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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AVERY DENNISON CORPORATION, Plaintiff, v. 3M COMPANY and 3M INNOVATIVE PROPERTIES COMPANY, Defendants.	CASE NO. CV 10-7931 MRP (RZx) **REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a)** Hon. Mariana R. Pfaelzer Hearing Date: February 7, 2011 Hearing Time: 11:00 a.m. Hearing Place: Courtroom 12 Trial Date: Not Set Complaint Filed: October 21, 2010

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I. INTRODUCTION

Avery's Opposition to 3M's Motion to Transfer fails to rebut 3M's evidence and argument regarding the interests of justice and the convenience of witnesses—the two factors courts in this Circuit have deemed "most important." Avery ultimately cannot explain how litigating two closely related actions in two different jurisdictions is more efficient than proceeding before a single judge, indeed a judge who is already steeped in many relevant factual and legal details. Moreover, Avery's antitrust and unfair competition claims are inextricably intertwined with its defenses asserted in the earlier-filed patent proceeding in the District of Minnesota ("the Patent Action"). As explained in 3M's Motion, the Minnesota court's resolution of issues such as patent validity will impact, and could potentially dispose of, material portions of Avery's claims in this action ("the Antitrust Action"). (*See* Mot. at 18-19.) Finally, Avery does not identify a single witness based in California or having any connection to this District, nor does it contest that the numerous party and non-party witnesses identified by 3M are more conveniently located to Minnesota than to California.

Instead, Avery gives undue weight to two non-dispositive considerations. First, Avery claims that California has an interest in this action, not because of any connection to operative facts or potential witnesses, but simply because California is a large and populous state with more motorists and roadway miles than Minnesota. This "potential for sales in the forum" theory of venue finds no support in the case law. Second, Avery contends that its California state law claims should override the federal character of this action and preclude transfer, yet no court has adopted such a rule.

Avery would have this Court extend unqualified deference to its chosen forum. Under controlling Ninth Circuit law, however, the deference owed to a plaintiff's choice of forum is substantially diminished where, as here, there is no substantial connection between the District and the operative facts. Avery has had ample opportunity to establish some evidentiary connection between its claims and this

District, but it has failed to do so. Because the interests of justice and convenience weigh strongly in favor of transfer, 3M's Motion should be granted.

II. ARGUMENT

Avery's Opposition recites the legal standards applicable to motions to transfer, but only partially applies the Ninth Circuit's balancing test.[1] Avery errs in cherry-picking two factors—its choice of forum and the forum's interests in the action—and painting these as bright-line rules rather than, more accurately, among the various factors to be weighed by the Court. This undue emphasis is contrary to Avery's own cited authority, which holds that "[w]eighing of the factors for and against transfer involves subtle considerations and is best left to the discretion of the trial judge." *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1981) (cited in Opp. at 6). As discussed below, in this matter the interests of justice and convenience to the witnesses far outweigh Avery's choice of forum and the interests of the forum state.

A. The Interests of Justice Overwhelmingly Favor Transfer

1. Overlap with the Ongoing Patent Litigation Is a Compelling Factor Favoring Transfer to Conserve Judicial Resources

Avery seeks to justify the burden and expense of separate proceedings by arguing that only a small portion of the facts at issue in the patent suit overlap with the claims in this case. However, the reality is that Avery's legal theories in both actions are largely founded upon what Avery itself has identified as its core contentions—

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[1] Avery neglects to address the first prong of the section 1404(a) analysis, effectively conceding that this action "might have been brought" in the District of Minnesota. *See* 28 U.S.C. § 1404(a). On this factor, there is simply no dispute. Avery also fails to submit any additional evidence to support the factors considered under the second prong. As discussed *infra*, Avery fails to fully consider the location where the alleged conduct occurred, the parties' (and their witnesses') contacts with the forum, the contacts relating to Avery's cause of action in the forum, differences in the costs of litigation between the two forums, or the availability of compulsory process to compel attendance of unwilling non-party witnesses. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000).

