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LEITH PATRICK KNAPP, et al., Plaintiffs, v. WACHOVIA CORPORATION, et al., Defendants.

No. C 07-4551 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 41000

May 12, 2008, Decided
May 12, 2008, Filed

COUNSEL: [*1] For Leith Patrick Knapp, Thomas Hampton Dear, Plaintiffs: Philip Steven Horne, LEAD ATTORNEY, LAW OFFICES OF PHILIP STEVEN HORNE, ESQ., San Francisco, CA.

For Wachovia Corporation, a Corporation, Wachovia SBA Lending, Inc., a Corporation, Kenneth McGuire, Ann Nonemaker, Defendants: Mark P. Grajski, LEAD ATTORNEY, Seyfarth Shaw, Sacramento, CA; Eden Edwards Anderson, Seyfarth Shaw LLP, San Francisco, CA.

JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE AND DISTRICT OF CALIFORNIA

Defendants' motion to transfer venue is scheduled for a hearing on May 16, 2008. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument, and VACATES the hearing. For the reasons set forth below, the Court GRANTS the motion and TRANSFERS this case to the Eastern District of California.

BACKGROUND

Plaintiffs are two men who are domestic partners and who both formerly worked for defendant Wachovia SBA Lending Inc., in Roseville, California. Roseville is located in the Eastern District of California. Plaintiffs allege that their supervisors and co-workers discriminated against them and harassed [*2] them on account of their sexual orientation and disability, and that after they complained, they were retaliated against and ultimately constructively discharged. The complaint alleges, *inter alia*, that plaintiffs were ostracized and harassed in the workplace, received unfair negative performance reviews, and that they were harassed at work-related social events.

Plaintiffs filed suit in the Northern District of California. Plaintiffs allege claims under the Americans with Disabilities Act, the California Fair Employment and Housing Act, the California Labor Code, the California Civil Code, the California Business and Professions Code, and common law. Plaintiffs originally sued Wachovia Corporation, Wachovia SBA Lending, Inc., and two Wachovia employees, Kenneth McGuire and Ann Nonemaker. In response to defendants' motion to transfer venue, plaintiffs voluntarily dismissed the individual defendants. The corporate defendants continue to seek transfer of this case to the Eastern District of California on the ground that the alleged events giving

rise to plaintiffs' claims occurred in the Eastern District and a majority of the witnesses are located in the Eastern District.

LEGAL STANDARD

"For [*3] the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil matter to any other district or division where it might have been brought." *28 U.S.C. § 1404(a)*. The purpose of *§ 1404(a)* is to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (internal citations and quotation omitted). A motion for transfer lies within the broad discretion of the district court, and must be determined on an individualized basis. *See Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000)*.

To support a motion for transfer, the moving party must establish: (1) that venue is proper in the transferor district; (2) that the transferee district is one where the action might have been brought; and (3) that the transfer will serve the convenience of the parties and witnesses, and will promote the interests of justice. *See Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F. Supp. 503, 506 (C.D. Cal. 1992)*. Transfer is discretionary, but is governed by certain factors specified in *§ 1404(a)* and in relevant [*4] case law.

DISCUSSION

As an initial matter, the Court finds that venue would be proper in either district, and the parties do not dispute that fact. [1] Once venue is determined to be proper in both districts, courts evaluate the following factors to determine which venue is more convenient to the parties and the witnesses: (1) plaintiff's choice of forum, (2) convenience of the parties, (3) convenience of the witnesses, (4) ease of access to the evidence, (5) familiarity of each forum with the applicable law, (6) feasibility of consolidation with other claims, (7) any local interest in the controversy, and (8) the relative court congestion and time of trial in each forum. *See Williams v. Bowman, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)*.

1 Prior to plaintiffs' dismissal of the individual defendants, defendants contended that venue was improper in this District. After dismissal of those defendants, the Wachovia defendants no longer contend that venue is improper in this District.

The Court finds that, on balance, these factors favor transfer. Although courts should afford considerable weight to a plaintiff's choice in determining a motion to transfer, *see Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985)*, [*5] a plaintiff's choice of forum is not dispositive, and must be balanced against other factors of convenience. For example, where the transactions giving rise to the action lack a significant connection to the plaintiff's chosen forum, the plaintiff's choice of forum is given considerably less weight, even if the plaintiff is a resident of the forum. *See* Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial § 4:763 (2007); *see also Schmidt v. American Inst. of Physics, 322 F. Supp. 2d 28, 33 (D.D.C. 2004)*.

Here, all of the alleged events giving rise to plaintiffs' claims occurred outside the Northern District, and most occurred in the Eastern District at the Roseville worksite. [2] Plaintiffs make much of the fact that they complained to Wachovia's human resources department in Oakland, and they allege that the human resources department did not adequately investigate their complaint. However, the gravamen of plaintiffs' claims concerns events that allegedly took place at the Roseville worksite. In addition, although plaintiffs have submitted declarations stating that they had clients in the Northern District, plaintiffs' claims do not stem from their interactions with these [*6] clients. Finally, although plaintiffs highlight the fact that they filed their administrative complaints with the EEOC and the DFEH in the Northern District, this fact has no bearing on the venue analysis.

2 The complaint also alleges that some discriminatory and/or harassing events took place outside of California.

The Court also finds that transfer will be significantly more convenient for the witnesses. Defendants have identified eleven witnesses mentioned in the complaint who are located in the Eastern District. These witnesses include former defendant McGuire, who is referenced repeatedly throughout the complaint, as well as plaintiffs' former co-workers who allegedly discriminated against and harassed plaintiffs. Although plaintiffs suggest that these witnesses are not relevant or necessary, that assertion is belied by the allegations of the

complaint. Moreover, plaintiffs have submitted declarations stating that they have residences in both the Northern and Eastern Districts, and thus although plaintiffs would prefer to litigate in the Northern District, it is not a hardship for plaintiffs to pursue this action in the Eastern District.

CONCLUSION

For the foregoing reasons and good [*7] cause shown, the Court hereby GRANTS defendants' motion to transfer venue and TRANSFERS this case to the Eastern District of California. (Docket No. 13).

IT IS SO ORDERED.

Dated: May 12, 2008

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

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MTS SYSTEMS CORPORATION, a Minnesota corporation, Plaintiff, v. HYSITRON, INCORPORATED, a Minnesota corporation, Defendant.

No. C 06-3156 CW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2006 U.S. Dist. LEXIS 66338

September 1, 2006, Decided
September 1, 2006, Filed

COUNSEL: [*1] For MTS Systems Corporation, Plaintiff: David M. Beckwith, McDermott, Will & Emery, San Diego, CA.; John Lester Krenn, Gray Plant Mooty Mooty & Bennett, PA, Minneapolis, MN.

For Hysitron Incorporated, Defendant: Daniel P. Muino, Gibson Dunn Crutcher, San Francisco, CA.; Denis R. Salmon, Gibson Dunn & Crutcher LLP, Palo Alto, CA.

For Hysitron Incorporated, Counter-claimant: Daniel P. Muino, Gibson Dunn Crutcher, San Francisco, CA.

For MTS Systems Corporation, Counter-defendant: David M. Beckwith, McDermott, Will & Emery, San Diego, CA.

JUDGES: CLAUDIA WILKEN, United States District Judge.

OPINION BY: CLAUDIA WILKEN

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE TO MINNESOTA

Defendant Hysitron, Inc., moves for a transfer of venue to the District of Minnesota. Plaintiff MTS Systems Corporation opposes the motion. The matter was taken under submission on the papers. Having considered all of the papers filed by the parties, the Court GRANTS Defendant's motion for a transfer of venue.

BACKGROUND

This patent infringement case arises out of Plaintiff's allegations that Defendant's use, sale or offer to sell nanotensile measuring devices infringes a claim or claims asserted [*2] in *U.S. Patent No. 6,679,124*B2 (the *'124 patent*), owned by Plaintiff. Complaint PP 6-7. Both parties are Minnesota corporations with their principal place of business in Eden Prairie, Minnesota. *Id.* P 5; Eggers Decl. P 2.

The named inventor of the *'124 patent*, Warren C. Oliver, lives and works for MTS Nano Instruments (MTS Nano), a subsidiary of Plaintiff, in Oak Ridge, Tennessee. Hay Decl. P 5. All MTS Nano employees are located in Oak Ridge, with the exception of its sales associates. *Id.* PP 6, 8. MTS Nano has no personnel in Minnesota. *Id.* P 8. "Virtually all key documents, materials, equipment relating to the development, testing, research, production, marketing and sales decisions regarding the MTS Nano's nanomeasurement devices are located in Tennessee." *Id.* Plaintiff anticipates calling as witnesses four MTS Nano officials, including Mr. Oliver, who are based in Oak Ridge, Tennessee, as well as its two Field Account Managers, Neal Gustafson and Bruce Anderson, who are based in Carlsbad, California and Gig Harbor, Washington, respectively. *Id.* P 11. Plaintiff also anticipates that two third parties may be called as

witnesses: Cheryl Hayashi, an Assistant [*3] Professor at the University of California, Riverside and George Pharr, Professor and Chair of the Material Science Department at the University of Tennessee in Knoxville. *Id.* P 12. Plaintiff also asserts that there are three additional third parties who are potential customers and who live in the Northern District of California.

According to Michael Eggers, Director of Finance, Defendant "has 58 employees worldwide, of which 55 are based in Minnesota, including all of the product development and company management personnel." Eggers Decl. P 2. Defendant "designs, develops, and manufactures all of its products at its facility in Eden Prairie, MN." *Id.* P 3. According to Mr. Eggers, Defendant's products include only one "nanotensile measure device," the nanoTensile 5000. All of the design and development work for the nanoTensile 5000 has occurred in Eden Prairie. *Id.* P 5. All personnel involved in the design and development of the nanoTensile 5000, as well as all documents, materials and equipment, including prototypes, are located at Defendant's Eden Prairie facility. *Id.* P 5. These persons include Dehua Yang, inventor of the nanoTensile 5000, Fred Tsuchiya, Project [*4] Manager for the nanoTensile 5000's development, and five other Hysitron employees who have been involved in its development. *Id.* PP 13-19.

Defendant has "one employee in California, a sales representative who covers the West Coast of the United States, working from his home." Eggers Decl. P 9. Bill Coney, the sales representative, has not been involved in the development of the nanoTensile 5000. *Id.* He resides "just outside of Sacramento." Beckwith Decl., Ex. A, Burkstrand Dep. 10:6-7. However, Plaintiff's evidence shows that Mr. Coney has been involved in the promotion of the nanoTensile 5000 in the Northern District of California.

Defendant maintained a booth at the "Material Research Society" industry conference and trade show in San Francisco, California, in April, 2006. Eggers Decl. P 5. Prior to the conference, Defendant had sent an email to its customer base stating that the nanoTensile 500 "would soon be available." *Id.* P 11. Defendant provided "a few" conference attendees with application notes and a preliminary product brochure for the nanoTensile 5000. *Id.* P 12. Defendant also engaged in additional promotional and marketing activities described in detail [*5] in the evidence filed under seal by Plaintiff.

LEGAL STANDARD

Title *28 U.S.C. § 1404(a)* provides as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The statute, therefore, identifies three basic factors for district courts to consider in determining whether a case should be transferred: (1) convenience of the parties; (2) convenience of the witnesses; and (3) the interests of justice. *28 U.S.C. § 1404(a)*. The Ninth Circuit has held that a fourth factor for the court to consider is the plaintiff's choice of forum. *See Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985)*. The *Securities Investor* court held that, unless the balance of the *§ 1404(a)* factors "is strongly in favor of the defendants, the plaintiff's choice of forum should rarely be disturbed." *Id.; see also Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986)* ("defendant must make a strong showing... to warrant upsetting the plaintiff's [*6] choice of forum"). The burden is on the defendant to show that the convenience of parties and witnesses and the interest of justice require transfer to another district. *See Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979)*.

A case may be transferred for convenience only to a venue in which it could have originally been brought. In civil cases where jurisdiction is based on a federal question, venue is proper in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State,
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or
>
> (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

DISCUSSION

I. Convenience of the Parties

The large majority of Defendant's relevant personnel and documents are located in Minnesota, while the large majority of Plaintiff's relevant personnel and documents are located in Tennessee. Although [*7] each party has sales personnel on the West Coast, none lives in the Northern District of California, and thus their sales personnel would have to travel at least somewhat to testify regardless of where this case is tried. Transferring the action to Minnesota would not, as Plaintiff suggests, merely shift the convenience from Plaintiff to Defendant, because Minnesota is no less convenient for Plaintiff's Tennessee-based MTS Nano division than Northern California. Indeed, MTS Nano's parent corporation is located in Minnesota. Therefore, the Court finds that the factor of convenience of the parties weighs strongly in favor of transferring this case to Minnesota.

II. Convenience of the Witnesses

Of the non-party witnesses identified by Plaintiff, one lives in Southern California, one lives in Tennessee, and three potential customers live in the Northern District of California. Given the stage at which Plaintiff filed this lawsuit, however, these potential customers are unlikely to have particularly important or relevant testimony. The Court finds that this factor weighs slightly in favor of keeping the case in the Northern District of California.

