UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. GRACO INC., *et al.*, Defendants.	Civil Action No. 11-cv-02239 (RLW)

MEMORANDUM OPINION[1]

The Federal Trade Commission ("FTC") filed a complaint seeking a temporary restraining order and preliminary injunction against Defendants Graco Inc., Illinois Tool Works Inc. ("ITW"), and ITW Finishing LLC ("ITWF") pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26. The FTC seeks a preliminary injunction to prevent Graco from acquiring its "largest and most significant competitor," ITWF, during the pendency of the FTC's ongoing administrative proceeding to determine the possible anticompetitive effects of such an acquisition.[2] The Defendants have moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(3) for lack of personal jurisdiction and improper venue. Alternatively, Defendants have moved to transfer the case to the United States District Court for the District of Minnesota pursuant to either 28 U.S.C. §§ 1404(a) or 1406(a). The Court will deny Defendants' motion to dismiss and grant the motion to transfer.

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1 This is a summary opinion intended for the parties and those persons familiar with the facts and arguments set forth in the pleadings; not intended for publication in the official reporters.

2 Based on the parties agreement that Defendant Graco would give the FTC two weeks' notice before consummating the acquisition, the Plaintiff's Motion for Temporary Restraining Order was denied without prejudice on December 19, 2011.

When personal jurisdiction is challenged under Rule 12(b)(2), the plaintiff bears the burden of establishing a factual basis for the Court's exercise of personal jurisdiction over each defendant. Crane v. N.Y. Zoological Soc'y, 894 F.2d 454, 456 (D.C. Cir. 1990). To establish that personal jurisdiction exists, the plaintiff must allege specific facts that connect the defendant with the forum. Second Amendment Found. v. U.S. Conference of Mayors, 274 F.3d 521, 524 (D.C. Cir. 2001). In determining whether a plaintiff has demonstrated that personal jurisdiction exists, the Court is not bound to treat all of the plaintiff's allegations as true, but instead "may receive and weigh affidavits and other relevant matter to assist in determining the jurisdictional facts." United States v. Philip Morris Inc., 116 F. Supp. 2d 116, 120 n. 4 (D.D.C. 2000).

Under Rule 12(b)(3), a court will dismiss or transfer a case if venue is improper or inconvenient in the plaintiff's chosen forum. Fed. R. Civ. P. 12(b)(3). If the court determines that venue is improper or inconvenient, the district court may either dismiss, "or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). The decision as to whether dismissal or transfer is "in the interest of justice" is committed to the sound discretion of the district court. Naartex Consulting Corp. v. Watt, 722 F.2d 779, 789 (D.C. Cir. 1983). In considering a Rule 12(b)(3) motion, the court accepts the plaintiff's well-pled factual allegations regarding venue as true, the court draws all reasonable inferences from those allegations in the plaintiff's favor, and the court resolves any factual conflicts in the plaintiff's favor. 2215 Fifth St. Assocs. v. U-Haul Int'l, Inc., 148 F. Supp. 2d 50, 54 (D.D.C. 2001).

The FTC asserts that personal jurisdiction exists, and therefore venue, because Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), confers jurisdiction over a corporate defendant irrespective of its contacts with the forum. The relevant language of the FTC Act is as follows:

> Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

15 U.S.C. § 53(b). The first sentence of this section sets forth three alternative options where venue is proper: where a defendant resides, where a defendant transacts business, or wherever venue is proper under 28 U.S.C. 1391. The FTC contends that it is the specific reference to section 1391 that allows a plaintiff to venue an action under the FTC Act in any judicial district in the country, regardless of the defendant's lack of contact with the district. The FTC reaches this conclusion based on their reading of three federal provisions, Section 13(b) of the FTC Act, Fed. R. Civ. P. 4, and the general venue statute, 28 U.S.C. § 1391(c).

