

**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

**IN RE: KABA SIMPLEX LOCKS
AND SALES PRACTICES LITIGATION**

MDL No. 2220

**DEFENDANTS' RESPONSE TO PLAINTIFF YESHAI MICHAEL KUTOFF'S
MOTION FOR TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION AND FOR COORDINATION OR CONSOLIDATION OF ALL
PRETRIAL PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407**

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Dated: December 29, 2010

I. INTRODUCTION & SUMMARY OF DEFENDANTS' RESPONSE

Plaintiff Yeshai Michael Kutoff (“Plaintiff” or “Movant”) has moved to transfer eight (8) cases and any tag-along cases to the United States District Court for the Northern District of Ohio, Eastern Division, and to consolidate and coordinate all cases for pretrial proceedings before the Honorable Donald C. Nugent. Defendants Kaba Ilco Corp., Kaba Corporation, Kaba Finance Corporation, Kaba Benzing America, Inc. and Kaba Delaware, LLC (collectively “Defendants”) do not oppose the transfer, consolidation and coordination of all cases. For the reasons set forth below, however, the more appropriate forum for the transfer of these actions is the Middle District of North Carolina because the majority of witnesses and documents are located at Defendants’ headquarters in that district. In the alternative, if the cases are not transferred to the Middle District of North Carolina, the District of New Jersey, Trenton Division (Judge Pisano); the Southern District of Florida (Judge Seitz); or the Northern District of Illinois, Eastern Division are more appropriate transferee courts than the Northern District of Ohio. All of these courts have more favorable docket conditions for management of these cases, have experienced judges who can manage the caseload, and are more easily accessible for the parties and witnesses.

II. BACKGROUND

A. Defendants’ Business

Defendant Kaba Ilco Corp. designs, manufactures, markets, and sells access control products.¹ Kaba Ilco Corp.’s product line encompasses a wide variety of access control

¹ Defendants Kaba Corporation, Kaba Finance Corporation, and Kaba Delaware, LLC are mere holding companies which do not engage in any such activities. *See Kutoff* Complaint (Doc. 1-7), ¶¶ 5-13; Affidavit of Michael Kincaid (“Kincaid Affidavit”), attached hereto as Exhibit A, ¶ 3. Another defendant, Kaba Benzing, is in the business of designing automated workforce management (“WFM”) tools, including time and attendance tracking, data collection, and

products, including electronic access controls and patented key control systems. Those electronic and key systems are ubiquitous in office buildings and hotels, where electronic or magnetic cards are used to unlock doors or gain access through turnstiles or other access control devices, or keys which cannot be duplicated are distributed to building tenants or residents. These class action lawsuits **do not** pertain to any of those electronic or key control systems.

Instead, as Plaintiffs allege in their complaint(s), the dispute here concerns specific models of a product within a distinct and separate line of non-electronic, “Simplex mechanical pushbutton locks.” Mechanical pushbutton locks were introduced into the access control marketplace in 1964. Mechanical pushbutton locks offer a convenient way to control access without keys or cards to manage, without computers to program, and without batteries to replace. Through a series of mergers and acquisitions over the next few decades, by 2001 Kaba Ilco Corp. was marketing the Simplex line of mechanical pushbutton locks under the Simplex brand name and trademark. *See Kutoff Complaint* (Doc. 1-7), ¶ 32.

Kaba Ilco Corp.’s Access Control Division’s offices and headquarters are located in Winston-Salem, North Carolina. *See Kutoff Complaint* (Doc. 1-7), ¶ 36; *Exhibit A, Kincaid Affidavit*, ¶ 4. The vast majority, if not all, of the design, manufacturing, marketing, warranty, technical support, sales records and other documents related to plaintiffs’ claims are located at Kaba Ilco Corp.’s Winston-Salem headquarters. *See Exhibit A, Kincaid Affidavit*, ¶ 4. Likewise, most if not all Kaba Ilco Corp. employees with direct knowledge of the design, manufacture and marketing of Simplex mechanical pushbutton locks maintain their offices at the Winston-Salem headquarters. *See Exhibit A, Kincaid Affidavit*, ¶ 5.

demand driven scheduling, which are not at issue in these cases. *See Exhibit A, Kincaid Affidavit*, ¶ 3.