III. Interests of Justice

[*8] Neither party makes any showing that the interests of justice will be affected by a transfer of venue to Minnesota, and therefore the Court finds that this is not a relevant factor.

IV. Plaintiff's Choice of Forum

There are exceptions to the general rule that a plaintiff's choice of forum "should rarely be disturbed." *See Securities Investor, 764 F.2d at 1317*. "Ordinarily, where the forum lacks any significant contact with the activities alleged in the complaint, plaintiff's choice of forum is given considerably less weight." *IBM Credit Corp. v. Definitive Computer Services, Inc., 1996 U.S. Dist. LEXIS 2385, 1996 WL 101172, *2 (N.D. Cal. 1996).* Here, the allegedly infringing product was developed and tested in Minnesota. Plaintiff itself does not reside in California. Plaintiff's assertion that a "large part of the infringing activity took place in California" overstates the evidence on which it relies. In fact, Plaintiff has shown little conclusive evidence that Defendant, in Northern California, made offers to sell that would have caused potential customers to understand that acceptance would conclude a sale. *Rotec Indus., Inc. v. Mitsubishi Corp., 215 F.3d 1246, 1257 (Fed. Cir. 2000)* [*9] (quoting Restatement (Second) of Contracts ? 24 (1979)). Therefore, the Court gives Plaintiff's choice of forum less weight than it would otherwise. *See Williams v. Bowman, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)* (noting that the degree of deference according to the plaintiff's choice of forum is substantially reduced where the plaintiff does not reside in the venue or where the forum lacks a significant connection to the activities alleged in the complaint) (quoting *Fabus Corp. v. Asiana Exp. Corp., 2001 U.S. Dist. LEXIS 2568, 2001 WL 253185, *1 (N.D. Cal. March 5, 2001))*.

On balance, the Court finds that the factors in this case weigh in favor of transfer of venue. There is no dispute that the District of Minnesota is an appropriate venue for this action, because that is the district where both parties are located. Therefore, the Court grants Defendant's motion to transfer venue to Minnesota.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's motion to transfer the case to the District of Minnesota (Docket No. 23). Venue of this case in its entirety is TRANSFERRED to the District of Minnesota pursuant to *28 U.S.C. § 1404(a)*. [*10] The Clerk shall transfer the file.

IT IS SO ORDERED.

Dated: 9/1/06

/s/

CLAUDIA WILKEN

United States District Judge

PATI JOHNS, Plaintiff, v. PANERA BREAD COMPANY, a Delaware corporation; and PANERA LLC, a Delaware limited liability company, Defendants.

Case No. 08-1071 SC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 78756

July 21, 2008, Decided
July 21, 2008, Filed

COUNSEL: [*1] For Pati Johns, Plaintiff: Dylan Hughes, Eric H. Gibbs, Geoffrey A. Munroe, LEAD ATTORNEYS, Elizabeth Cheryl Pritzker, Girard Gibbs LLP, San Francisco, CA; George A. Hanson, Richard M. Paul, III, LEAD ATTORNEYS, PRO HAC VICE, Stueve Siegel Hanson LLP, Kansas City, MO; George Allan Hanson, LEAD ATTORNEY, Stueve Siegel Hanson LLP, Kansas City, MO.

For Panera Bread Company, Panera LLC, Defendants: Elizabeth Cheryl Pritzker, Girard Gibbs LLP, San Francisco, CA; Margaret Hart Edwards, Littler Mendelson, A Professional Corporation, San Francisco, CA.

JUDGES: Samuel Conti, UNITED STATES DISTRICT JUDGE.

OPINION BY: Samuel Conti

OPINION

ORDER GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE

I. *INTRODUCTION*

This matter comes before the Court on the Motion to Transfer Venue ("Motion") filed by the defendants Panera Bread Company and Panera LLC (collectively "Panera" or "Defendants"). Docket No. 6. The plaintiff Pati Johns ("Plaintiff" or "Johns") filed an Opposition and Panera submitted a Reply. Docket Nos. 15, 18. For the following reasons, Panera's Motion is GRANTED.

II. *BACKGROUND*

Plaintiff, a resident of Antioch, California, was employed as a General Manager at the Antioch Panera bakery-cafe from March 2005, until January 12, [*2] 2008. First Am. Compl. ("FAC"), Docket No. 3, P 6. Panera is a Delaware corporation with its principal place of business in Richmond Heights, Missouri. *Id.* P 7. Panera owns and operates approximately 500 bakeries nationwide, 32 of which are located in California. *Id.* P 10; Higgins Decl., Docket No. 7, P 9. [1]

1 Courtney Higgins is the Senior Manager for Human Resource Systems at Panera's headquarters in Missouri.

Plaintiff brought the present action alleging wage and hour violations on behalf of two putative classes against Panera. The first is a nationwide, Fair Labor Standards Act ("FLSA") opt-in collective action. *Id.* P 21. The second putative class is defined as "[a]ll current and former General Managers employed by Panera in the State of California within the last four years." *Id.* P 22. The second putative class alleges violations of various California laws, including the California Labor Code and

California's Business and Professions Code § 17200 et seq. *Id*. PP 44-69.

III. *LEGAL STANDARD*

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil matter to any other district or division where it might have been brought." *28 U.S.C. § 1404(a)*. [*3] The purpose of *§ 1404(a)* is to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (internal quotation marks omitted). "A motion for transfer lies within the broad discretion of the district court, and must be determined on an individualized basis." *Foster v. Nationwide Mut. Ins. Co., No. C 07-4928, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408, at *1 (N.D. Cal. Dec. 14, 2007)* (relying on *Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000))*.

To support a motion for transfer, the moving party must establish that venue is proper in the transferor district, the transferee district is one where the action might have been brought, and the transfer will serve the convenience of the parties and witnesses and will promote the interests of justice. *Foster, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408, at *2*. It is clear, and the parties do not argue otherwise, that venue in this district is proper and that the action might have been brought in the proposed transferee district, the Eastern District of Missouri. *See* Opp'n at 2. Thus, the issue to be decided is whether Panera has satisfied its burden [*4] of demonstrating that transfer will serve the convenience of the parties and witnesses and will promote the interests of justice.

In determining this issue, courts look to the following factors: (1) plaintiff's choice of forum; (2) convenience of the parties and witnesses; (3) ease of access to the evidence; (4) familiarity of each forum with the applicable law; (5) feasibility of consolidation with other claims; (6) any local interest in the controversy; and (7) the relative court congestion and time of trial in each forum. *See Foster, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408, at *2*. In addition, a forum selection clause is a significant but not dispositive factor in a court's *§ 1404(a)* analysis. *Jones, 211 F.3d at 498*.

IV. *DISCUSSION*

A. *Plaintiff's Choice of Forum*

In general, a plaintiff's choice of forum carries substantial weight in a motion to transfer venue. *See, e.g., Foster, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408, at *2*; *Flint v. UGS Corp., No. C 07-4640, 2007 U.S. Dist. LEXIS 94643, 2007 WL 4365481, at *3 (N.D. Cal. Dec. 12, 2007)*. In class actions, however, a plaintiff's choice of forum is often accorded less weight. *See Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987)* (stating that "[a]lthough great weight is generally accorded plaintiff's choice of [*5] forum, . . . when an individual . . . represents a class, the named plaintiff's choice of forum is given less weight"). "In judging the weight to be accorded [the plaintiff's] choice of forum, consideration must be given to the extent of [the parties'] contacts with the forum, including those relating to [the plaintiff's] cause of action." *Id*.

In the present case, Plaintiff resides in Antioch, California. Antioch falls within Contra Costa County, which is situated in the Northern District of California. *See 28 U.S.C. § 84(a)*. In addition, the Panera bakery where Plaintiff worked is also in Antioch. These factors tend to favor deference towards Plaintiff's forum choice.

Nonetheless, Plaintiff's decision to seek to represent a nationwide class substantially undercuts this deference. *See, e.g., Foster, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408, at *3* (stating that one of the "multiple factors weigh[ing] against consideration of plaintiffs' choice of forum" was the fact that "plaintiffs ha[d] brought th[e] case as a class action"); *Italian Colors Rest. v. Am. Express, No. C 03-3719, 2003 U.S. Dist. LEXIS 20338, 2003 WL 22682482, at *5 (N.D. Cal. Nov. 10, 2003)* (same); *Hoefer v. U.S. Dep't of Commerce, No. C 00-0918, 2000 U.S. Dist. LEXIS 9299, 2000 WL 890862, at *2 (N.D. Cal. June 28, 2000)* [*6] (holding because the "members of the purported class are numerous and are located throughout the nation[,]" the "plaintiff's choice of forum . . . is not given substantial weight when determining whether a transfer of venue is proper").

These cases are consistent with Ninth Circuit and Supreme Court authority. *See, e.g., Lou, 834 F.2d at 739* (finding that "when an individual . . . represents a class, the named plaintiff's choice of forum is given less weight"); *Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 67 S. Ct. 828, 91 L. Ed. 1067 (1947)* (stating "where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with

the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened").

Plaintiff argues, with some persuasion, that her case is unique from *Koster* and its progeny in that the nationwide class she proposes would, under the FLSA, require class members to opt in. This opt-in requirement, according to Plaintiff, negates the concerns in *Koster* that were animated primarily by the nature of the [*7] shareholder derivative suits at issue. As at least several other courts have noted, "the opt-in structure of collective actions under *section 216(b) of the FLSA* strongly suggests that Congress intended to give plaintiffs considerable control over the bringing of a FLSA action." *Onyeneho v. Allstate Ins. Co., 466 F. Supp. 2d 1, 6 n.2 (D.D.C. 2006)*; *see also id*. (collecting cases).

In addition, Plaintiff argues that because she seeks to represent two classes, one of which would be comprised solely of managers of Panera's California stores, her choice of a forum in California is entitled deference. Although this reasoning in the abstract may be true, the numbers in this case tell a different story. According to Panera, while it has 509 bakeries nationwide, only 32 of these are located in California. Higgins Decl. P 9. Because Panera did not open its first bakery in California until 2005, Panera estimates that there are roughly only 40 current and former managers living in California, while nationwide there may be as many as 1,400. *Id*. PP 17, 21. In light of these numbers and the reasoning discussed above, the Court finds that Plaintiff's choice of forum in the present case is entitled [*8] little deference.

B. *Convenience of Parties and Witnesses*

"In analyzing whether transfer of a case would serve the convenience of the witnesses, the Court must look at who the witnesses are, the nature of what the testimony will be, and why such testimony is relevant or necessary." *Flint, 2007 U.S. Dist. LEXIS 94643, 2007 WL 4365481, at *4*. It is clearly more convenient for Plaintiff to litigate her claims here in the Northern District of California, where she lives. It is equally clear that convenience for Panera would best be served by litigating the action in the Eastern District of Missouri, close to Panera's headquarters. The Court must therefore weigh the convenience to the other potential witnesses.

The putative class members who reside in California might be less inconvenienced if the litigation were to occur in California rather than Missouri. As noted by Panera, however, the putative class in California is comprised only of approximately 40 persons. Higgens Decl. P 17. The nationwide putative class, on the other hand, consists of 1,400 past or current Panera general managers, more than a third of whom live in Missouri, Illinois, Indiana, or Michigan. *Id*. P 20. These putative class members, should they opt [*9] in, would likely best be served by litigation in Missouri. Nonetheless, "the Court still lacks any indication of how many people from the putative class are anticipated to be witnesses, and what their relevant testimony would be." *Flint, 2007 U.S. Dist. LEXIS 94643, 2007 WL 4365481, at *4*. Therefore, the Court "cannot base a decision to transfer on speculation as to the relevance of potential, but unnamed, witnesses." *Id*.

Panera has provided a list of nine witnesses who are employees of Panera and who, according to Panera, would likely testify at trial. *See* Higgins Decl. P 25. Plaintiff concedes that of these nine, seven will likely be able to provide relevant testimony. Opp'n at 11. Plaintiff argues, however, that of these seven, only four actually reside in Missouri, with the other three living in New York, Texas, and Massachusetts, respectively.

It is clear that the four witnesses who reside in Missouri will be better served through litigation in Missouri. In addition, those living in the other states will also be better served by transfer, as their home states are significantly closer to Missouri than to California.

For the above-stated reasons, the Court finds that convenience of the parties and witnesses substantially [*10] favors transfer to the Eastern District of Missouri. This conclusion is supported by a number of other district court opinions. *See, e.g., Foster, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408, at *4-5* (finding that "Defendant's corporate headquarters is located in [the proposed transferee district], as are many of the witnesses defendant would likely call to testify at trial," and holding that because of this, in combination with other factors, the convenience of the parties and witnesses favored transfer); *Evancho v. Sanofi-Aventis U.S., Inc., No. C 07-0098, 2007 U.S. Dist. LEXIS 35500, 2007 WL 1302985, at *3 (N.D. Cal. May 3, 2007)* (finding that because "a large number of critical witnesses live and work in New Jersey, and a greater proportion of the

putative class members lives and works on the east coast than the west coast," convenience of the parties and witnesses favored transfer); *Hoefer, 2000 U.S. Dist. LEXIS 9299, 2000 WL 890862, at *2* (stating that because the headquarters of defendants were in Washington D.C., "crucial witnesses are easily accessible if the action is litigated in the District of Colombia").