namely, that 3M (1) improperly manipulated the ASTM process by entering into agreements to approve the Type XI standard; (2) is using the Type XI standard to steer customers away from other types of sheeting; and (3) has asserted certain patents in the Patent Action in a manner contrary to its alleged representations to the ASTM committee.[2] (Opp. at 4.) That the legal theories pursued by Avery in the separate actions differ in certain respects is not of great importance to the analysis. *See, e.g.*, *Szegedy v. Keystone Food Prods, Inc.*, No. CV 08-5369 CAS (FFMx), 2009 WL 2767683, at *6 (C.D. Cal. Aug. 26, 2009) ("Although the . . . action presently pending in the [transferee forum] may involve some different legal theories compared to the instant action, it involves similar, if not identical, facts and issues.").

Although Avery attempts to distinguish this Court's decision in *FTC v. Watson Pharmaceuticals, Inc.*, 611 F. Supp. 2d 1081 (C.D. Cal. 2009) (Pfaelzer, J.) (Opp. at 13), that decision is closely analogous to the situation presented here. Here, as in *Watson*, "the merits of the underlying patent case[] must be examined to some extent to make an antitrust determination." *Id.* at 1088. In such circumstances, it makes sense for the federal judge most familiar with the patent issues to undertake that examination.

Avery does not, and cannot, dispute that a transferee court's prior commitment of judicial resources to a related action weighs heavily in favor of transfer, particularly in cases involving patents and complex technology. (*See* Mot. at 10-11.) Yet Avery seeks to undermine the obvious efficiencies of transfer here by implying that this Court

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[2] Avery suggests that its "false advertising" claims do not overlap with its standards-related allegations, but as noted in Part II.C.2., *infra*, Avery's allegations of false or misleading product descriptions are limited to a single alleged incident involving a highway sign in Florida. Avery's false advertising claims do not rise to the level of activity to support an antitrust claim. *See Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997) ("While false or misleading advertising directed solely at a single competitor may not be competition on the merits, the [conduct] in question must have a significant and enduring adverse impact on competition itself in the relevant markets to rise to the level of an antitrust violation.").

need not even "understand" the technology at issue in order to rule on Avery's competition-related claims. (*See* Opp. 15.) Avery's own Complaint—which contains pages of detail on the relevant technology—is direct evidence to the contrary. (*See* Compl., ¶¶ 25-36.) Moreover, as this Court knows from considerable past experience, an understanding of the underlying technology is important to judicial resolution of technology-related antitrust claims.

In the Minnesota Patent Action, Judge Davis has already engaged in detailed fact finding in connection with 3M's preliminary injunction motion. (*See* O'Brien Decl., ¶ 5; Ex. C [Memorandum Opinion and Order, Civil No. 10-2630, Dkt. #90, at 6-7 (D. Minn. Dec. 21, 2010)].)[3] There can be no doubt that the interests of justice will be better served by transfer of this matter to a court that has already developed an understanding of the relevant products, technologies, and patents, related pricing and commercial issues, and other pertinent facts. *See, e.g.*, *Madani v. Shell Oil Co.*, No. C07-04296 MJJ, 2008 U.S. Dist. LEXIS 9626, at *7-8, *12 (N.D. Cal. Jan. 30, 2008) ("Judicial resources are conserved when an action is adjudicated by a court that has already 'committed judicial resources to the contested issues and is familiar with the facts of the case.'"). Accordingly, the significant overlap between this case and the Minnesota Patent Action strongly supports transfer.

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[3] In the December 21, 2010 Order denying 3M's Motion for Preliminary Injunction, Judge Davis analyzed numerous factual issues that the parties addressed in extensive briefing and oral argument. As is evident from the Court's order, in ruling on 3M's motion Judge Davis conducted an extensive examination and analysis of various patent issues; the elements, geometry, and technology used in retroreflective sheeting; markets for retroreflective sheeting, including Type XI sheeting; the role and requirements of government procurement in such markets; competition, pricing, price erosion, and market share in markets for retroreflective sheeting; and 3M's goodwill and reputation in the industry. (*See* O'Brien Decl., ¶ 5; Ex. C.)