The venue argument of the FTC proceeds in four steps. First, as set forth above, Section 13(b) of the FTC Act authorizes a plaintiff to serve a defendant in any judicial district in the country "wherever [the defendant] may be found . . . ." (Here, it is undiputed that both Graco and ITW "can be found" in at least one judicial district in the United States.) Second, because Fed. R. Civ. P. 4(k)(1)(c) provides that service pursuant to a federal statute is sufficient to establish personal jurisdiction over a defendant, the FTC contends that, taken together, Section 13(b) and Rule 4(k)(1)(c) indicate that a plaintiff in an FTC enforcement action may file a lawsuit in this judicial district, serve the defendants in any judicial district in the country, and thereby subject those defendants to personal jurisdiction in this district – the United States District Court for the District of Columbia. Third, the FTC argues that because the general

venue statute, 28 U.S.C. § 1391(c), deems a corporation "to reside in any judicial district in which it is subject to personal jurisdiction," and because the defendants are subject to personal jurisdiction in this district, the defendants therefore reside in this district. Fourth, the FTC contends that because venue is proper under Section 1391(b) in any district in which one or more defendants "reside,"[3] venue is proper within this district.

The Defendants contend that this venue analysis proffered by the FTC is flawed. Defendants argue that plaintiff's broad reading of Section 13(b) of the FTC Act is improper because Section 13(b) does not confer nationwide personal jurisdiction and venue as plaintiff alleges. Defendants argue that the FTC must first satisfy the venue provision of the Section 13(b) before invoking the nationwide service of process provision of Federal Rule 4, attacking the second step of the FTC's venue argument outlined above. Relying on the D.C. Circuit's holding in GTE New Media Servs., Defendants argue that Section 13(b)'s first clause regarding venue must be read as a precondition to the exercise of jurisdiction under Section 13(b)'s national service of process provision. See GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1351 (D.C. Cir. 2000) (holding that a party seeking to take advantage of the Clayton Act's liberalized service provisions must first establish proper venue as required by the Act's first clause.). Thus, the Defendants urge the Court to read Section 13(b) as an integrated whole and find that the service of process provision is effective only when, pursuant to the first clause of the Section 13(b), the action is brought in a district where the defendant resides or transacts business, or wherever venue is proper under section 1391 of title 28. The Defendants argue that

[3] Section 1391(b)(1) provides that non-diversity civil actions may be brought, among other places, in "a judicial district where any defendant resides, if all defendants reside in the same State . . . or [in] 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).

the FTC has failed to meet the precondition set forth in Section 13(b)'s first clause because the FTC has not established proper venue in this judicial district as to any defendant.

Ultimately, the Court finds that it is unnecessary to resolve whether Section 13(b) of the FTC Act requires a proper showing of venue before the FTC can rely upon the nationwide service of process provision in Rule 4. In this case, even under the Defendants' narrower interpretation of section 13(b), the Court finds that venue is proper in this district.

Although the Defendants have argued otherwise, ITW and ITWF are proper parties to this action. The FTC brought this action pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, as well as pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45.[4] Section 7 of the Clayton Act prohibits any corporation engaged in commerce from acquiring the stock or assets of another corporation engaged in commerce "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. Thus, by its terms, Section 7 is directed only to the acquiring party. Section 5 of the FTC Act, however, has no such limitation and applies to sellers as well as to buyers. See Yamaha Motor Co. v. FTC, 657 F.2d 971, 982-83 (8th Cir. 1981).

ITW and ITWF are identified as sellers in the Asset Purchase Agreement. The first paragraph of the Asset Purchase Agreement states that Graco Inc., Graco Holdings Inc., Illinois Tool Works Inc., and ITW Finishing LLC are parties to the agreement. (Docket No. 42-1 at 7). This paragraph further defines Illinois Tool Works Inc. as the "Seller Parent" and ITW Finishing LLC as the "US Seller." Id. In the "Definitions" section of the Agreement, "seller" is defined

[4] Section 13(b) of the FTC Act and Section 16 of the Clayton Act provide for injunctive relief for violations of the antitrust laws. In this case, the FTC is asking the Court for an injunction pursuant to Section 13(b) and Section 16 during the pendency of the FTC's administrative investigation pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18. Complaint ¶¶ 18, 19, 51.

as: "Seller Parent, U.S. Seller, and any other Subsidiaries of Seller Parent that become Sellers pursuant to Section 6.1(j), and each of them individually is referred to herein as a 'Seller.' " Id. at 15. (emphasis in original). Thus, the terms of the Agreement establish that both ITW and ITWF are sellers and are proper parties to this action.