C. ***Ease of Access to the Evidence***

"Documents pertaining to defendants' business practices are most likely to be found at their personal place of business." [*11] *Italian Colors Rest., 2003 U.S. Dist. LEXIS 20338, 2003 WL 22682482, at *5*. Neither party disputes the fact that most, if not all, of the evidence is located at Panera's Missouri headquarters. Opp'n at 12; Reply at 8.

Plaintiff argues that because Panera has not demonstrated that the evidence exists only in hard copies, rather than electronically, ease of access to the evidence should not favor transfer. This issue was recently discussed by another court in this district. The court noted that "[w]ith technological advances in document storage and retrieval, transporting documents does not generally create a burden." *Van Slyke v. Capital One Bank, 503 F. Supp. 2d 1353, 1362 (N.D. Cal. 2007)*. In *Van Slyke*, the court found that "[o]ther than describing where their records are located, defendants do not contend that transporting records, or reducing them to electronic form, would cause them significant hardship." *Id*. In assessing the overall impact of this factor, the court stated that transfer of venue "may reduce discovery costs somewhat, at least for defendants. This factor, however, is of diminished importance and is neutral toward transfer." *Id*.

Although the Court finds the reasoning of *Van Slyke* relevant to the [*12] present case, it is also mindful that "[l]itigation should proceed where the case finds its center of gravity." *Hoefer, 2000 U.S. Dist. LEXIS 9299, 2000 WL 890862, at *3* (internal quotation marks omitted). Therefore, because all of Panera's key witnesses and documents are located in or near Missouri, the center of gravity would plainly appear to be the Eastern District of Missouri.

D. ***Familiarity of Each Forum with Applicable Law***

Plaintiff's First Amended Complaint contains one claim under the FLSA and four claims under California law. It is true that this Court is more familiar with California law than is the Eastern District of Missouri. It is also true, however, "that other federal courts are fully capable of applying California law." *Foster, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408*. In addition, "it has been noted that where a federal court's jurisdiction is based on the existence of a federal question, as it is here, one forum's familiarity with supplemental state law claims should not override other factors favoring a different forum." *Id*. Nonetheless, given that four out of five of Plaintiff's claims arise out of California state law, the Court finds that this factor disfavors transfer.

E. ***Remaining Factors***

The remaining factors - [*13] the feasibility of consolidation with other claims, any local interest in the controversy, and the relative court congestion and time of trial in each forum - are neutral. To begin, there is no evidence of any other pending claims which might be consolidated with this action. In addition, both California and Missouri have interests in the controversy. California's interest lies in protecting the rights of its citizens, including the named Plaintiff and the putative class members of the proposed California class. Missouri's interest stems from the fact that Panera's headquarters are there and it is "the place where the personnel decisions at issue in this case were made." *Foster, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408, at *7*.

Finally, the evidence provided regarding court congestion does not favor one district over another. Although there are apparently fewer cases pending in the Eastern District of Missouri, the average time to trial in each district is 10 approximately two years. *See* Opp'n at 14; Reply at 9; *see also Foster, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408, at *7*.

F. ***Forum Selection Clause***

The final issue for the Court is the forum selection clauses contained in the two employment agreements executed by the parties. *See Jones, 211 F.3d at 498* [*14] (stating that forum selection clause is a significant but not dispositive factor in a court's *§ 1404(a)* analysis).

Pursuant to her employment with Panera, Plaintiff signed a "First Amended and Restated Joint Venture General Manager Compensation Plan" ("Compensation Plan"), and an "Employment Agreement JV General Manager" ("Employment Agreement," collectively, the

"Agreements"). Higgins Decl. Exs. A, B. The Compensation Plan outlines the compensation Plaintiff was to receive based on incentive targets put forth by Panera. The Employment Agreement outlined Plaintiff's salary, vacation, benefits, and termination compensation. The Agreements both contained forum selection clauses requiring that any disputes arising under the Agreements be brought in a state or federal court in Missouri.

"Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." *Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 (9th Cir. 1988)* In the present case, it does not appear that Plaintiff's claims require interpretation of the contracts. Rather, she asserts that, regardless of what the contracts say, she was paid as an [*15] exempt employee but was in fact engaged primarily in non-exempt work. The forum selection clauses therefore are neutral.

V. *CONCLUSION*

The second and third factors strongly favor transfer. The first and fourth factors, although weighing against transfer, provide significantly less weight that the second and third. As the remaining factors are neutral, for the reasons discussed herein, Panera's Motion to Transfer Venue is GRANTED. Any matters presently scheduled for hearing are VACATED and must be renoticed in the United States District Court for the Eastern District of Missouri. The clerk shall transmit the file to the clerk in that district pursuant to *Civil Local Rule 3-14*.

IT IS SO ORDERED.

Dated: July 21, 2008

/s/ Samuel Conti

UNITED STATES DISTRICT JUDGE

FRANK FOSTER, PHILLIP WAMOCK, individually, on behalf of all others similarly situated, and on behalf of the general public, Plaintiffs, v. NATIONWIDE MUTUAL INSURANCE CO., Defendant.

No. C 07-04928 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 95240

December 14, 2007, Decided
December 14, 2007, Filed

COUNSEL: [*1] For Frank Foster, Phillip Wamock, individually, on behalf of all others similarly situated, and on behalf of the general public, Plaintiffs: Matthew C Helland, LEAD ATTORNEY, Bryan Jeffrey Schwartz, Nichols Kaster & Anderson, PLLP, San Francisco, CA; Donald H. Nichols, Matthew H Morgan, Paul J. Lukas, Nichols Kaster & Anderson, PLLP, Minneapolis, MN.

For Nationwide Mutual Insurance Company, Defendant: Andrew J. Voss, Littler Mendelson, Minneapolis, MN; Richard H. Rahm, Littler Mendelson, PC, San Francisco, CA.

JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE TO THE SOUTHERN DISTRICT OF OHIO

Defendants have filed a motion to transfer venue, scheduled for hearing on December 18, 2007. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument, and hereby VACATES the hearing. Having considered the arguments of the parties and the papers submitted, and for good cause shown, the Court hereby GRANTS defendant's motion to transfer venue to the Southern District of Ohio.

BACKGROUND

This is a wage and hour violations suit brought by two named plaintiffs on behalf of two putative classes [*2] against defendant Nationwide Mutual Insurance Company. Plaintiffs and all putative class members were employed by defendant as special investigators or senior special investigators at all times relevant to the complaint. Complaint at PP 1-3. The Complaint describes two putative classes: (1) a nationwide Fair Labor Standards Act (FLSA) class bringing a claim for failure to pay overtime compensation; and (2) a California class bringing California state law claims for, *inter alia*, failure to pay overtime compensation and failure to provide meal and rest periods. *Id.* at PP 2-4, 11, 17, 36-38, 46-50.

The two named plaintiffs in this case are Frank Foster and Phillip Wamock. Foster resides in Placer County, California, in the Eastern District of California, and Wamock resides in Arkansas, though Wamock previously worked for defendant in southern California. *Id.* at PP 5-6. Plaintiffs contend that they were misclassified as exempt employees and as a result were denied overtime compensation, meal rest periods, and accurate itemized wage statements, in violation of the

FLSA and California law. *Id.* at P 1, 4.

According to the Complaint, defendant is a foreign corporation doing business and maintaining [*3] offices throughout the United States. *Id.* at P 7. Defendant's corporate headquarters is located in Columbus, Ohio, as are the departments charged with overseeing human resources, payroll, and pay policies. Wiencek Decl. at 2-3. While defendant has its central office in Ohio, it also owns the Allied Group, which has regional offices in roughly 12 states, including California. Wiencek Supplemental Decl. at 2. The California offices appear to be in Sacramento and Southern California and are not located within the Northern District of California. *Id.*; Plaintiffs' Opposition at 2.

Now before the Court is defendant's motion to transfer venue to the Southern District of Ohio.

LEGAL STANDARD

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil matter to any other district or division where it might have been brought." *28 U.S.C. § 1404(a)*. The purpose of *§ 1404(a)* is to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (internal citations and quotation omitted). A motion for transfer lies within [*4] the broad discretion of the district court, and must be determined on an individualized basis. *See Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000).*

To support a motion for transfer, the moving party must establish: (1) that venue is proper in the transferor district; (2) that the transferee district is one where the action might have been brought; and (3) that the transfer will serve the convenience of the parties and witnesses, and will promote the interests of justice. *See Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F. Supp. 503, 506 (C.D. Cal. 1992)*. Once venue is determined to be proper in both districts, courts evaluate the following factors to determine which venue is more convenient to the parties and the witnesses and will promote the interests of justice: (1) plaintiff's choice of forum, (2) convenience of the parties, (3) convenience of the witnesses, (4) ease of access to the evidence, (5) familiarity of each forum with the applicable law, (6) feasibility of consolidation with other claims, (7) any local interest in the controversy, and (8) the relative court congestion and time of trial in each forum. *See Williams v. Bowman, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001).*

DISCUSSION

The [*5] parties agree that venue would be proper in either this district or the Southern District of Ohio. The key dispute, therefore, is whether the transfer will serve the convenience of the parties and witnesses and will promote the interests of justice. As discussed above, courts evaluate several factors in making this determination. On the whole, the balance of factors in this case favors transfer to the Southern District of Ohio.

1. Plaintiffs' choice of forum

Defendant asserts that the deference usually given to plaintiffs' choice of forum should be given little to no weight because it is a putative class action and because there are indications of forum shopping. The Court agrees, and finds that plaintiffs' choice of forum in this matter should not be accorded deference.

A plaintiff's choice of forum generally receives deference in a motion to transfer venue. *Lewis v. ACB Bus. Servs., 135 F.3d 389, 413 (6th Cir. 1998)*. In class actions, however, a plaintiff's choice of forum is often accorded less weight. *See Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 67 S. Ct. 828, 91 L. Ed. 1067 (1947)*; *Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987)* ("Although great weight is generally accorded plaintiff's choice [*6] of forum . . . when an individual . . . represents a class, the named plaintiff's choice of forum is given less weight."). Nonetheless, even in a class action,

> [i]n judging the weight to be accorded [plaintiff's] choice of forum, consideration must be given to the extent of both [plaintiff's] and the [defendants'] contacts with the forum, including those relating to [plaintiff's] cause of action. . . . If the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter, [plaintiff's] choice is entitled to only minimal consideration.

Lou, 834 F.2d at 739 (citations omitted). Where

forum-shopping is evident, however, courts should disregard plaintiff's choice of forum. *Italian Colors Rest. v. Am. Express Co., No. C-03-3719, 2003 U.S. Dist. LEXIS 20338, 2003 WL 22682482 *4 (N.D. Cal. Nov. 10, 2003)*; *Royal Queentex Enters. v. Sara Lee Corp., No. C-99-04787, 2000 U.S. Dist. LEXIS 10139, 2000 WL 246599 *3 (N.D. Cal. March 1, 2000).*

In this case, multiple factors weigh against consideration of plaintiffs' choice of forum. First, plaintiffs have brought this case as a class action. Second, "the operative facts have not occurred within the forum," *Lou, 834 F.2d at 739*, because the only named plaintiff [*7] who resides in California, Frank Foster, lives and works primarily in the Eastern District of California, not in the Northern District as alleged in the Complaint and plaintiffs' opposition brief. After this mistake was brought to the parties' attention, plaintiffs acknowledged that Foster actually resides in the Eastern District, but alleged that Foster spent approximately 30% of his working hours in the Northern District. However, given the fact that Foster lives outside of the Northern District and worked 70% of the time in the Eastern District, the Ninth Circuit's decision in *Lou* indicates that very little weight should be accorded to plaintiffs' choice of forum. *Id.; see also Strigliabotti v. Franklin Res., Inc.*, No. C-04-0883, 2004 WL 2254556 *3 (N.D. Cal. Oct. 5, 2004) ("Where a plaintiff's choice of forum is a district other than one in which he resides, his choice may be given considerably less weight.") (citing *Black v. J.C. Penny Life Ins. Co., No. C-01-4070, 2002 U.S. Dist. LEXIS 5886, 2002 WL 523568 *3 (N.D. Cal. Apr. 1, 2002)*). Third, even assuming plaintiffs made an innocent mistake about where Foster resides, forum shopping can be inferred here based on plaintiffs' apparent eagerness to have their [*8] case tried in the Northern District rather than in the Eastern District or in Arkansas, where the lead plaintiffs reside. Therefore, the Court will accord no deference to plaintiffs' choice of forum.

2. Convenience of the witnesses and parties

Defendant argues that the convenience of the parties and witnesses weighs heavily in favor of transfer because defendant's corporate headquarters and witnesses are located in Ohio and because more putative class members worked and lived on or near the East Coast. Plaintiffs argue in response that the location of party witnesses should be afforded little weight and that the majority of plaintiffs who have already opted in reside on or near the West Coast. For the following reasons, the Court agrees with defendant that these factors, taken together, weigh in favor of transfer.