2. Maintaining a Separate Proceeding in This Forum Would Be Duplicative and Inefficient, and Would Risk Inconsistent Rulings

As 3M discussed at length in its Motion, this Court cannot decide the merits of Avery's antitrust claims until certain threshold issues have been resolved in the Patent Action. (Mot. at 17-20.) In the Patent Action, Avery is seeking to invalidate or bar enforcement of the very patent claims it alleges foreclose competition and exclude Avery from the relevant market. Judge Davis's findings with regard to the validity and enforceability of 3M's patents, and Avery's patent-related defenses of invalidity, waiver, and estoppel, all stand to impact the claims asserted by Avery in this proceeding. (*Id.* at 18.) If, for example, 3M's patents are ruled unenforceable in the Patent Action, Avery cannot allege that they constitute an ongoing source of market exclusion. On the other hand, if 3M's patents are upheld as valid and enforceable notwithstanding Avery's patent-suit defenses—which overlap substantially with Avery's affirmative claims in this action—this result could bring a substantial end to the Antitrust Action, in part through application of collateral estoppel. Although resolution of the Patent Action may not entirely dispose of each of Avery's antitrust and false advertising claims, the outcome of the Patent Action almost certainly will be determinative of significant issues in this case, and Avery cannot claim otherwise.

Numerous legal and factual issues in the Antitrust Action are inextricably intertwined with similar issues in the Patent Action and substantial overlap exists among the sources of proof in both cases, including both witnesses and documents. There can be no doubt that the concurrent litigation of Avery's affirmative claims in this case and its related defenses in the Patent Action would be inefficient and duplicative. Insofar as identical issues of fact must be litigated in two different district courts, this creates manifest risk of inconsistent rulings. As one example, the Minnesota court must determine whether 3M's participation in the ASTM standards-setting process resulted in waiver of any 3M patent claims. Absent transfer, this Court would likewise be required to review the very same body of facts to conclude whether

3M's actions violated antitrust law. Although the legal standards vary to some degree in the patent waiver and antitrust contexts, there is substantial and undeniable overlap in the legal and factual analysis necessary to decide these questions, including the analysis of potential remedies.

Avery does not, and cannot, argue that it is efficient for two separate federal trial courts to simultaneously litigate these parallel issues in different jurisdictions with the obvious and unavoidable risk of inconsistent rulings.[4] In fact, Avery expressly acknowledges the factual overlap between the two cases, at least as concerns the parties' participation in ASTM proceedings. (Opp. at 10-11.) Proceeding with discovery in both actions will necessarily involve reviewing the same documents, taking depositions of the same witnesses, and litigating similar pretrial issues, which may result in duplicative (and potentially conflicting) fact-finding regarding the same communications and events. By contrast, a single court presiding over both actions—as 3M has advocated—"will be able to formulate the most efficient discovery and pretrial plan for the parties to avoid duplicative, unnecessary discovery efforts by both parties." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, No. CV 06-4871 PA SSX, 2006 WL 4568798, at *6 (C.D. Cal. Nov. 30, 2006).

B. Avery Fails to Establish That California Is the More Convenient Forum

Avery devotes only two paragraphs at the end of its Opposition to addressing the "convenience of witnesses" factor (Opp. at 15), despite the fact that many of Avery's own authorities hold that convenience of witnesses is often the "most important

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[4] In arguing for the separate maintenance of the Patent Action and the Antitrust Action, Avery ignores established Supreme Court and Ninth Circuit precedent strongly favoring litigation of related claims in the same district in order to facilitate efficient pretrial proceedings and to avoid duplication. *See, e.g.*, *Cont'l Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960) (permitting "two cases involving precisely the same issues . . . simultaneously pending in different District Courts leads to the wastefulness of time, energy, and money that § 1404(a) was designed to prevent"); *A.J. Indus., Inc. v. United States Dist. Court for the Cent. Dist.*, 503 F.2d 384, 389 (9th Cir. 1974) ("[T]he pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and convenience to witnesses and parties.").

factor."[5] Notably, Avery never claims that it would suffer inconvenience or prejudice from proceeding in the District of Minnesota.[6] As a multinational corporation with sophisticated national counsel currently litigating the Patent Action in the District of Minnesota, Avery cannot assert that it would be inconvenienced by transfer.