Moreover, both ITW and ITWF are estopped from arguing that the Court lacks personal jurisdiction because ITW authored a stipulation which bound ITW and ITWF to "agree[] to accept service of process, and to subject itself to personal jurisdiction, in all federal districts within the United States." (Pl.'s Supp. Opp.'n Ex. 2 at 4). This stipulation was written in response to the FTC's Request for Additional Information ("Second Request"), in which the FTC defined "ITW Finishing" and the "Company" as ITWF and its domestic and foreign parents. (Pl.'s Opp.'n Ex. 3 at 3). While ITWF argues that they never conceded jurisdiction because the response to the FTC was only on behalf of ITW, ITWF's argument is belied by several facts. First, the face of the FTC request indicates that it was directed to ITWF, as it specifically identifies ITW Finishing LLC. Second, the "Definitions and Instructions" section further corroborates this by providing a definition for ITW Finishing. Third, ITW's responses to the FTC's requests for production contained references to documents that belonged to both ITW and ITWF. Perhaps most telling is the fact that ITW and ITWF received the benefits of the stipulation; both parties were able to forego a full response to the FTC's request and avoided jurisdictional discovery in the FTC investigational hearings. Because both parties received a benefit from the jurisdictional concession, it would be improper to allow ITWF to renege on the agreement to avoid jurisdiction here.

Because this judicial district has personal jurisdiction over ITW and ITWF, both companies "reside" in this district within the meaning of the general venue statute. See 28

U.S.C. § 1391(c). As described *supra*, residence of either ITW or ITWF in this district makes venue proper here. See 28 U.S.C. § 1391(b). Because venue is proper as to ITW and ITWF, Graco, as the purchasing party to the Asset Purchase Agreement, may be properly added as a party under the second clause of Section 13(b). Accordingly, the Court finds that personal jurisdiction and venue has been satisfied as to all defendants.

Even where venue is proper, a district court has "broad discretion" to order transfer" of venue pursuant to 28 U.S.C. § 1404(a). See In re Scott, 709 F.2d 717, 720 (D.C. Cir. 1983). Section 1404(a) provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it may have been brought." In adjudicating motions to transfer, "the proper technique to be employed is a factually analytical, case-by-case determination of convenience and fairness." SEC v. Savoy Indus., 587 F.2d 1149, 1154 (D.C. Cir. 1978) (citing Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)). See also Moore's Federal Practice - Civil § 111.13[1][a] (3rd ed.) (motion to transfer under Section 1404(a) "lies within the broad discretion of the district court" and "requires the court to make a 'flexible and individualized analysis,' and to 'weigh in the balance a number of case-specific factors' to determine whether the proposed transferee district would be a more convenient forum for the litigation") (citations omitted).

In order to succeed on a motion to transfer, the movant must first establish that the action could have been brought in the proposed transferee district—in this case, the District of Minnesota. DeLoach v. Phillip Morris Co., 132 F. Supp. 2d 22, 24 (D.D.C. 2000). Second, the movant must demonstrate that the "balance of convenience of the parties and witnesses and the interest of justice" favor transfer. Thayer/Patricof Educ. Funding LLC v. Pryor Res., 196 F. Supp. 2d 21, 31 (D.D.C. 2002).

It is undisputed that this action could have been brought in the District of Minnesota as all the defendants are found in and transact business in the District of Minnesota. Therefore, it is only the second inquiry that requires examination.

