing Franchising, LLC, an Arizona limited liability company; and Zounds Hearing Inc., a Delaware corporation,

Plaintiffs,

v.

Glenn Harbold, an individual; and Perfect Clarity LLC, an Ohio limited liability company,

Defendants.

No. CV-16-01467-PHX-NVW

Zounds Hearing Franchising, LLC, an Arizona limited liability company; and Zounds Hearing Inc., a Delaware corporation,

Plaintiffs,

v.

Lawrence R. Woerner and Nancy Woerner, husband and wife; Susan Steigerwald and David Steigerwald, husband and wife; Lawrence W. Woerner and Rosemarie Woerner, husband and wife; and WOCO Franchise LLC, an Ohio limited liability company,

Defendants.

No. CV-16-01470-PHX-DLR