Nor does Avery assert that any witnesses would be inconvenienced by transfer. In its Motion and supporting papers, 3M clearly satisfied its burden as the moving party to "produce information regarding the identity and location of the witnesses, the content of the testimony, and why such testimony is relevant to the action." *Steelcase, Inc. v. Haworth*, 41 U.S.P.Q.2d 1468, 1470 (C.D. Cal. 1996). By refusing to disclose the identity or location of its anticipated witnesses, Avery has left wholly uncontested 3M's presentation of potential party and non-party witnesses and the relevant testimony they may provide. (*See* Mot. at 21-23; RJN, Ex. H [Kleinschmit Decl.]; Abler Decl., ¶¶ 3-18; Karel Decl., ¶¶ 2-16; Floyd Decl., ¶¶ 2-20.)

In contrast to 3M's detailed evidentiary showing, Avery makes no attempt to identify a single party witness in California. Indeed, by assuring the Court that it "will make all of its own witnesses available in California" (Opp. at 15), Avery appears to tacitly concede that none of its witnesses are found in this District to begin with. Further reinforcing the point, Avery does not dispute that its Reflective Films Division is based in Painesville, Ohio, with additional offices in the Chicago area. (Floyd Decl.,

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[5] *See, e.g.*, *Everpure, LLC v. Selecto, Inc.*, No. CV 09-2844 AHM (FFMx), 2010 U.S. Dist. LEXIS 18098, at *7-8 (C.D. Cal. Feb. 3, 2010) (cited in Opp. at 5) ("Convenience of the witnesses 'is often the most important factor' in determining whether to transfer a case under section 1404(a)."); *United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso*, 362 F. Supp. 2d 1175, 1185 (C.D. Cal. 2005) (cited in Opp. at 5) ("convenience of witnesses is the most important factor"); *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 89 F.R.D. 497, 501 (C.D. Cal. 1981) (cited in Opp. at 5) ("The convenience of witnesses is said to be the most important factor in passing on a transfer motion.").

[6] Tellingly, Avery has never challenged venue on convenience grounds in the Patent Action. Moreover, as 3M pointed out in its Motion, Avery has defended other suits brought by 3M in Minnesota without quarrel and has filed multiple lawsuits against 3M in jurisdictions far from California. (*See* Mot. at 24.)

¶¶ 2-3.) Nor does Avery contest that the particular Avery witnesses in Ohio and Chicago identified by 3M will provide testimony relevant to this proceeding. (Karel Decl., ¶ 12; Floyd Decl., ¶¶ 4-5, 7.) Considering that 3M's witnesses are based in Minnesota and that Avery's witnesses are located in the Midwest, the convenience of the party witnesses plainly weighs in favor of transfer to Minnesota.

Avery also fails to identify a single non-party witness based in California, despite asserting that 3M's competitors (including Avery) have been excluded from competing for California business and that "a number of" California counties and municipalities have been affected. (Opp. at 7.) As for the ***twenty-one*** potential non-party witnesses identified by 3M, all are based hundreds or thousands of miles from California, and are significantly closer to Minnesota than California. (*See* Karel Decl., ¶¶ 10-11, 13-14; Floyd Decl., ¶¶ 6, 8-20.) Avery inexplicably argues that this fact is not persuasive because witnesses outside of Minnesota must travel to either forum (Opp. at 15), but the law holds that proximity to the forum is the proper test of convenience. *See, e.g.*, *Vehimax Int'l, LLC v. Jui Li Enter. Co.*, No. CV 09-6437 SVW (JEMx), 2010 U.S. Dist. LEXIS 42801, at *11 (C.D. Cal. Mar. 16, 2010) ("[W]here many of the witnesses will be inconvenienced regardless of where the trial is held, venue is most appropriate where the inconvenience can be minimized.").