Plaintiffs are correct that some courts have accorded greater weight to the convenience of third-party witnesses than to the convenience of party witnesses. *See Flotsam of Cal., Inc. v. Huntington Beach Conf. & Visitors Bureau, No. C-06-7028, 2007 U.S. Dist. LEXIS 31762, 2007 WL 1152682 *3 (N.D. Cal. April 18, 2007)*; *Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994)*; [*9] *but see In re Funeral Consumers Antitrust Litig.*, No. C-05-1804, 2005 WL 2334362 *4 & n.3 (N.D. Cal. Sept. 23, 2005). In this case, however, neither party has identified any third-party witnesses at all. The Court therefore finds that the convenience of third-party witnesses is not a relevant factor, and will instead focus on the convenience of the parties and witnesses affiliated with the parties.

Defendant asserts that the Southern District of Ohio will be more convenient for both parties and their witnesses. The Court agrees. Defendant's corporate headquarters is located in Columbus, Ohio, as are many of the witnesses defendant would likely call to testify at trial. For instance, most of defendant's management-level employees who oversee the special investigators or work in human resources are based in Ohio; others work in Iowa and Florida, making Ohio more convenient for them as well. Defendant's Motion at 4-6; Wiencek Decl. at 2-4. Plaintiffs argue that defendant is a national company with offices throughout the country, including the regional offices of the Allied Group located in Sacramento, Camarillo, and La Mesa, California. *See* Plaintiffs' Opposition at 2. None of these cities [*10] is located within the Northern District of California, however, and neither party suggests that employees at Allied Group offices in California will be involved in this litigation as witnesses or otherwise. For these reasons, the Court finds that the Southern District of Ohio is far more convenient for defendant than the Northern District of California.

Ohio also appears to be more convenient for plaintiffs. The nationwide class in this case consists of all persons who were employed by defendant as special investigators or senior special investigators at any time over the last two years -- or three years if the violation was willful, *29 U.S.C. § 255(a)* - and were misclassified as exempt, Complaint at P 2. According to defendant, there have been 306 special investigators employed

during the two-year class period who fit this description. Wiencek Supplemental Decl. at 2. Although California has been home to more special investigators than any other state, with a total of 31, the majority of the special investigators lived in eastern states. *Id.* at 2-3. For example, 67 lived in New York, Ohio, and Pennsylvania, making the Southern District of Ohio far more convenient for them, while 26 [*11] lived in Florida, 14 lived in Maryland, 13 lived in Michigan, 16 lived in North Carolina, 9 lived in Tennessee, and 18 lived in Virginia. *Id.* Adding up these nine states alone, all of which are far closer to Ohio than to California, creates a total of 163 special investigators. This total does not include the many other special investigators residing in states such as Alabama, Connecticut, Georgia, Iowa, Mississippi, and South Carolina. *See id.* By contrast, the only western states that special investigators called home were Arizona, California, Colorado, Nevada, Oregon, Utah, and Washington, with a total of 55 special investigators. *See id.* This is less than the total number of special investigators in New York, Ohio, and Pennsylvania combined. The numbers are similarly skewed in favor of the eastern states for a class period of three years rather than two. *Id.* at 3. In addition, the second named plaintiff, Phillip Wamock, resides in Arkansas. Complaint at 6.

Plaintiffs argue that Ohio is actually less convenient for plaintiffs when the "current reality of the case" is taken into account. Plaintiffs' Opposition at 7. That is, plaintiffs suggest the Court should examine only the residences [*12] of those plaintiffs who have opted in to the FLSA class at this point, rather than the entire potential class of FLSA plaintiffs. *Id.* Of the opt-in plaintiffs, 11 are from California, Arizona, Nevada, and Texas, and 5 are from eastern states. Morgan Decl. at 1-2. Plaintiffs cite no authority for this method of examining the convenience of putative class members, and for good reason. Plaintiffs acknowledge that "the other Special Investigators employed by Defendant have not received notice of this lawsuit," and that the ones who have opted in "have joined only as the result of Plaintiffs' informal efforts and word of mouth." Plaintiffs' Opposition at 3. The Court does not imagine that plaintiffs plan to keep the other 290 potential class members in the dark about the existence of this lawsuit, and that instead plaintiffs will attempt to enlarge the class far beyond the current 16 special investigators who have opted in. At this point, it is simply too early to know exactly where all the class members reside, but the total number of potential class members paints a far more accurate picture of the eventual class than the first 16 special investigators who happened to have heard about [*13] the lawsuit through word-of-mouth. Were it otherwise, a party could engineer a favorable geographic distribution of opt-in plaintiffs for purposes of a transfer motion by selectively notifying potential class members in certain states. The Court will not rely this haphazard group of opt-in plaintiffs in determining which venue is more convenient for the class.

For all of these reasons, the Court finds that the convenience of the parties and witnesses weighs substantially in favor of transfer to the Southern District of Ohio. This conclusion is supported by a number of other district court decisions. *See, e.g., Evancho v. Sanofi-Aventis U.S., Inc., No. C-07-0098, 2007 U.S. Dist. LEXIS 35500, 2007 WL 1302985 *3 (N.D. Cal. May 3, 2007)* (these factors weigh substantially in favor of transfer to New Jersey where "a large number of critical witnesses live and work in New Jersey, and a greater proportion of the putative class members lives and works on the east coast than on the west coast"); *Freeman v. Hoffmann La Roche, Inc., No. 06CIV1 3497, 2007 U.S. Dist. LEXIS 23132, 2007 WL 895282 *2 (S.D. N.Y. Mar. 21, 2007)* (convenience of the New Jersey-based corporate witnesses was an important factor); *Waldmer v. SER Solutions, Inc., No. 05-2098, 2006 U.S. Dist. LEXIS 4934 *10-15, 17 (D. Kan. Feb. 3, 2006)* [*14] (finding the location of witnesses to be an important factor and noting that "the logical origin of this dispute is Virginia. It was at the company's headquarters in Virginia [where defendant's] personnel made and implemented the decision to treat plaintiffs as exempt under the FLSA. No company policies were ever established in Kansas.").

3. Ease of access to the evidence

This Court has noted that "[d]ocuments pertaining to defendants' business practices are most likely to be found at their principal place of business." *Italian Colors Rest., 2003 U.S. Dist. LEXIS 20338, 2003 WL 22682482 at *5*. Defendant contends that its policies and practices related to human resources, compensation, and the special investigator positions more generally were generated at its corporate headquarters in Ohio and are currently maintained there. Wiencek Decl. at 2-3. Defendant also asserts that payroll records are processed in Ohio and that employee pay is prepared and distributed from corporate headquarters. *Id.* Plaintiffs argue in response that this evidence is stored in electronic format and will not be

difficult to access in California. Plaintiffs are most likely correct that many of these records and policies may be stored electronically, [*15] but this Court has held that while "developments in electronic conveyance have reduced the cost of document transfer somewhat, the cost of litigation will be substantially lessened if the action is venued in the same district where most of the documentary evidence is found." *Italian Colors Rest., 2003 U.S. Dist. LEXIS 20338, 2003 WL 22682482 at *5*. Plaintiffs also argue that the special investigators themselves will be in possession of important evidence, but as discussed above, these class members are spread across the country and are far more likely to live in eastern states bordering or close to Ohio than in California or other western states. Accordingly, this factor also weighs in favor of transfer.

4. Familiarity of each forum with the applicable law

Plaintiffs argue that because the complaint includes supplemental claims arising under California law, this factor weighs in favor of keeping the case here because this Court is more familiar with California law than the Southern District of Ohio. It is true that this Court is more familiar with California law, *see Evancho, 2007 U.S. Dist. LEXIS 35500, 2007 WL 1302985 *4*, but it is also true that other federal courts are fully capable of applying California law, *see Strigliabotti*, 2004 WL 2254556 *5. [*16] In addition, it has been noted that where a federal court's jurisdiction is based on the existence of a federal question, as it is here, one forum's familiarity with supplemental state law claims should not override other factors favoring a different forum. *Funeral Consumers*, 2005 WL 2334362 at *6 ("The caselaw favoring the district 'at home' on the controlling law has arisen in the *diversity* context, not the *federal-question* context.") (citing *Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986)* (listing as a factor "the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action")). Therefore, since there are California state law claims at issue in this case, the Court will consider this factor as weighing somewhat in favor of trying this case in the Northern District of California.

5. Remaining factors

The remaining factors -- the feasibility of consolidation with other claims, local interest in the controversy, and the relative court congestion and time of trial in each forum -- are neutral. First, there is no evidence of other claims to consolidate with this case. Second, both states have an interest [*17] in the controversy. Ohio is interested because it is the location of defendant's corporate headquarters and the place where the personnel decisions at issue in this case were made. California has an interest in protecting the rights of the putative California class members, though if plaintiffs were truly concerned with protecting the local interest in this litigation they might have filed in the Eastern District of California, where lead plaintiff Foster resides and spent most of his working hours and where the Allied Group operates a regional office. Finally, the evidence provided regarding court congestion shows that this factor is more or less neutral. While the Northern District of California clearly has more cases pending per judge, the median time from filing to disposition is shorter in this District, at 7.4 months, than in the Southern District of Ohio, at 12.6 months. *See* Rahm Decl. at exs. I & J. In both districts, however, it takes a little over two years to proceed to trial. *Id.* The Court finds that this factor is neutral.

CONCLUSION

Viewing the totality of the factors, the Court finds that this case belongs in the Southern District of Ohio. A larger proportion of the putative [*18] nationwide class members resides in eastern states than in western states, and the largest single geographical grouping of potential class members reside in Ohio and neighboring states. Furthermore, given the circumstances of this case, plaintiffs' choice of forum carries no weight, and the policies and practices of defendants that underlie this action originated at defendant's headquarters in Ohio, where many witnesses are also based. For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendant's motion to transfer venue [Docket No. 15].

IT IS SO ORDERED.

Dated: December 14, 2007

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

1 of 1 DOCUMENT

GREGORY YOUNG, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. WELLS FARGO & CO., et al., Defendants.

No. C 08-3735 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 103955

December 17, 2008, Decided
December 17, 2008, Filed

COUNSEL: [*1] For Gregory Young, Odetta Young, Edward Huyer, Connie Huyer, on behalf of themselves and all others similarly situated, Plaintiffs: Michael Robert Reese, LEAD ATTORNEY, Kim E. Richman, PRO HAC VICE, Reese Richman LLP, New York, NY; Deborah Clark-Weintraub, Whatley Drake & Kallas LLC, New York, NY; J. Preston Strom, Mario A. Pacella, Strom Law Firm, L.L.C., Columbia, SC; Joshua Eric Whitehair, Severson & Werson, San Francisco, CA; Sara C. Hacker, PRO HAC VICE, Birmingham, AL.

For Wells Fargo & Co., Wells Fargo Home Mortgage, Inc., Defendants: Joshua Eric Whitehair, Severson & Werson, San Francisco, CA.

JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE TO SOUTHERN DISTRICT OF IOWA; DENYING ALL OTHER PENDING MOTIONS AS MOOT

Several motions are scheduled for a hearing on December 19, 2008. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matters are appropriate for resolution without oral argument, and VACATES the hearing. The Court also VACATES the case management conference scheduled for the same day. For the reasons set forth below, the Court GRANTS defendants' motion and TRANSFERS this action to the United States [*2] District Court for the Southern District of Iowa.

BACKGROUND

Plaintiffs filed this lawsuit on behalf of a nationwide class of mortgage borrowers, and they challenge property inspection fees and late fees assessed by Wells Fargo. The named plaintiffs are Gregory and Odetta Young, who purchased a home in New Jersey by obtaining a Wells Fargo mortgage, and Edward and Connie Huyer, who purchased a home in South Carolina by obtaining a Wells Fargo mortgage. Complaint PP 12-13. The complaint alleges claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and various California statutes, including the Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200 et seq.*, False Advertising Law, *Cal. Bus. & Prof. Code §§ 17500 et seq.*, and the Consumer Legal Remedies Act, *Cal. Civ. Code §§ 1750 et seq.*

Plaintiffs have sued Wells Fargo & Co. ("WFC") and Wells Fargo Home Mortgage, Inc. WFC is a "diversified financial services company headquartered in San Francisco, California." Complaint P 14. The complaint alleges that Wells Fargo Home Mortgage Inc. is a subsidiary of WFC, and that Wells Fargo Home

Mortgage Inc. serviced plaintiffs' mortgage loans. *Id*. PP 14-15.

Defendants have submitted [*3] the declaration of Keith Schares, who is the Vice President - Loss Control/Claims/Property Preservation of Wells Fargo Bank, N.A. ("WFB"). Mr. Schares states that WFB is a national banking association, chartered and with a principal place of business in South Dakota, and that WFB is a subsidiary of WFC. Schares Decl. PP 3-4. Mr. Schares states that Wells Fargo Home Mortgage ("WFHM") is WFB's residential mortgage loan origination and servicing division. *Id*. P 5. "Prior to May 8, 2004, 'Wells Fargo Home Mortgage, Inc.' did exist; it was a corporation, and a subsidiary of WFB. On that date, however, it was merged into WFB. Thus, WFHM no longer exists as a separate corporation or legal entity. Rather it is the mortgage division of WFB, a national bank." *Id*. [1]

> 1 Plaintiffs assert that "defendants' claim that Wells Fargo Home Mortgage Inc. ceased to exist as a legal entity as of 2004 (and therefore cannot be sued by homeowners who accuse it of fraud) [] appears to be untrue" based upon a recent bankruptcy case involving Wells Fargo Home Mortgage Inc. Plaintiffs' Opposition at 2 (citing *In re Dorothy Chase Stewart, 391 B.R. 327 (Bankr. E.D. La. 2008))*. However, as defendants note, in that [*4] bankruptcy action Wells Fargo has appeared as "Wells Fargo Bank, NA Successor by Merger to Wells Fargo Home Mortgage, Inc. *See* Defs' Request for Judicial Notice Ex. A (Response to Objection to Proof of Claim filed in *In re Dorothy Chase Stewart*). In any event, the Court finds it irrelevant to the transfer analysis whether Wells Fargo Home Mortgage Inc. is a separate legal entity, and thus plaintiffs do not need to conduct discovery on that issue for purposes of resolving the instant motion. Regardless of WFHM's legal status, the factual record is undisputed that WFHM is headquartered in Des Moines, and that the witnesses and evidence associated with WFHM are largely if not entirely located in Des Moines.