When considering a motion to transfer under section 1404(a), a court must weigh a number of private and public interest factors. The private interest factors include: (1) the plaintiff's choice of forum; (2) the defendants' choice of forum; (3) where the claim arose; (4) convenience of the parties; (5) convenience of the witnesses, but only to the extent that witnesses may be unavailable for trial in one of the fora; and (6) ease of access to sources of proof. The public interest considerations include: (1) the transferee's familiarity with the governing law; (2) the relative congestion of the courts of the transferor and potential transferee; and (3) the local interest in deciding local controversies at home. See FTC v. Cephalon, 551 F. Supp. 2d 21, 25 (D.D.C. 2008) (citations omitted). Applying these factors here, the Court finds that, in totality, they weigh in favor of transfer to the District of Minnesota.

The FTC is correct that the plaintiff's choice of forum is "a paramount consideration" and ordinarily entitled to "great deference" in the transfer inquiry. See Thayer/Patricof Educ. Funding, 196 F. Supp. 2d at 31. The FTC is also correct that some courts have given "heightened respect" to the government's choice of forum in antitrust cases. United States v. Brown Univ., 772 F. Supp. 241, 242 (E.D. Pa. 1991) (citing cases from the Second and Ninth Circuits). However, that deference is mitigated where "the plaintiff['s] choice of forum has no meaningful ties to the controversy and no particular interest in the parties or subject matter." Greater Yellowstone Coalition v. Bosworth, 180 F. Supp. 2d 124, 128 (D.D.C. 2001). Additionally, "the defendants' burden in a motion to transfer decreases when the plaintiff['s] choice of forum has no meaningful nexus to the controversy and the parties." Id. The District of

Columbia's ties to this case are minimal, while the majority of the conduct that gave rise to the FTC's claims took place in the District of Minnesota. Graco is headquartered in the District of Minnesota. The Asset Purchase Agreement that is the subject of this litigation was negotiated in Minnesota. ITW is headquartered in Illinois. ITW finishing business in the United States is primarily located in the Midwest. Key competitors that would presumably be affected by the proposed acquisition are also located throughout the Midwest. The FTC argues that the "acquisition is national in scope—it affects this district as well as districts all across the country." (Pl.'s Opp'n. at 10). However, this broad assertion further establishes that the District of Columbia has no meaningful connection to this action. Accordingly, plaintiff's choice of forum is not entitled to great deference. Of course, the Defendants' choice of forum is the District of Minnesota, but that choice is not entitled to great deference either. In light of these facts, the first and second private interest factors—the parties' respective choices of forum—are largely neutral, perhaps tipping slightly in favor of the FTC.

The third private interest factor – where the claim arose – weighs in defendants' favor because "no underlying operative facts" arose in the District of Columbia. S.E.C. v. Ernst & Young, 775 F. Supp. 411, 414 (D.D.C. 1991). The FTC argues that because this case is preliminary injunction proceeding in aid of an administrative proceeding currently pending in the District of Columbia, this case, in a procedural sense, arises out of that administrative action. There is, however, no legal support provided for the plaintiff's proposition. Courts in this district have held that claims "arise" for purposes of Section 1404(a) in the location where the corporate decisions underlying those claims were made, see, e.g., Berenson v. National Financial Services, LLC, 319 F. Supp. 2d 1, 4 (D.D.C. 2004) (agreeing with "the defendants' position that the claims arose at the location where the corporate decisions were made"), or where most of the significant

events giving rise to the claims occurred. See, e.g., Davis v. Am. Soc'y of Civil Eng'rs, 290 F. Supp. 2d 116, 123 (D.D.C. 2003) (concluding that the case did not "arise" in this district where "only one of the many potential events giving rise to this action . . . occurred in the District of Columbia"). The Asset Purchase Agreement was negotiated, drafted, and executed in Minneapolis. The proposed purchaser, Graco, has its principal place of business in Minnesota. Accordingly, the third private interest factor weighs in favor of transfer.

The next two considerations, convenience of the parties and convenience of the witnesses, do not weigh in favor of either party. Minnesota is more convenient for the defendants and the District of Columbia is more convenient for the FTC. With respect to the convenience of the witnesses, the FTC correctly points out that the relevant inquiry with respect to the convenience of the parties is "not whether witnesses are located outside the forum of the plaintiff's choice, but whether they would be unwilling to testify in that forum." (Pl.'s Opp.'n at 14) (quoting Cephalon, 551 F. Supp. 2d at 28). There is no evidence that any witnesses would be unwilling or unavailable to testify in either forum.