Because it cannot identify any witnesses with a nexus to California, Avery claims that "the practical reality of contemporary litigation is that witnesses and evidence can be made available in almost any jurisdiction." (Opp. at 15.) This is misleading for two reasons. First, although access-to-proof arguments are occasionally accepted by courts with respect to documentary evidence, Avery does not even indicate that its relevant documents are housed in California. Second, Avery fails to consider that non-party witnesses can only be "made available" within a court's subpoena power, absent voluntary appearance. *See Painter's Dist. Council No. 30 Health & Welfare Fund v. Amgen, Inc.*, No. CV 07-3880 PSG (AGRx), 2007 WL 4144892, at *6 (C.D. Cal. Nov. 13, 2007) ("While a party can compel the testimony of

its employees at trial, for non-party witnesses, the court's subpoena power extends only to areas anywhere within the district and/or one hundred miles of the place of trial.") (internal citation omitted).

In view of Avery's inability to identify a single witness located in this District who would be forced to travel to Minnesota, Avery's argument that 3M is "attempt[ing] to shift the inconvenience of travel to Avery" (Opp. at 6) is completely unsupportable.[7] In the absence of any countervailing evidence, this Court is left to conclude that the litany of Midwesterners that 3M identified as potential witnesses (including Avery's key witnesses) would be less inconvenienced by a Minnesota forum than by a California venue two thousand miles away. (*See* Abler Decl., ¶ 7; Karel Decl., ¶¶ 3, 8-9; Floyd Decl., ¶¶ 5, 8-20.)

Finally, Avery cites no authority for its spurious claim that this Court should consider "variables such as Minnesota's winter weather, including snow storms, or the larger number of flights that service Los Angeles as compared to Minneapolis." (Opp. at 15.) Insofar as courts have adopted any variables for judging inconvenience, it is the distance from the forum that impacts witness convenience—not seasonal weather patterns or airline schedules. *See, e.g.*, *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320 (Fed. Cir. 2008) (holding that court erred in refusing to consider that "identified witnesses would need to travel a significantly further distance from home to attend trial in Texas than Ohio"); *Vehimax*, 2010 U.S. Dist. LEXIS 42801, at *19 (finding California inconvenient for non-party witnesses "located in Michigan, approximately 100 and 250 miles, respectively, from the Eastern District of Wisconsin").

[7] Even if Avery could produce such a witness, this hypothetical California resident would in all likelihood have his or her deposition taken in this District and would only be required to travel to Minnesota in the event of a trial.

C. Avery's Claims Lack Any Genuine Nexus to California

1. Avery Has Failed to Present Evidence or to Make Specific Allegations of Challenged Conduct Occurring in California

Avery hinges its Opposition largely on the claim that "[m]any of 3M's anticompetitive acts . . . occur[ed] in California." (Opp. at 1.) Yet this claim finds no support whatsoever in the allegations of the Complaint or in the proof submitted with Avery's Opposition. Other than in legal citations, the Complaint itself mentions California only once, referring to Avery's "principal place of business." (Compl., ¶ 18.) The Complaint lacks even one allegation suggesting that California was the locus of any specific 3M act challenged in Avery's suit.

Presumably, if Avery believed 3M had engaged in anticompetitive conduct in California, it would have produced supporting evidence with its Opposition. But the evidence furnished with Avery's Opposition falls far short of establishing any conduct-based nexus with California. For instance, there is no evidence of relevant meetings in California, challenged agreements executed in California, or specific injury to California-based entities or affecting California customers. Avery's unauthenticated "evidence" regarding a California municipality's bid preferences for 3M sheeting (*see, e.g.*, O'Brien Decl., Exs. A, B) is not proof of anticompetitive conduct occurring within the State.

The most Avery can offer is speculation. Avery's Opposition postulates that, because it is the most populous state in the nation, "California surely purchases significantly more retroreflective sheeting than Minnesota and virtually any other state." (Opp. at 7.) Statistics regarding California's population, registered vehicles and licensed drivers, roadway mileage, and government funding and expenditures within the State simply prove too much. The sheer size of California and its highway system cannot be determinative of a venue dispute such as this, and indeed is not even directly relevant to any pertinent legal consideration.