B. Defendants' Receipt of Notice of the Alleged "Defect"

Kaba Ilco Corp. has never advertised or warranted in any way that any of its access control products are impenetrable. Locksmiths are schooled, trained and licensed in the art of defeating locks – from picks, to “bump” keys, to mechanical slides. Thieves and others who want to defeat locks can obtain the same tools and learn the same techniques locksmiths use. Indeed, any thief – even the most clumsy – can use a sledge hammer, a pry bar or bolt cutter to bypass essentially any lock. Locks may serve as a deterrent to theft, but have never been an absolute bar.

It was, however, still a surprise when, on or about August 15, 2010, a New Jersey Simplex sales representative reported to Kaba Ilco Corp. that a distributor reported to him that while attending a locksmith association show, the distributor saw a locksmith demonstrate how he could manipulate a model 7000 Simplex mechanical pushbutton lock by swiping an extremely powerful “rare earth” magnet along the lock’s left side. The magnetic force required for the manipulation exceeded 200 pounds of force – in other words the magnet would have to be big enough and strong enough to lift at least 200 pounds. Magnets of this size are not widely available or easily transportable, and because of their extreme power have the potential to cause bodily injury during use. Nonetheless, if the magnetic field reaches a “sweet spot” that varies from magnet to magnet and from lock to lock and may not exist at all, the field may be able to pull a mechanical lock component out of alignment and potentially bypass the locking mechanism.

Prior to August 15, 2010, Defendants never previously received any report or complaint that any model of Simplex mechanical pushbutton locks could be or had been compromised by a magnet. Defendants never received any reports of burglaries or other

criminal activity related to any magnetic manipulation of any model of a Simplex mechanical pushbutton lock – and indeed, none of the Plaintiffs have alleged that any such activity ever occurred. In point of fact, powerful rare earth magnets of this size and strength – still not widely available – were not even commercially feasible until the last few years.

C. Defendants’ Response to the Report

Kaba Ilco Corp. immediately investigated the report of the new locksmith’s trick that the distributor had seen at the locksmith association show. Its engineers added new design elements to the lock’s mechanical componentry, to help prevent even the powerful magnetic field of a rare earth magnet from manipulating the mechanical apparatus inside the lock. By September 19, 2010, Kaba Ilco Corp. incorporated this upgrade into the select handful of models of Simplex mechanical pushbutton locks that were potentially vulnerable to this “rare earth magnet” manipulation. This was approximately only one month after receiving the initial report of the locksmith’s new “rare-earth” magnet trick. Kaba Ilco Corp. is researching other engineering upgrades that may complement the upgrade it has already made, and could be effectively applied to existing installations.

D. Plaintiffs’ Class Actions

On November 29, 2010, three purported nationwide class action complaints were filed against Defendants, alleging generally that certain specified models of Simplex mechanical pushbutton locks contain defects in design that make them susceptible to bypassing through the use of an extremely powerful “rare earth” magnet. The core of Plaintiffs’ complaints is that Defendants have committed fraud by selling these locks since 1964, knowing for the past forty-six years that they could be manipulated by a rare earth magnet, and without disclosing that the locks could be manipulated by a rare earth magnet – even though such large and powerful rare

earth magnets only became commercially feasible a few years ago. The only claimed damages are an alleged diminution in the economic value of the subject locks. Plaintiffs do not allege that they actually purchased any of the locks, nor do they allege that any lock has actually been magnetically compromised as part of a criminal act that resulted in property damage or loss, or in bodily injury. All of the Plaintiffs allege they own a 7000/7100 series Simplex lock, except for one plaintiff who allegedly owns a 6200 series.

The first three complaints were filed in three different districts on November 29, 2010. The first complaint was filed in the District of New Jersey and is assigned to the Honorable Joel Pisano. Doc. 1-4 (Exhibit to Plaintiff's Motion). The second complaint was filed in the Eastern District of New York and is assigned to the Honorable Jack Weinstein. Doc. 1-5 (Exhibit to Plaintiff's Motion). The third complaint was filed by the Movant in the Northern District of Ohio and is assigned to the Honorable Donald Nugent. Doc. 1-7 (Exhibit to Plaintiff's Motion). Eight (8) additional complaints have been filed since then in the Southern District of New York, Northern District of Ohio, Central District of California and Southern District of Florida. Docs. 3-1 & 8-1 (Plaintiffs' Revised Schedules of Actions) & Exhibit B attached hereto (Defendants' Revised Schedule of Actions).