Turning to the final private-interest consideration—ease of access to the sources of proof—the Court finds that this factor weighs slightly in favor of transfer. The FTC contends that the documentary evidence in this case is in electronic form and available to anyone with authority to access it and an internet connection. (Pl's. Opp'n. at 15). The Court acknowledges the fact that that the location of documents is "increasingly irrelevant in the age of electronic discovery. Fanning v. Capco Contractors, Inc., 711 F. Supp. 2d 65, 70. However, these technological advances do not obviate the access to evidence inquiry entirely. See In re Apple, Inc., 602 F.3d 909, 914 (8th Cir. 2010) (finding that, notwithstanding the convenience provided

by electronic filing, "if the need arises to refer to original documents or evidence in the litigation, [the district where the movant is headquartered] would prove more convenient.").

Of the three public interest factors, the first – local interest – cuts in favor of transfer. The District of Minnesota has an interest in having plaintiff's claims "resolved in the locale where they arise." Trout Unlimited v. Dep't of Agric., 944 F.Supp. 13, 19 (D.D.C. 1996); see also Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 509 (1947) (stating that, "[t]here is a local interest in having localized controversies decided at home."). As previously discussed, the majority of the operative facts underlying the FTC's claims occurred in the District of Minnesota. The Asset Purchase Agreement at issue was negotiated, drafted, and executed in that district. Graco is headquartered in that district. Based on these facts, the Court finds that transfer is supported by a local interest in having this matter resolved in a Minnesota court.

The relative congestion of the transferee and transferor courts are largely neutral. While "congestion alone is not sufficient reason to transfer, relative docket congestion and potential speed of resolution is an appropriate factor to be considered" by district courts in the motion to transfer analysis. See Starnes v. McGuire, 512 F.2d 918, 932 (D.C. Cir. 1974). The median time to trial is a little over a year longer in the District of Columbia than in Minnesota. However, as this is an action for a preliminary injunction, the median time from filing to disposition is the more relevant metric. The median time from filing to disposition in the District of Columbia was 7.2 months for the 12-month period ending on September 30, 2011, while the median time interval for the District of Minnesota was 8.5 months for the same time period. See Federal Court Management Statistics, District Courts – September 2011, available at http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/DistrictCourtsSep2011.aspx. Because there is no appreciable difference in docket congestion between the two districts,

this factor is neutral. Similarly, the final factor—familiarity with the governing laws—does not cut in favor of, or against, transfer. This action involves claims grounded in federal law. The district court in Minnesota does not have any more or less familiarity with the federal antitrust laws or the administrative laws that are relevant to this preliminary injunction proceeding than this district.

Taken together, the Defendants have carried their burden to show that "the balance of convenience of the parties and witnesses and the interest of justice" favor transfer. The FTC's choice of forum is entitled to some deference, but not "great deference," because the District of Columbia has no meaningful connection to the parties or the subject matter of the controversy. No other factor favors retaining venue in the District of Columbia. The District of Minnesota is the more appropriate forum because the operative events arose there, the evidence and sources of proof are located there, the Defendants are located there (or closer to there), and the district has a local interest to adjudicate this dispute.

For the foregoing reasons, the Court will deny defendants' motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) and improper venue under Rule 12(b)(3), but grant defendants' motion to transfer this action to the United States District Court for the District of Minnesota pursuant to 28 U.S.C. § 1404(a). A separate Order accompanies this Memorandum Opinion.

SO ORDERED.
Date: January 26, 2012

Digitally signed by Judge Robert L. Wilkins
DN: cn=Judge Robert L. Wilkins, o=U.S. District Court, ou=Chambers of Honorable Robert L. Wilkins, email=RW@dc.uscourt.gov, c=US
Date: 2012.01.26 16:21:07 -05'00'

ROBERT L. WILKINS
United States District Judge