2. Avery's Choice of Forum Is Not Entitled to Deference in the Absence of Operative Events Occurring in This District

Avery misleadingly claims that "[c]ourts give particular deference to the plaintiffs' choice of forum in antitrust suits."[8] (Opp. at 5.) Yet as the Ninth Circuit has clearly stated, "Plaintiff's choice of forum . . . is not the final word. In judging the weight to be given such a choice, . . . consideration must be given to . . . both of the defendant's business contacts with the chosen forum and of the plaintiff's contacts, including those relating to his cause of action." *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968) (vacating order denying transfer of venue).[9] "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***." *Id.* (emphasis added); *accord Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987).[10]

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[8] The only case Avery cites from the Ninth Circuit for this proposition is inapposite. In *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 89 F.R.D. 497, the plaintiff Commission filed suit against the NFL, challenging league rules prohibiting transfer of a team's home location as invalid under the antitrust laws. Because the NFL meeting at which the league formally voted not to approve a transfer of the Oakland Raiders to Los Angeles was held in Los Angeles, the court found that "[t]he Central District thus has a significant connection with the subject matter of the case." *Id.* at 500. The Central District was more convenient to the parties because the Commission, the defendant Los Angeles Rams, most of the attorneys, and many of the witnesses were located in Los Angeles. *Id.* In contrast, none of the meetings alleged in Avery's Complaint occurred in this District and none of the potential witnesses are located in this District.

[9] *Pacific Car & Foundry* is quoted at length in several cases relied upon by Avery's Opposition. *See, e.g., Los Angeles Mem'l Coliseum Comm'n*, 89 F.R.D. at 499-500 (cited in Opp. at 5); *Florens Container v. Cho Yang Shipping*, 245 F. Supp. 2d 1086, 1092 (N.D. Cal. 2002) (cited in Opp. at 4-5).

[10] In contrast to Avery's Complaint, the cases Avery cites for the proposition that a plaintiff's choice of forum is given substantial weight involved actual operative events in the forum state. *See, e.g., DIRECTV v. EQ Stuff, Inc.*, 207 F. Supp. 2d 1077, 1082-83 (C.D. Cal. 2002) (finding that "much of the operative events—the pirating of DIRECTV's signals—occurred in California" and that defendants marketed illegal pirating devices in the Central District); *Florens Container*, 245 F. Supp. 2d at 1092 (noting that "the basis of the current action arises out of [plaintiff's] efforts to enforce its perfected security interest in freights collected by [defendant] for cargo loaded or discharged from a vessel in California").

Avery's Opposition completely disregards the "instances in which a plaintiff's choice of forum receives less weight." *Metz v. United States Life Ins. Co.*, 674 F. Supp. 2d 1141, 1146 (C.D. Cal. 2009). "Deference to the plaintiff's choice of venue is further diminished if the moving party establishes one or more of the following factors: (1) the operative facts have not occurred within the forum; (2) the forum has no particular interest in the parties or subject matter; (3) the forum is not the primary residence of either the plaintiff or defendant; or (4) the subject matter of the litigation is not substantially connected to the forum." *Id.* (internal quotation omitted). These factors clearly undermine Avery's appeal for deference to its chosen forum.

First, as in other cases where antitrust claims have been transferred to another District, neither the Complaint in this case nor Avery's Opposition indicates that any meetings or any other alleged anticompetitive acts occurred in California. *See, e.g.*, *Von der Werth v. Johns Mansville Corp.*, No. C 07-01456 JSW, 2007 U.S. Dist. LEXIS 62762, at *10 (N.D. Cal. Aug. 14, 2007) (granting transfer where alleged conspirators resided outside California and the only meeting relevant to the alleged conspiracy occurred in Miami). Moreover, Avery does not allege that its false advertising claims have any connection to California. In fact, the Complaint itself proves otherwise. Paragraph 84 of the Complaint contains a photograph of a highway sign that conspicuously depicts Florida State Road 536—identified by the outline of the State of Florida—and Interstate 4 (I-4), an interstate highway located entirely within that State.[11]

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[11] *See* http://www.dot.state.fl.us/TrafficOperations/Operations/exitnumb/i_4.shtm; http://www.fhwa.dot.gov/reports/routefinder/table1.cfm.