III. LEGAL STANDARD

Under 28 U.S.C. § 1407(a), the Panel may order the transfer and consolidation or coordination of civil actions involving one or more common questions of fact if such a transfer “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407. The selection of an appropriate transferee court is based on a balancing test of several factors, no one of which is dispositive. MANUAL FOR COMPLEX LITIGATION, FOURTH § 20.132 (citing Robert A. Cahn, *A Look at the Judicial Panel on*

Multidistrict Litigation, 72 F.R.D. 211, 214-15 (1977)). The factors include: (1) the location of relevant documents and witnesses; (2) the backlog of a court's civil docket and the extent to which it is overtaxed with other MDL cases; (3) a centrally located forum for national litigation; and (4) the preference of the parties. See *In re Avandia Mktg., Sales Pract. & Prods. Liab. Litig.*, 528 F. Supp. 2d 1339, 1341 (J.P.M.L. 2007); *In re Classicstar Mare Lease Litig.*, 528 F. Supp. 2d 1345, 1347 (J.P.M.L. 2007); *In re African-American Slave Descendants Litig.*, 231 F. Supp. 2d 1357, 1358 (J.P.M.L. 2002).

IV. ARGUMENT

A. The Middle District of North Carolina is the Most Appropriate Forum.

The most appropriate transferee forum for these cases is the Middle District of North Carolina. Substantially all of Defendants' activities related to the design, manufacture, marketing, and sale of mechanical push button locks occur at Kaba Ilco Corp.'s Access Control Division's offices and headquarters in Winston-Salem, North Carolina, which is in the Middle District of North Carolina. Accordingly, the vast majority of relevant documents and witnesses are located in the Middle District, which makes the Middle District a convenient forum for the parties and witnesses. See *In re Avandia Mktg., Sales Pract. & Prods. Liab. Litig.*, 528 F. Supp. 2d at 1341 (transferring consolidated cases to the district of the pharmaceutical manufacturer defendant's principal place of business where many relevant documents and witnesses were likely to be found); *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 293 F. Supp. 2d 1381, 1382 (J.P.M.L. 2003) (noting the proximity of the transferee court to documents and witnesses); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 254 F. Supp. 2d 1368, 1370 (J.P.M.L. 2003) (transferee court was "conveniently located" for many witnesses); *In re Express*

Scripts, Inc., Pharm. Benefits Mgmt. Litig., 368 F. Supp. 1356, 1357 (J.P.M.L. 2005)

(transferring actions to court that was conveniently located for many parties and witnesses).

Furthermore, the general docket conditions in the Middle District of North Carolina support this transfer. The Middle District currently has three hundred fifty-three (353) pending cases per judge, with a 9.4 month average time between filing and disposition of civil cases.² See Exhibit C attached hereto (Judicial Caseload Profile for Middle District of North Carolina, <http://www.uscourts.gov/cgi-bin/cmsd2009.pl>). The Middle District has *no* pending MDL assignments. See Exhibit D attached hereto (Distribution of Pending MDL Dockets (as of November 4, 2010)).

In Plaintiff's proposed transferee venue of the Northern District of Ohio, by contrast, there are four hundred eighty-eight (488) pending cases per judge –one hundred thirty-five (135) more cases than in the Middle District of North Carolina. Compare Exhibit C with Doc. 1-12 (Exhibit to Plaintiff's Motion). In addition, there are already 10 MDLs assigned to the Northern District of Ohio comprised of 1994 individual actions. Doc. 1-12. The general docket conditions in the Middle District of North Carolina are far more favorable for transfer and will ensure that the transferee forum has the resources needed to manage these cases. *In re Classicstar Mare Lease Litig.*, 528 F. Supp. 2d at 1347 (stating that “general docket conditions permit us to make the Section 1407 assignment knowing that the court has the resources available to manage this litigation”); *In re Vonage Mktg. & Sales Pract. Litig.*, 505 F. Supp. 2d 1375, 1377 (J.P.M.L. 2007) (transferee judge “has the time and experience” to manage the consolidated cases). Moreover, there is nothing unique about Ohio or its connection as one of fifty states where this lock was allegedly marketed and sold.