Mr. Schares states that WFHM does not have headquarters in California, as alleged in the complaint, but rather that WFB's mortgage division is headquartered in Des Moines, Iowa, where over four thousand employees work. *Id*. P 6.

> The chief officers and many of the employees responsible for WFHM's mortgage business are located in these offices in Des Moines. These include the co-Presidents of WFHM, the Vice President - Head of Mortgage Servicing, and the Vice President - Loss Control/Claims/Property [*5] Preservation. The Bank has officers and employees in other states, including California. However, the officers and directors who work in the mortgage division, WFHM, and who are responsible for developing, implementing and managing the policies, practices and procedures at issue in this action, i.e., the assessment of fees to borrowers in default, are all located in the West Des Moines area. None of these persons is located in California. The WFHM officers and employees in Des Moines would be able to testify about its loan servicing operations and its policies and procedures concerning the assessment of fees to borrowers in default, including the purpose and application of property inspection and late fees, which are at issue in this action. Such potential witnesses would include me, Sherilee Massier, Loan Administration Manager and Melissa Keller, Loan Administration Manager. All three of us live and work in the Des Moines area of Iowa. WFHM's procedures for charging fees to its real estate borrowers were not devised, implemented or directed from California, as alleged in paragraphs 85 and 90 of the Complaint.

Id. P 7.

With regard to WFC, Mr. Schares states that WFC is a bank holding [*6] company headquartered in San Francisco. "It is primarily composed of a board of directors who delegate the daily routine of conducting WFB's business to WFB's officers and employees. The directors fulfill their fiduciary and legal obligations to WFC, but they are not involved in the administration of WFB's mortgage business, and they were not involved in

the creation, execution or supervision of the particular policies and practices at issue in this action, i.e., the assessment of fees against borrowers in default. WFC has few officers and employees of its own, but the only ones who are involved in these practices and policies live and work in the West Des Moines area of Iowa." *Id*. P 4.

Defendants have submitted copies of plaintiffs' mortgages/deeds of trust. The documents identify WFB as the lender, and state that WFB's address is "P.O. Box 5137, Des Moines, IA 50306-5137." *Id*. Ex. A at 2, B at 2. The Youngs made mortgage payments by sending those payments to a lock box established by a vendor for WFHM in Newark, New Jersey. *Id*. P 12. The Huyers made their mortgage payments by sending those payments to a lock box established by a vendor for WFHM in Dallas, Texas. *Id*. P 13. Neither [*7] the Youngs nor the Huyers ever mailed their mortgage payments to California. *Id*. PP 12-13.

Mr. Schares also states that WFHM maintains loan servicing records which are stored on WFHM's mainframe computer system known as the Fidelity System. *Id*. P 9. The complaint refers to this system as the "Fidelity Mortgage Servicing Package" or "Fidelity MSP." Complaint PP 2, 23. Plaintiffs allege that the Fidelity MSP "is programmed to assess as many fees as possible." *Id*. P 22. According to defendants, computer systems for the Fidelity System are maintained in Jacksonville, Florida and Little Rock, Arkansas. Schares Decl. P 9. Mr. Schares states that WFHM employees responsible for operating the Fidelity System are located throughout the United States, and that the employees in Des Moines "are the persons knowledgeable about how that system is programmed." *Id*.

WFHM contracts with three vendors to conduct inspections of properties which secure its mortgage loans: First American Field Services, Inc., LPS Field Services, Inc., and Mortgage Contracting Services, LLC. *Id*. P 10. Mr. Schares states that contacts for First American are located in Texas; contacts for LPS are located in Ohio; and contacts [*8] for Mortgage Contracting Services are located in Florida. *Id*.

LEGAL STANDARD

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil matter to any other district or division where it might have been brought." *28 U.S.C. § 1404(a)*. The purpose of *§ 1404(a)* is to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (internal citations and quotation omitted). A motion for transfer lies within the broad discretion of the district court, and must be determined on an individualized basis. *See Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000)*.

To support a motion for transfer, the moving party must establish: (1) that venue is proper in the transferor district; (2) that the transferee district is one where the action might have been brought; and (3) that the transfer will serve the convenience of the parties and witnesses, and will promote the interests of justice. *See Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F. Supp. 503, 506 (C.D. Cal. 1992)*. Transfer is discretionary, [*9] but is governed by certain factors specified in *§ 1404(a)* and in relevant case law.

DISCUSSION

As an initial matter, the Court finds that venue would be proper in either this district or the Southern District of Iowa. A RICO action may be brought in any district in which a defendant resides, is found, has an agent or transacts its affairs, or where the general venue statute is satisfied. *See 18 U.S.C. § 1965(a)*. There is no dispute that defendants reside or may be found in both districts.

Once venue is determined to be proper in both districts, courts evaluate the following factors to determine which venue is more convenient to the parties and the witnesses: (1) plaintiff's choice of forum, (2) convenience of the parties, (3) convenience of the witnesses, (4) ease of access to the evidence, (5) familiarity of each forum with the applicable law, (6) feasibility of consolidation with other claims, (7) any local interest in the controversy, and (8) the relative court congestion and time of trial in each forum. *See Williams v. Bowman, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)*.

The Court finds that on balance, these factors favor transfer. Where a plaintiff does not reside in the forum, the [*10] Court may afford his choice considerably less weight. *See* Schwarzer et al., Federal Civil Procedure Before Trial § 4:760 (2006). Here, the Youngs reside in New Jersey and the Huyers reside in South Carolina, and none of the named plaintiffs appear to have any

connection to this district. In addition, "when an individual brings a derivative suit or represents a class, the named plaintiff's choice of forum is given less weight." *Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987)*. The evidence before the Court shows that WFB's policies, procedures and practices regarding the assessment of property inspection and late fees were developed, implemented and managed at the mortgage division headquarters in Des Moines. The address listed in plaintiffs' mortgage agreements for the "lender" is WFB's address in Des Moines. Plaintiffs assert that WFC dictated the policies and practices at issue from its headquarters in California, and they argue that if the Court is inclined to grant the transfer motion they should be permitted to conduct discovery on WFC's involvement in the disputed policies and practices. However, even if WFC is involved to some degree in the formulation of these policies and [*11] practices, the connection between plaintiffs' claims and this district is much more tenuous than the connection to Iowa.

The Court further finds that on balance, Iowa is more convenient for the parties and witnesses, and provides greater ease of access to evidence. Plaintiffs assert that California is more convenient because there are more direct flights on two airlines (United Airlines and American Airlines) from JFK to SFO than from JFK to Des Moines. Plaintiffs' evidence in support of this assertion consists of a print out from an internet travel site showing a list of flights from JFK to SFO; there is no information about flights to Des Moines, nor is there any information about flights from plaintiffs' states of New Jersey or South Carolina. The Court cannot conclude that this district is more convenient than Iowa for plaintiffs. However, the Court does find that Iowa is more convenient for defendant and the identified WFB and third party witnesses. Mr. Schares states that the senior level officers and employees responsible for developing and implementing the polices and procedures at issue are located in Des Moines. Much of the evidence is located in Des Moines where the mortgage [*12] division is headquartered, or Florida and Arkansas where the Fidelity MSP computer servers are maintained.

Plaintiffs assert that it is likely that many class members reside in California because of the "struggling real estate market" in California, and that transfer should be denied because this district will be more convenient for these class members. The Court finds that even if this assertion is true, [2] that fact does not weigh against transfer because the relevant inquiry is the convenience of the named parties and principal witnesses likely to be deposed or testify at trial. As noted above, the named plaintiffs do not reside in California, defendants' identified witnesses reside in Des Moines, and the third party vendor witnesses are largely not located in California. [3] In light of the fact that this case is brought as a nationwide class action, class members will be located throughout the country, including, no doubt, numerous borrowers on the East [4] and West coasts and in the major metropolitan areas scattered across the country.

2 As with plaintiffs' assertion that they need to conduct discovery regarding the legal status of WFHM, the Court finds that discovery on class members [*13] is not necessary to decide the transfer motion. The Court also notes that defendants offered to make Mr. Schares available for deposition on the matters contained within his declaration, and that plaintiffs refused.

3 The Court notes that First American Real Estate Information Services is headquartered in California. Even if there are some First American witnesses located in California, according to defendants the First American witnesses with knowledge of the issues in this case are located in Texas. Schares Decl. P 10.

4 Convenience of counsel is not among the factors to be separately considered when evaluating a venue motion. Here, however, all plaintiffs' counsel are from the eastern half of the country (New York City, Birmingham, Alabama and Columbia, South Carolina). Had the action been filed in New Jersey, where the Young plaintiffs reside, or South Carolina, where the Huyer plaintiffs reside, at least their convenience and counsel's convenience would be affirmatively improved. As a matter of geography, litigation in California will convenience neither the Youngs, the Huyers nor counsel.

The remaining factors are either neutral or favor transfer. With respect to familiarity with [*14] plaintiff's RICO claims, "either forum is equally capable of hearing and deciding those questions." *DealTime.com Ltd. v. McNulty, 123 F. Supp. 2d. 750, 757 (S.D.N.Y. 2000)*. Although plaintiffs have alleged a number of California claims, it is unclear whether California law applies. The mortgages plaintiffs signed state that "[t]his Security Instrument shall be governed by federal law and the law

of the jurisdiction in which the Property is located." Schares Decl. Ex. A at 13; B at 13. In addition, the Court notes that generally nonresidents may not sue under California statutes unless the wrongful conduct occurred in California. *See generally Norwest Mortgage, Inc. v. Superior Court, 72 Cal. App. 4th 214, 222-27, 85 Cal. Rptr. 2d 18 (1999).*

The Court finds that the Southern District of Iowa has a stronger interest in the controversy than does this district. Notably, none of the named plaintiffs reside in either district. Although WFC is located in this district and may be a proper defendant, [5] the record before the Court shows that the Bank's mortgage division is headquartered in Des Moines, and defendants state that the policies and practices at issue were all designed and implemented in Des Moines.

> 5 Defendants [*15] state that they intend to move to dismiss WFC and substitute WFB. The Court does not express any view regarding whether WFC is a proper defendant.

Finally, plaintiffs cite the fact that the time from filing to *disposition* is quicker in this district than in the Southern District of Iowa, while defendants emphasize that the time from filing to *trial* is shorter in Iowa; at the outset of the litigation, the Court is unable to predict which statistic is more relevant. Defendants also note that this district is relatively more congested by virtue of sheer volume of filings and pending cases. The Court finds that this factor is neutral in the transfer analysis.

CONCLUSION

For the foregoing reasons and good cause shown, the Court hereby GRANTS defendants' motion to transfer venue, and TRANSFERS this action to the United States District Court for the Southern District of Iowa. The Court DENIES AS MOOT defendants' motion for a protective order and motion to dismiss the complaint. (Docket Nos. 12, 15, & 22).

IT IS SO ORDERED.

Dated: December 17, 2008

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

1 of 1 DOCUMENT

SUSAN FARMER, et al., Plaintiffs, v. FORD MOTOR CO., et al., Defendants.

No. C 07-3539 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 90289

November 28, 2007, Decided
November 28, 2007, Filed

COUNSEL: [*1] For Susan Farmer, Arthur Farmer, Estate of Virginia M. Farley, Virginia M. Farley Revocable, Plaintiffs: Nancy Chung, Robert Jay Nelson, Scott Purington Nealey, LEAD ATTORNEYS, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA.

For Ford Motor Company, Defendant: Amir M Nassihi, H. Grant Law, Mia Ottilia Solvesson, LEAD ATTORNEYS, Shook, Hardy & Bacon LLP, San Francisco, CA.

For Budget Rent A Car System, Inc., Defendant: Douglas Alson Sears, LEAD ATTORNEY, Joel Aaron Eisenberg, Michael A. Bishop, Matheny Sears Linkert & Jaime, Sacramento, CA.

JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE TO NORTHERN DISTRICT OF OHIO

Defendants' motion to transfer venue is scheduled for a hearing on November 30, 2007. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral argument, and VACATES the hearing. For the reasons set forth below, the Court GRANTS defendants' motion and TRANSFERS this action to the United States District Court for the Northern District of Ohio.