Next, although Avery's headquarters is located in this District,[12] "the plaintiff's residence is not determinative where all other operative facts giving rise to the litigation occurred elsewhere." *Raynes v. Davis*, No. CV 05-6740 ABC (CTx), 2007 WL 4145102, at *2 (C.D. Cal. Nov. 19, 2007). Avery does not contest 3M's citations to numerous decisions holding that the plaintiff's presence or headquarters in the forum is not sufficient to avoid transfer where the operative facts occurred elsewhere. (*See* Mot. at 23-24 & n.13.)

Finally, the mere fact that 3M's products are sold within California does not establish any unique or substantial connection to the State that might warrant greater deference to Avery's chosen forum. To paraphrase a recent decision from this District, Avery argues that "its choice of forum should be given deference because [3M] transacts business nationwide, including in California, and that sales from California, in part, form the basis of [Avery's] claim." *Vehimax*, 2010 U.S. Dist. LEXIS 42801, at *17. "However, the fallacy of this argument is apparent on its face—that is, as [Avery] alleges that [3M] transacted business nationwide, [Avery's] argument is equally applicable to any district throughout the United States. Such facts clearly do not favor California over any other forum." *Id.*[13]

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[12] This fact alone is not controlling, particularly considering that the transferee forum is the corporate home of the defendants and has an equally substantial interest in the subject matter of the dispute. *See, e.g.*, *Skyriver Tech. Solutions, LLC v. OCLC Online Computer Library Ctr., Inc.*, No. C 10-03305 JSW, 2010 U.S. Dist. LEXIS 119984, at *15 (N.D. Cal. Oct. 28, 2010) (where plaintiff was headquartered in the transferor forum and defendant was located in the transferee forum, both states "have substantial interests in th[e] litigation").

[13] *See also Von der Werth*, 2007 U.S. Dist. LEXIS 62762, at *10 (according less deference to plaintiff's choice of forum where plaintiff did not allege conduct relevant to its antitrust and unfair competition claims occurring in California, other than alleged purchases of the relevant product); *Broadcast Data Retrieval Corp. v. Sirius Satellite Radio, Inc.*, No. CV 06-1190-JFW (SSx), 2006 U.S. Dist. LEXIS 37641, at *9-10 (C.D. Cal. June 7, 2006) (holding that transmission of satellite radio and sales in the plaintiff's chosen forum did not constitute the "operative facts" upon which plaintiff's patent infringement claims were based, since the development and design of the products at issue took place in New York); *Multistate Legal Studies, Inc. v. Marino*, No. CV 96-5118 ABC (RNBx), 1996 WL 786124, at *10-12 (C.D. Cal. Nov. 4, 1996) (transferring suit to New York even

[Footnote continued on next page]

Clearly this is not a case that substantially concerns conduct occurring within the State of California. On the contrary, Avery itself describes its claims as being targeted against alleged 3M conduct "stretch[ing] ***across the country***." (Opp. at 7, emphasis added.) Considering that Avery points to no facts, witnesses, or sources of evidence in California, Avery's "choice of forum . . . is not a sufficiently strong factor to deny the motion to transfer." *Watson Pharms.*, 611 F. Supp. 2d at 1089; *see also Metz*, 674 F. Supp. 2d at 1147 (discounting Plaintiff's choice of forum where "there does not seem to be anyone with testimony relevant to this matter located in the State of California").

3. Avery's California State Law Claims Are Supplemental to Its Federal Claims and Lack Any Factual Nexus to California

Avery errs in contending that California has a greater interest than Minnesota in deciding this matter simply because the Complaint pleads five California state law claims. (Opp. at 9-10.) To be sure, consideration of "the state that is most familiar with the governing law" is a factor in the venue analysis, but it is only one of many factors, and certainly not a dispositive one. *See Jones*, 211 F.3d at 498-99 ("A motion to transfer venue under § 1404(a) requires the court to weigh multiple factors in its determination whether transfer is appropriate in a particular case."). If this factor weighed as heavily against transfer as Avery suggests, one would expect to find a number of federal court transfer decisions turning on the presence of supplemental California claims. Yet Avery's Opposition fails to cite even one such decision.