BACKGROUND

This case arises out of an automobile accident that occurred on June 10, 2006 in Akron, Ohio. [*2] On June 8, 2006, plaintiff Susan Farmer rented a 2006 Grand Marquis from defendant Budget Rent A Car located at Cleveland Hopkins International Airport in Ohio. Complaint PP 2-3. [1] Mrs. Farmer was visiting her mother, Virginia Farley, in Ohio where Ms. Farley lived. *Id.* PP 5, 10. The complaint alleges that on June 10, 2006, in the parking lot of the Carousel Dinner Theater in Akron, Ohio, Mrs. Farmer put the rental car into what she believed to be "park," and then exited the car to assist her mother into the passenger seat of the car. *Id.* P 3. Plaintiffs allege that as Mrs. Farmer opened the passenger door, the car self-shifted into "reverse," knocking Ms. Farley to the ground. *Id.* Mrs. Farmer attempted to pull her mother away from the car, and became caught between the car's floorboard and the open passenger door. *Id.* Mrs. Farmer was dragged 80 feet across the parking lot. *Id.* Both Mrs. Farmer and her mother were injured as a result of the accident. *Id.*

1 The complaint alleges that "the solicitation for and eventual reservation with BUDGET for the GRAND MARQUIS rental car was made in

Contra Costa County, California." *Id.* P 5.

Mrs. Farmer and her mother received assistance at the scene [*3] from members of the Akron Police Department, and were then taken to the Akron City Hospital where they received further treatment. Nassihi Decl. P 2, Ex. A. Mrs. Farmer has required extensive medical treatment as a result of her injuries, including major reconstructive spinal surgery and spinal fusion, which took place in San Francisco and Contra Costa County. Farmer Decl. P 3. The allegedly defective car is being stored in Cleveland, Ohio. Kachler Decl. P 6. Soon after the accident, Mrs. Farmer and Ms. Farley retained a Hudson, Ohio attorney to represent them and to ensure that the vehicle be preserved in its then-current condition. Nassihi Decl. Ex. B.

On June 7, 2007, Mrs. Farmer, the Estate of Virginia M. Farley, [2] and the Virginia M. Farley Revocable Trust, through executor and trustee, Gail M. Royster, filed this action in Contra Costa County Superior Court, alleging strict products liability, negligence, violations of *California Business & Professions Code § 17200 et seq.*, and California Civil Code § 750 *et seq.* In addition, Arthur L. Farmer, Mrs. Farmer's husband, alleges loss of consortium due to his wife's injuries. Mr. and Mrs. Farley live in Orinda, California. Complaint [*4] PP 7-8. Gail M. Royster is Virginia Farley's daughter, and is a resident of Ohio. *Id.* P 9.

2 The complaint states that Ms. Farley passed away in November 2006, at the age of 93. Complaint P 9.

Defendant Budget Rent A Car System, Inc., rented and maintained the allegedly defective car solely in Ohio. Kachler Decl. PP 3-4. Of the previous renters of the car who Budget has identified to date, none are residents of California, and four are residents of Ohio. *Id.* P 5. Defendant Ford Motor Company has submitted documents showing that the vehicle was designed in Michigan and assembled in Canada. Nassihi Decl. P 6, Ex. C. Defendant Ford is a Delaware corporation with its headquarters in Dearborn, Michigan. *Id.* P 12. Defendant Budget is a Delaware corporation with its principal place of business in Parsippany, New Jersey. Eisenberg Decl. P 2.

On July 9, 2007, defendants removed this action on the basis of diversity jurisdiction. Defendants now move to transfer this action to the Northern District of Ohio pursuant to *28 U.S.C. § 1404(a)*.

LEGAL STANDARD

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil matter to any other district or [*5] division where it might have been brought." *28 U.S.C. § 1404(a)*. The purpose of *§ 1404(a)* is to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (internal citations and quotation omitted). A motion for transfer lies within the broad discretion of the district court, and must be determined on an individualized basis. *See Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000)*.

To support a motion for transfer, the moving party must establish: (1) that venue is proper in the transferor district; (2) that the transferee district is one where the action might have been brought; and (3) that the transfer will serve the convenience of the parties and witnesses, and will promote the interests of justice. *See Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F. Supp. 503, 506 (C.D. Cal. 1992)*. Transfer is discretionary, but is governed by certain factors specified in *§ 1404(a)* and in relevant case law.

DISCUSSION

As an initial matter, the Court finds that venue would be proper in either this district or the Northern District of Texas, [*6] and plaintiffs do not dispute this point. Once venue is determined to be proper in both districts, courts evaluate the following factors to determine which venue is more convenient to the parties and the witnesses: (1) plaintiff's choice of forum, (2) convenience of the parties, (3) convenience of the witnesses, (4) ease of access to the evidence, (5) familiarity of each forum with the applicable law, (6) feasibility of consolidation with other claims, (7) any local interest in the controversy, and (8) the relative court congestion and time of trial in each forum. *See Williams v. Bowman, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)*.

Plaintiffs only address the first three factors: plaintiffs' choice of forum, and convenience of the parties and witnesses. Plaintiffs argue that their choice of forum is to be given great deference, and they emphasize the fact that the only two living plaintiffs reside in California.

Plaintiffs also argue that Mrs. Farmer's current treating physicians are located in California, and that transfer will be very inconvenient for these witnesses.

Courts should afford considerable weight to a plaintiff's choice in determining a motion to transfer. *See Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985).* [*7] A plaintiff's choice of forum, however, is not dispositive, and must be balanced against other factors of convenience. For example, where the transactions giving rise to the action lack a significant connection to the plaintiff's chosen forum, the plaintiff's choice of forum is given considerably less weight, even if the plaintiff is a resident of the forum. *See* Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial § 4:763 (2007); *see also Schmidt v. American Inst. of Physics, 322 F. Supp. 2d 28, 33 (D.D.C. 2004)*. Here, a majority of the operative facts giving rise to this case occurred in Ohio; the accident took place in Ohio, the car was serviced and maintained in Ohio, and plaintiffs were treated on the scene and at an Ohio hospital. Plaintiffs are correct that the design and assembly of the vehicle did not take place in Ohio; however, neither of those transactions occurred in California. [3]

> 3 Citing the fact that plaintiffs initially retained an Ohio attorney, defendants contend that plaintiffs' choice of forum should be disregarded because there are indications of forum shopping. The Court does not find this fact necessarily indicative of forum shopping, and accordingly [*8] does not find it relevant in the transfer analysis.

On the whole, transfer will be marginally more convenient for the parties. Two of the four named plaintiffs -- the Estate of Virginia Farley and the Virginia M. Farley Revocable Trust -- are based in Ohio. Although the Farmers reside in California, and thus transfer will be less convenient for them, the Farmers do have ties to Ohio. Further, defendants note that the Northern District of Ohio permits parties to attend hearings via telephone, and thus to the extent the Farmers wish to attend hearings, they may do so by phone. Nassihi Reply Decl. P 10, Ex. O (local rules). Because defendants are large companies, California would not be a particularly inconvenient forum. However, defendant Ford's principal place of business is in neighboring Michigan, and defendant Budget is headquartered in New Jersey, which is closer to Ohio.

The Court also finds that transfer will be significantly more convenient for the witnesses. Defendants have identified numerous witnesses who are located in Ohio, including the responding police officers, paramedics and physicians, employees of Budget, and individuals who previously rented the car. The Court is not [*9] persuaded by plaintiffs' assertion that the testimony of these individuals is not particularly relevant or important. Witnesses to the aftermath of the accident may possess information relevant to liability and causation, and whether prior renters had any experiences similar to plaintiffs' would be highly relevant. Similarly, Budget employees located in Ohio will testify as to the rental and maintenance of the car. Ford employees in nearby Michigan will testify about the design and manufacture of the car. Mrs. Farmer's current treating physicians are located in California, and it is true that transfer will be inconvenient for them. However, their testimony primarily goes to the issue of damages, and may be susceptible of video- and records-based presentation.

The remaining factors, which plaintiffs do not address, are either neutral or favor transfer. The parties will have greater ease of access to evidence in Ohio since the scene of the accident, the car, and many percipient witnesses are located there. The car's service and maintenance records are located in Ohio. Kachler Decl. PP 2-3, Ex. A. Either court is equally capable of applying the applicable law, whether that law is California [*10] law or Ohio law, and thus this factor is neutral in the transfer analysis. The feasibility of consolidation with other claims is not relevant here. The local interest in the controversy also favors Ohio, as the accident occurred in that district. Defendant Budget serviced and maintained the allegedly defective car in Ohio. Kachler Decl. PP 2-5, Ex. A & B. Defendant Ford does not have any manufacturing, assembly or fabrication plants in California, while Ford does have four such plants in Ohio. Nassihi Decl. PP 8-9, Ex. E & F. California's connection to this lawsuit is solely limited to the fact that two of the plaintiffs live in California. Finally, this district is considerably more congested than the Ohio district. *See* Nassihi Decl. Ex. I (Federal Judicial Caseload Statistics).

CONCLUSION

For the foregoing reasons and good cause shown, the Court hereby GRANTS defendants' motion to transfer

venue, and TRANSFERS this action to the United States District Court for the Northern District of Ohio. (Docket Nos. 17 & 21).

IT IS SO ORDERED.

Dated: November 28, 2007

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

1 of 1 DOCUMENT

CENTER FOR BIOLOGICAL DIVERSITY, KENTUCKY ENVIRONMENTAL FOUNDATION, and SIERRA CLUB, Plaintiffs, v. RURAL UTILITIES SERVICE, a federal agency within the United States Department of Agriculture, Defendant

No. C-08-1240 MMC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 51835

June 27, 2008, Decided
June 27, 2008, Filed

COUNSEL: [*1] For Center for Biological Diversity, Kentucky Environmental Foundation, Sierra Club, Plaintiffs: Matthew D. Vespa, LEAD ATTORNEY, Center for Biological Diversity, San Francisco, CA; Marianne G Dugan, Eugene, OR.

For Rural Utilities Services, a federal agency wit the United States Department of Agriculture, Defendant: Rachel Anne Dougan, LEAD ATTORNEY, Julie Sharon Thrower, U.S. Department of Justice, Washington, DC.

For East Kentucky Power Cooperative, Inc., Intervenor Dft: Jose R. Allen, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, San Francisco, CA; Kenneth Alan Reich, WolfBlock, Boston, MA; Timothy Joseph Hagerty, Frost Brown Todd LLC, Louisville, KY.

JUDGES: MAXINE M. CHESNEY, United States District Judge.

OPINION BY: MAXINE M. CHESNEY

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE; VACATING HEARING

Before the Court is defendant Rural Utilities Service's motion, filed April 30, 2008 and amended May 7, 2008, to transfer the above-titled action to the District Court for the Eastern District of Kentucky, or, alternatively, to the District Court for the District of Columbia, pursuant to *28 U.S.C. § 1404(a)*. Plaintiffs Center for Biological Diversity, Kentucky Environmental Foundation, and Sierra [*2] Club have filed opposition, to which defendant has replied. Having considered the papers filed in support of and in opposition to the motion, the Court deems the matter appropriate for decision on the papers, VACATES the hearing scheduled for June 27, 2008, and as set forth below, the Court finds, for the reasons stated by defendant in its motion, the instant action should be transferred to the Eastern District of Kentucky, pursuant to *§ 1404(a)*. [1]

1 In light of this finding, the Court does not consider East Kentucky Power Cooperative, Inc.'s motion to intervene, also noticed for hearing on June 27, 2008. Such motion may be renoticed for hearing before the transferee court.

In particular, because plaintiffs seek judicial review of defendant's decision regarding "two new . . . combustion turbine electric generating units" located in the Eastern District of Kentucky, "two new electric switching stations" located in the Eastern District of Kentucky, and a 36-mile "electric transmission line" located in the Eastern District of Kentucky, (*see* Compl. P 3), [2] the "public factors" of "having localized

controversies decided at home" and in avoiding "burdening citizens in an unrelated forum with [*3] jury duty" weigh heavily in favor of transfer. *See Decker Coal Co. v. Commonwealth Edison Co., 805 F. 2d 834, 843 (9th Cir. 1986)* (identifying factors); *Trout Unlimited v. United States Dept of Agriculture, 944 F. Supp. 13, 19 (D. D.C. 1996)* (noting interest in having "localized controversy decided at home is "compelling"; holding "[t]his policy rationale applies equally to the judicial review of an administrative decision which will be limited to the administrative record"); *see, e.g., Sierra Club v. Flowers, 276 F. Supp. 2d 62, 71 (D. D.C. 2003)* (holding action seeking judicial review of administrative decision, to issue mining permits for certain wetlands in Southern Florida, properly transferred to Southern District of Florida; observing "depth and extent of Florida's interest is indisputable"). Indeed, the requisite public notice provided before defendant rendered its decision was provided in Kentucky, both through public meetings held in Kentucky and publication in Kentucky newspapers. *See 72 FR 53526-01*. Significantly, plaintiffs cite no public factor that weighs in favor of retention of the action in this District.

> 2 The subject units, stations, and transmission line are located [*4] in Clark, Madison and/or Garrard counties in Kentucky, (*see id.*); such counties are within in the Eastern District of Kentucky, *see 28 U.S.C. § 97(a)*.

To the extent plaintiffs argue that "private factors" provide a sufficient basis to retain the matter in this district, *see Decker Coal, 805 F. 2d at 843*, specifically, the deference due plaintiffs' choice of forum and the inconvenience plaintiffs and their counsel may experience if the matter is transferred, the Court is not persuaded. First, plaintiffs' choice of forum is entitled to minimal deference because no part of their claims arose in the instant district. *See Lou v. Belzberg, 834 F. 2d 730, 739 (9th Cir. 1989)* (holding where "operative facts have not occurred" in plaintiff's chosen forum, plaintiff's choice is "entitled only to minimal deference"). Second, any asserted convenience to plaintiffs, each of whom is an organization, is not entitled to significant weight; one plaintiff, Kentucky Environmental Foundation, has its only office in Kentucky and appears to have no connection to California, (*see* Compl. P 12), a second plaintiff, the Sierra Club, maintains a chapter in Kentucky with over 5000 members, (*see* Compl. P 13), and [*5] the remaining plaintiff, the Center for Biological Diversity, has hundreds of members in Kentucky, (*see* Compl. P 11). [3] Finally, the convenience of counsel is not a recognized factor. *See, e.g., In re Horseshoe Entertainment, 337 F. 3d 429, 434 (5th Cir. 2003)* (holding "factor of 'location of counsel' is irrelevant and improper for consideration in determining the question of transfer of venue"); *Solomon v. Continental American Life Ins. Co., 472 F. 2d 1043, 1047 (3rd Cir. 1973)* (holding "convenience of counsel is not a factor to be considered").

> 3 The Court further notes that each such plaintiff has, according to plaintiffs, members that regularly use the subject land in Kentucky for recreation and other activities. (*See* Compl. PP 11-13.) Evidence necessary to establish such allegation is likely to be located in Kentucky, not California. *See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-64, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (holding where plaintiff organization's standing is challenged, plaintiff must prove member or members have suffered "injury in fact" by reason of defendant's decision).

In sum, any convenience to plaintiffs' counsel based on litigating the matter in this District, even if cognizable [*6] and coupled with the minimal deference afforded plaintiffs' choice of forum, is insufficient to warrant retention of the matter in this District, given the compelling interest in having local controversies decided locally and the fact that none of the operative facts occurred in this District.

Accordingly, the motion to transfer is hereby GRANTED, and the above-titled action is hereby TRANSFERRED to the Eastern District of Kentucky.

IT IS SO ORDERED.

Dated: June 27, 2008

/s/ Maxine M. Chesney

MAXINE M. CHESNEY

United States District Judge

Not Reported in F.Supp.2d, 2005 WL 2334362 (N.D.Cal.)
(Cite as: 2005 WL 2334362 (N.D.Cal.))

United States District Court,
N.D. California.
In re FUNERAL CONSUMERS ANTITRUST LITIGATION.
No. C 05-01804 WHA, C 05-02501 WHA, C 05-02502 WHA, C 05-02792 WHA, C 05-03124 WHA, C 05-03305 WHA, C 05-02806 WHA.

Sept. 23, 2005.

Andrew G. Celli, Jr., Jonathan S. Abady, Katherine Rosenfeld, Emery Celli Brinckerhoff & Abady LLP, Constantine Cannon, Gordon Schnell, Jean Kim, Kerin E. Coughlin, Matthew L. Cantor, S. Michael Kayan, New York, NY, Jeffrey F. Keller, Kathleen R. Scanlan, Law Officces of Jeffrey F. Keller, Steven Marc Sherman, Law Offices of Steven M. Sherman, San Francisco, CA, for Funeral Consumers Alliance Inc., Gloria Jaccarino Bender, Anthony J. Jaccarino, John Clark, Donna Sprague, Nancy Helman, Ira Helman, Donald Sprague and Robert Chitel.

Andrew M. Edison, Bracewell & Giuliani LLP, Houston, TX, John A. Mason, Gurnee Wolden & Daniels, Roseville, CA, for Service Corporation International.

Charles H. Samel, Howrey Simon Arnold & White, Los Angeles, CA, for Stewart Enterprises Inc.

John F. Cove, Jr., Boies Schiller & Flexner LLP, Oakland, CA, for Hillenbrand Industries, Inc., and Batesville Casket Company.

Bryan L. Clobes, Melody Forrester, Michael S. Tarringer, Miller Faucher and Cafferty LLP, Philadelphia, PA, for Francis H. Rocha.

Juden Justice Reed, Robert C. Schubert, Willem F. Jonckheer, Schubert & Reed LLP, San Francisco, CA, for Francis H. Rocha, Marsha Berger and Caren Speizer.

Dan Drachler, Seattle, WA, Paul Kleidman, Robert S. Schachter, Stephen L. Brodsky, Zwerling, Schachter & Zwerling, LLP, New York, NY, for Marsha Berger.

Craig R. Spiegel, Elaine T. Byszewski, Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Los Angeles, WA, George W. Sampson, Seattle, WA, for Maria Magsarili and Tony Magsarili.

Melissa A. Immel, Iverson Yoakum Papiano & Hatch, Los Angeles, CA, for Alderwoods Group Inc.

Hollis L. Salzman, Kellie Safar, Goodkind Labaton Rudoff & Sucharow LLP, New York, NY, for Caren Speizer.

Eugene A. Spector, Jeffrey J. Corrigan, Jeffrey L. Kodroff, Simon Bahne Paris, Spector Roseman & Kodroff PC, Philadelphia, PA, Jack F. Burleigh, Jeffrey L. Raizner, Michael P. Doyle, Doyle Raizner LLP, Houston, TX, William P. Klein, Law Offices of William P. Klein, San Francisco, CA, for Frank Moroz.

Jenelle Welling, Brian S. Umpierre, Robert S. Green, Green Welling LLP, Christine G. Pedigo, Shannon P. Cereghino, Finkelstein Thompson & Loughran, San Francisco, CA, for Pioneer Valley Casket Co., Inc.

ORDER GRANTING MOTION TO TRANSFER

ALSUP, J.

INTRODUCTION

***1** In these antitrust cases, defendants jointly have moved under 28 U.S.C. 1404(a) to transfer venue to the Southern District of Texas. Defendants have carried their burden of proving that the convenience of parties and witnesses, and the interest of justice, would clearly and substantially be improved by such a transfer. The motion is therefore GRANTED.

STATEMENT

The complaint in the first of these cases was filed May 2, 2005. Certain plaintiffs, a consumers group

and individual consumers, purchased caskets and other funeral-industry products and services. Another plaintiff, Pioneer Valley Casket Co, Inc., is an independent, low-cost casket seller. Defendants are funeral-home chains, a casket manufacturer and its parent company. Plaintiffs accuse defendants of violating Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1-2, and the California Unfair Competition Law, Cal. Bus. & Prof.Code §§ 17200-210. The consumers group, Funeral Consumers Alliance, Inc., and the individual consumers, sue on behalf of a putative nationwide class of consumers who bought Batesville caskets from the funeral-home co-defendants, Service Corporation International (SCI), Alderwoods Group, Inc., and Stewart Enterprises, Inc. Pioneer Valley sues on behalf of a putative nationwide class of independent casket retailers. Specifically, plaintiffs claim defendants

- conspired through a group boycott to prevent independent casket retailers from selling caskets marketed under the Batesville brand and others,

- engaged in a campaign of disparagement against independent casket retailers and their wares, and

- jointly worked to restrict casket price competition and to coordinate casket pricing by restricting or preventing price advertising, sharing price information and promoting "sham" discounting.

On August 2, 2005, defendants jointly moved under 28 U.S.C. 1404(a) to transfer these cases (collectively, "In re Funeral Consumers Antitrust Litigation") to the Southern District of Texas. This motion applies to the following of cases, described here by plaintiff name and case number: *FCA* (No. C 05-01804 WHA), *Rocha* (No. C 05-02501 WHA), *Berger*, (No. C 05-02502 WHA), *Magsarili* (No. C 05-02792 WHA), and *Pioneer Valley* (No. C 05-02806 WHA).

ANALYSIS

1. VENUE TRANSFER RULES.

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. 1404(a). The section's purpose is "to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) (internal quotation marks omitted) A district court has discretion "to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) (citation omitted). A court must "balance the preference accorded plaintiff's choice of forum with the burden of litigating in an inconvenient forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.1986).

***2** In weighing each case, a court also should consider:

(1) the relative ease of access to sources of proof, (2) availability of compulsory process for attendance of unwilling witnesses, (3) the cost of obtaining attendance of willing witnesses, (4) the possibility of view of premises, if appropriate to the action, (5) all other issues related to making a trial easy, expeditious and inexpensive, (6) the relative congestion of the two courts, (7) the local interest in having localized controversies decided at home, (8) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, (9) avoidance of unnecessary problems in conflict of laws, or in the application of foreign law, and (10) the unfairness of burdening citizens in an unrelated forum with jury duty, (11) the location where relevant agreements were negotiated and executed, (12) the respective parties' contacts with the forums, (13) contacts relating to the plaintiff's causes of action in the chosen forum, and (14) the differences in the costs of litigation in the two forums.

Ibid.; *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir.2000).

2. ACTION COULD HAVE BEEN BROUGHT IN THE SOUTHERN DISTRICT OF TEXAS.

There is no dispute that plaintiffs could have brought this action either here or in the Southern District of Texas. The unfair competition claim could have been brought in any court of competent jurisdiction, al-

though this does not mean the California law reaches extra-territorial conduct. *See* Cal. Bus. & Prof.Code § 17203. Antitrust venue may be laid in any district in which a corporate defendant "may be found or transacts business." 15 U.S.C. 22. That means that large corporations are subject to suit in virtually every corner of the country, given their commonly wide scope of operations these days. Such breadth of operations provokes motions such as the present one to transfer venue under 28 U.S.C. 1404(a).

The Court finds that venue would have been proper in the United States District Court for the Southern District of Texas. It would have had jurisdiction over the federal antitrust actions under 28 U.S.C. 1331 and supplemental jurisdiction over the state-law claim under 28 U.S.C. 1367.

3. BALANCING THE FACTORS: AN OVERVIEW.

No plaintiff resides in this district. Only one of the dozen or so plaintiffs even resides in California. Most reside on the East Coast. All of defendants' principal places of businesses are in Houston or points east. No operative fact is alleged to have occurred in this district. On the other hand, defendant funeral home companies operate 44 funeral homes in this district and 228 in California (as well as many others nationwide). The Rule 26(a) disclosures reveal some witnesses in California. Most, however, reside in Texas or on the other side of the Mississippi River. No district claims a majority of all witnesses, but the Southern District of Texas claims more than any other district.

***3** Section 1404(a) calls out three factors to guide a transfer motion: (i) the convenience of parties, (ii) the convenience of witnesses and (iii) the interest of justice. In volumes, the caselaw has illuminated the meaning of these three factors. This order will concentrate on the caselaw most pertinent to the record at hand.

Under Section 1404(a), a plaintiff's choice of venue is entitled to substantial weight, although this is often said to be less controlling in a purported nationwide class actions, as here. *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir.1987). At all events, movants must make a clear-cut showing. The issue is not merely whether some other district would better serve the parties and witnesses. The burden is on the moving parties to show that the Section 1404(a) factors would clearly be better served by a transfer.

4. PARTY CONVENIENCE.

We may not use a transfer simply to shift the burden of venue from one side to the other. Here, however, no plaintiff resides in this district and only one resides in California. The clear center of gravity of the residences of all plaintiffs is well east of the Mississippi River.

Houston is the principal place of business of the largest of defendant funeral-home company, SCI, and is in the Southern District of Texas. Another defendant funeral-home company is Stewart, headquartered in New Orleans. In the wake of Hurricane Katrina, it has temporarily moved its headquarters to Irving, Texas. Alderwoods is the third defendant funeral-home company. It is headquartered in Cincinnati. All three own and operate outlets in this district. Given their nationwide scope, their connections to this district are similar to their connections to districts elsewhere in America. Their executive offices and the representatives supervising the defense, however, are in the cities stated-Houston, New Orleans and Cincinnati.

The three funeral-home chains are alleged to have entered into a horizontal conspiracy to stamp out independents who seek to sell low-priced caskets to bereaved families. Plaintiffs claim this forced consumers to pay exorbitant prices for caskets. The three allegedly pressured a prominent manufacturer, defendant Batesville Casket Company, to refuse to do business with the independents, thus cutting off the independents from a source of quality product. Batesville has its headquarters in Batesville, Indiana. The last defendant is Batesville's parent, Hillenbrand Industries, Inc., also located in Batesville.

How will the situs of this case affect the burden on the parties? In addition to litigation counsel, corporate representatives can be reasonably expected to attend various hearings and the trial. Given the complexity and scope of the case, more hearings can be expected than in the usual case, not counting mere discovery conferences with the judge that may be manageable by telephone. The trial can surely be expected to last longer than the usual case. All of this

means that more days will be spent in court by the parties themselves than in the usual case.