The closest Avery comes to citing an authority on point is *Ellis v. Costco Wholesale Corp.*, 372 F. Supp. 2d 530 (N.D. Cal. 2005). But in *Ellis* the court did not deny transfer because of the existence of California state law claims. Rather, the court concluded that "[i]t would not serve the interests of justice, judicial efficiency, or convenience to transfer this action to a district where two of the named plaintiffs have

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[Footnote continued from previous page]
though plaintiff's principal place of business was in California and defendant marketed products in California).

no contacts, defendant has weaker contacts than in competing forums, fewer relevant employment records are stored compared to competing forums, and the putative class is less widely represented." *Id.* at 540.

Avery does not even attempt to distinguish three federal antitrust cases cited and discussed by 3M, in which district courts granted transfer under section 1404(a) notwithstanding the plaintiff's pleading of California state law claims. (*See* Mot. at 15-16.) Similar cases abound, with courts consistently declining to find that supplemental claims arising under California law preclude transfers for convenience and in the interests of justice.[14]

Avery's Complaint is first and foremost an action under the Sherman and Lanham Acts. As another court has stated in similar circumstances, when considering transfer of a suit rooted largely in federal law claims but including supplemental state law causes of action, "the tail should not wag the dog." *In re Funeral Consumers Antitrust Litig.*, No. C 05-01804 WHA, 2005 WL 2334362, at *6 (N.D. Cal. Sept. 23, 2005) ("If the main *federal* event is clearly better served in the [transferee forum] than in [the transferor forum], the pendency of a supplemental state-law claim should not override the indicated result.") (emphasis in original); *see also Hoefer v. United States Dep't of Commerce*, No. C 00 0918 VRW, 2000 U.S. Dist. LEXIS 9299, at *8 (N.D.

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[14] *See, e.g.*, *Skyriver Tech. Solutions*, 2010 U.S. Dist. LEXIS 119984, at *15-16 (finding "that the Southern District of Ohio is fully capable of adjudicating claims that arise under California law"); *Szegedy*, 2009 WL 2767683, at *7 ("The fact that plaintiff has alleged claims under both Pennsylvania and California law does not weigh for or against transfer."); *Watson Pharms.*, 611 F. Supp. 2d at 1089 ("Both courts are familiar with the governing law."); *Johns v. Panera Bread Co.*, No. 08-1071 SC, 2008 U.S. Dist. LEXIS 78756, at *12 (N.D. Cal. July 21, 2008) (granting transfer even where four out of five of plaintiff's claims arose under California state law); *Painter's Dist. Council*, 2007 WL 4144892, at *8 (granting transfer where the only factor weighing against transfer was the forum state's familiarity with the applicable law); *Foster v. Nationwide Mut. Ins. Co.*, No. C 07-04928 SI, 2007 U.S. Dist. LEXIS 95240, at *15 (N.D. Cal. Dec. 14, 2007 ("It is true that this Court is more familiar with California law, but it is also true that other federal courts are fully capable of applying California law."); *Von der Werth*, 2007 U.S. Dist. LEXIS 62762, at *10-11.

Cal. June 28, 2000) ("[W]hen the gravamen of the case involves federal law, a state law claim is usually not a significant consideration on a motion to transfer venue").

Finally, while it makes the superficial claim that application of the Cartwright and Sherman Acts may lead to different results (Opp. at 9), Avery offers no explanation why this might be true, nor does it explain why the District of Minnesota would be less capable of analyzing and applying each statute. No reported decision has held that the Cartwright Act is so distinct from the Sherman Act as to require venue in California of suits raising claims under both statutes. In any event, Avery's "kitchen sink"-style pleading of California claims cannot trump the interests of justice and convenience factors weighing heavily in favor of transfer.

III. CONCLUSION

As demonstrated by the arguments set forth here, as well as the arguments and uncontested evidence presented by 3M's Motion, the interests of justice and convenience to the parties and the witnesses overwhelmingly weigh in favor of transfer to the District of Minnesota. Accordingly, 3M's Motion to Transfer Pursuant to 28 U.S.C. § 1404(a) should be granted.

DATED: January 24, 2011

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