***4** A transfer to the Southern District of Texas will drastically reduce the burden on the largest funeral-home defendant, SCI. And, it will significantly reduce the burden on the other defendants as well. The travel times from their locations to the Southern District are all markedly less than the travel times to San Francisco, as the record demonstrates in detail. The same is true for almost all of the plaintiffs. The Southern District seems to present a clear advantage over San Francisco.[FN1]

> FN1. Plaintiff Funeral Consumers Alliance, Inc., is located in Vermont (and incorporated in Pennsylvania). While it has many members in California, it has a nationwide membership (Compl.¶ 12). The members, however, are not parties. Their convenience does not matter. The leadership and executive officers of the association are in Vermont and will benefit, cost-wise, by a transfer to Texas.

Although a few decisions have given weight to the location of counsel, most have not saying that it is not to be considered at all or to be given very little weight. Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure*, § 3850 (2d ed.1986). One reason is that it would be easy to manipulate venue simply by obtaining counsel in the venue of choice. Be that as it may, it is worthwhile to note that the largest team of plaintiffs' counsel in this action is based in New York. Even for plaintiffs' counsel, therefore, the burden would be diminished by a transfer to the Southern District of Texas.[FN2]

> FN2. This order agrees with plaintiffs that the availability of modern imaging and copying methods greatly reduces the importance of the location of documents.

5. WITNESS CONVENIENCE.

In assessing a Section 1404(a) transfer motion, the matter of trial witnesses subdivides into two parts: the willing and the unwilling. Willing witnesses are those who can be expected to appear at trial voluntarily, meaning without the necessity of a subpoena. The unwilling are those who can be expected to testify live at trial only if they are within subpoena range of the courthouse.

As for the willing, the convenience-of-witnesses factor looms large. These individuals must take time out of their work and private time to travel to and from the place of trial, to live away from home and to wait around windowless corridors on call to testify. Back home, they have children to get to school, elderly parents to care for, jobs to do and lives to lead-all of which must be managed somehow or put on hold. Although lawyers tend to underestimate this burden, it is genuine, all the more so in a distant city. Even where a witness is an employee of a party and will be paid, the disruption is still a hard fact. The expenses of transportation, housing and meals, even if borne by a party, are nonetheless authentic outlays. *See, e.g.*, *Decker Coal*, 805 F.2d at 843. Among other things, Section 1404(a) prefers a venue where the burden on witnesses will be clearly reduced. *Belzberg*, 834 F.2d at 739.[FN3]

> FN3. In light of *Decker Coal* and the language of the statute itself, this order rejects the notion that inconvenience to *party* witnesses must be ignored or discounted. *See Decker Coal*, 805 F.2d at 843.

In order to better appreciate the comparative witness burdens associated with the two districts in question, the Court requested post-hearing supplemental information to include all Rule 26(a) disclosures of potential witnesses, among other things. This was invited so that the prospective witnesses, as disclosed by counsel themselves, could be, in effect, imagined on a map of the United States. These were submitted and reviewed by the Court.

The Rule 26(a) disclosures identified a large number of witnesses. Plaintiffs identified 69 individuals and organizations likely to have discoverable information that plaintiffs might use to support their claims. One is a resident of this district. A half-dozen live in other parts of California. The overwhelming majority are in Texas or east of the Mississippi River, including present and former employees of defendants. Plaintiffs also listed every state funeral-directors association. Plaintiffs also listed 161 casket retailers throughout the country, six of which are located in this district. Defendants listed 209 individuals throughout the

United States, of which one resides in this district and 49 reside in Houston. Overall, the vast majority reside east of the Mississippi River.

***5** We all know that the final trial witnesses will be a much smaller subset. In a Sherman Act case, the key liability witnesses (on both sides) are usually present and former officers and employees of the accused. This is because they were the ones at various meetings alleged to be conspiratorial or with pricing and marketing responsibilities. When a nationwide antitrust conspiracy is alleged, the key witnesses usually work (or worked) at a national office or a regional office rather than a local retail outlet. Therefore, the final trial witnesses (on liability) are very likely to be drawn in this case from Houston and east of the Mississippi River, as plaintiffs' own Rule 26 disclosures bear out. The damages witnesses will likely be plaintiffs themselves (and retained experts as yet unknown).

Plaintiffs now showcase four California-based witnesses. One is the editor of the *Funeral Monitor*, an industry newspaper published in Monterey. The complaint (¶¶ 63, 68, 75-76) quotes from four or so articles therein. It is hard to see, however, how newspaper articles will be admissible at trial. The same is true as to any information possessed by the editor. It will be largely hearsay. As for Mark Blankenship, the record does not show that he resides in California. He may work for a chain with an outlet in Susanville, California, but his residence is not shown to be in the state.[FN4] On the other hand, plaintiffs may well be entitled to call the spokesperson for the California Funeral Directors Association who made the disparaging comment (Compl.¶ 80). For that California witness to appear in Texas will be more burdensome. The same is true for the president of the association. Against the larger picture of the far greater number of witnesses in Texas, as shown by the Rule 26 disclosures, the California witnesses shrink into insignificance.

> FN4. In fact, plaintiffs' Rule 26 disclosures show his address as “in care of” a funeral chapel in Carson City, Nevada.

6. THE INTEREST OF JUSTICE.

Unwilling witnesses present more of an “interest of justice” problem than a “convenience of witnesses” problem. In the conduct of the trial itself, any jury would prefer to see and hear important witnesses in person. In this way, the jury can better assess demeanor and credibility. And, live testimony is easier to follow and comprehend than deposition read-ins or video clips. The difficulty is exacerbated by the fact that depositions are often taken before certain fact issues gather importance. They may, therefore, not fully address points decisive to the jury. Live testimony, therefore, always is to be preferred over deposition excerpts.[FN5] A problem arises when witnesses are beyond trial subpoena range and they can only be compelled to attend via depositions.

> FN5. For this reason, this order rejects the argument by plaintiffs that defendants could save money by presenting their defense at trial via depositions.

To be sure, a corporate defendant can be expected to arrange for some present and past employees to testify live and voluntarily but only if their testimony will be favorable on balance to the defense. Those with testimony favorable to the *other* side are often unwilling to appear except by deposition unless, of course, they are within subpoena range of the trial court. It would be better to try a case where any such unwilling but important witnesses could be compelled to appear in person. Plaintiffs' counsel may be prepared to proceed via deposition but we should not force a jury to suffer through it where there is a good alternative.

***6** At this stage, it is impossible to predict exactly who the unwilling witnesses will be. Experience tells us, however, that they are likely to be present and former employees of defendants. If they have information favorable to the other side, such individuals are usually reluctant to testify against their former and present colleagues unless compelled to do so. So while we do not yet know who precisely will fall into this category, it is reasonably certain that such witnesses will emerge. Houston has the largest single concentration of such potential witnesses. Those witnesses will be subject to trial subpoenas only in the Southern District of Texas.

In terms of “local interest,” *i.e.*, the connection of the respective districts to the subject of the action, the Southern District of Texas has a larger stake. Both districts, of course, have funeral homes operated by

the alleged wrongdoers. Both districts have alleged victims (bereaved families and independent casket retailers) in the putative classes. What distinguishes them is that the largest of the defendant funeral-home chains is based in Houston, not San Francisco. That alone is a substantial connection. Moreover, conspiratorial events, if there were any, were likely to have occurred in Houston. None would have likely occurred in this district (and none is alleged to have occurred here).

Turning to another interest-of-justice consideration, plaintiffs argue that our district has less work than the Southern District of Texas and therefore this case could go to trial sooner here than there. The statistics submitted do not bear out this claim. In terms of "weighted" filings per judge, our district shows a heavier caseload per judge over the six-year period of data supplied by plaintiffs' counsel although, for 2003-04 and 2004-05, the Southern District had a slightly heavier load. The median time to trial for civil cases is faster in the Southern District than here. It is true that we have fewer criminal actions here but the majority of the criminal docket in the Southern District, especially in the divisions other than in the Houston division, are § 1326 illegal immigration cases, which almost always plead out without much burden on the judge. Overall, it is unfair to claim that the Southern District is not equipped to handle this large civil action as expeditiously as it could be handled here. In this regard, it should be added that counsel on both sides, at the initial case management conference, requested trial dates of November 2007 (plaintiffs' choice) and January 2008 (defendants' choice), both very far into the future. This Court required an earlier date in December 2006. The point is that neither side seemed to be in a hurry to go to trial; it is somewhat insincere not to express regret over a possibly longer timetable.

The basis for subject-matter jurisdiction is the federal antitrust law. Under the Court's supplemental jurisdiction, however, plaintiffs have alleged a claim under Section 17200 of California's Unfair Competition Law, at least on behalf of the general public in California. It is probably true that judges in this district will be better able to handle this state-law claim than judges in the transferee district. But the tail should not wag the dog. This is first and foremost a purported nationwide antitrust class action under the Sherman Act. The caselaw favoring the district "at home" on the controlling law has arisen in the *diversity* context, not the *federal-question* context. *Decker Coal*, 805 F.2d at 843. If the main *federal* event is clearly better served in the Southern District of Texas than in San Francisco, the pendency of a supplemental state-law claim should not override the indicated result. Moreover, the submissions indicate that federal judges in Texas are familiar with the Texas analogue to California Section 17200. Finally, Pioneer Valley has alleged Texas as well as California state-law antitrust and unfair-competition claims. In any case, this state-law question is a very small factor in the overall balance.

***7** In summary, the clear balance of the statutory factors favors transfer. The chief consideration the other way is plaintiffs' choice of forum. Although that choice is normally given substantial weight, the Ninth Circuit has qualified that rule:

> If the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled only to minimal consideration.

Pacific Car and Foundry Co. v. Pence, 403 F.2d 949, 954 (9th Cir.1968). That this is brought as a nationwide class action further dilutes the deference due plaintiffs' choice. *Belzberg*, 834 F.2d at 739. Plaintiffs also argue that 15 U.S.C. 22, the law granting them a wide choice of venue in antitrust actions, entitles their choice to special deference upon a motion for transfer. This is not the law. Courts may transfer cases under Section 1404(a) even though they are filed pursuant to 15 U.S.C. 22. *United States v. Nat'l City Lines*, 337 U.S. 78, 84, 69 S.Ct. 955, 93 L.Ed. 1226 (1949). Furthermore, the questions of proper venue and transfer of venue have a different relationship in the instant case than plaintiffs suggest. *Cf. Ex parte Collett*, 337 U.S. 55, 60, 69 S.Ct. 959, 93 L.Ed. 1207 (1949) (holding, in the context of a similar venue statute, 45 U.S.C. 56, that the venue statute and Section 1404(a) "deal with two separate and distinct problems."). Title 15 U.S.C. 22 makes venue here in this case proper. Whether to transfer it under Section 1404(a) is, however, another matter. In this case, movants have carried their burden.

After the record was closed on this motion and as this order was being finalized, the Court received a fur-

ther declaration from counsel for plaintiffs. It stated that, in about ten days, counsel would be adding a further-named plaintiff resident in this district. The record shows that the day after the hearing of this motion, plaintiffs' counsel sent out a solicitation letter. The letter was sent to families who had purchased caskets from funeral homes in the district. Counsel's letter invited them to join the suit as named plaintiffs, advising that "We are seeking a few more individuals to serve as class representatives." The letter added, "Being a class representative takes very little time, will cost you nothing, and may entitle you to compensation over and above any overcharge you paid for a casket." Evidently, someone from San Jose has answered the call.

The Court has carefully considered whether this potential development would change the outcome on this motion. The answer is no. *First,* we will take counsel at his word in his solicitation letter that "being a class representative takes very little time." If so, the inconvenience to the solicited potential new party will be minimal no matter where venue is laid. *Second,* even **adding** a new **plaintiff** to the dozen already on board would not significantly shift the geographic center of gravity of all **plaintiffs**. *Third,* the solicitation of a new party after the fact to shore up local contacts for purposes of a pending § 1404 issue smacks of **forum-shopping**. The caselaw holds that if "there is any indication that plaintiff's choice of forum is the result of **forum shopping**, plaintiff's choice will be accorded little deference." *Williams v. Bowman*, 157 F.Supp.2d 1103, 1106 (N.D.Cal.2001) (Walker, J.); *Italian Colors Restaurant v. American Express Co.*, No. C 03-3719 SI, 2003 WL 22682482 at *3-5 (Nov. 10, 2003 N.D.Cal.) (Illston, J.). *Fourth,* as stated, plaintiffs' choice of forum is accorded less weight where the action is brought, as here, as a class action, all the more so when it is brought as a nationwide class action. *Belzberg,* 843 F.2d at 739.

***8** For the foregoing reasons, the motion to transfer is GRANTED in the following cases: *FCA* (No. C 05-01804 WHA), *Rocha* (No. C 05-02501 WHA), *Berger,* (No. C 05-02502 WHA), *Magsarili* (No. C 05-02792 WHA), and *Pioneer Valley* (No. C 05-02806 WHA). The Clerk shall transfer the files to the Clerk for the Southern District of Texas. Meanwhile, the amended complaint and follow-on motions to dismiss should be served on the timetable previously set. When the cases arrive in the Southern District of Texas, the pleadings and motions should be filed with the court. This will avoid any interruption in the prosecution of the cases, all of this, of course, being wholly subject to whatever new schedule will be set by the transferee court.

IT IS SO ORDERED.

N.D.Cal.,2005.
In re Funeral Consumers Antitrust Litigation
Not Reported in F.Supp.2d, 2005 WL 2334362 (N.D.Cal.)

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