² The Middle District did not publish a statistic for the average time from filing to trial for civil cases in 2009.

Based on the location of documents and witnesses and the general docket conditions, the Middle District of North Carolina is a more appropriate transferee venue than the Northern District of Ohio. Defendants suggest the cases be assigned to Judge Schroeder in Winston-Salem, or to Judge Osteen or Judge Tilley in Greensboro, all of whom have substantial experience managing complex civil litigation. Both locations are easily accessible via the Piedmont Triad Airport in Greensboro, or the Charlotte/Douglas International Airport in Charlotte. *In re Air Cargo Shipping Servs. Antitrust Litig.*, 435 F. Supp. 2d 1342, 1345 (J.P.M.L. 2006) (noting “easily accessible” locale as factor in transfer decision).

B. In the Alternative, the District of New Jersey is a More Appropriate Forum than the Northern District of Ohio.

In the alternative, the District of New Jersey is a more appropriate transferee forum for these cases than the Northern District of Ohio. One of the three first-filed cases from November 29, 2010 was filed in the District of New Jersey and is currently assigned to Judge Joel Pisano in Trenton, New Jersey. Doc. 1-4 (Exhibit to Plaintiff’s Motion); *In re Household Goods Movers Antitrust Litig.*, 502 F. Supp. 2d 1356, 1357 (J.P.M.L. 2007) (citing forum of first-filed action as influential). Judge Pisano has substantial experience handling class actions and does not currently have an MDL assignment. *See* Exhibit D attached hereto (Distribution of Pending MDL Dockets (as of November 4, 2010)).

Furthermore, the general docket conditions in the District of New Jersey are more favorable to a transfer than the general docket conditions in the Northern District of Ohio. The District of New Jersey has four hundred four (404) pending cases per judgeship, as opposed to four hundred eighty-eight (488) in the Northern District of Ohio. *See* Doc. 1-12 (Exhibit to Plaintiff’s Motion). Moreover, while there are sixteen (16) currently pending MDL assignments in the District of New Jersey, the total number of actions now pending in those MDLs is one

hundred seventy-two (172), whereas the total number of MDL actions now pending in the Northern District of Ohio is one thousand, nine hundred ninety-four (1,994). *See* Exhibit D attached hereto (Distribution of Pending MDL Dockets (as of November 4, 2010)). These general docket conditions favor transfer to the District of New Jersey and Judge Pisano over transfer to the Northern District of Ohio. *In re Classicstar Mare Lease Litig.*, 528 F. Supp. 2d at 1347; *In re Vonage Mktg. & Sales Practices Litig.*, 505 F. Supp. 2d at 1377.

C. In the Alternative, the Southern District of Florida is Also a More Appropriate Forum than the Northern District of Ohio.

In the alternative, the Southern District of Florida is also a more appropriate transferee forum than the Northern District of Ohio. One of these cases has already been assigned to Judge Seitz in the Southern District of Florida. Doc. 8 (Notice of Related Case). Judge Seitz has substantial MDL experience and is currently handling two (2) MDLs, one comprised of three (3) currently-pending actions and the other comprised of five (5) currently-pending actions. *See* Exhibit D attached hereto (Distribution of Pending MDL Dockets (as of November 4, 2010)). Moreover, the Southern District of Florida has more favorable general docket conditions than the Northern District of Ohio. *See* Exhibit E attached hereto (Judicial Caseload Profile for Southern District of Florida, <http://www.uscourts.gov/cgi-bin/cmsd2009.pl>). In the Southern District of Florida, there are an average of three hundred seventeen (317) pending cases per judgeship, in contrast to four hundred eighty-eight (488) in the Northern District of Ohio. *Compare* Exhibit E *with* Doc. 1-12 (Exhibit to Plaintiff's Motion). The average time from filing to trial in civil actions in the Southern District of Florida is 15.7 months, which is also more favorable than the 17-month average in the Northern District of Ohio. *Compare* Exhibit E *with* Doc. 1-12.

D. In the Alternative, the Northern District of Illinois is Also a More Appropriate Forum than the Northern District of Ohio.

Finally, and in the alternative, the Northern District of Illinois, Eastern Division in Chicago is also a more appropriate transferee forum than the Northern District of Ohio in Cleveland. While Defendants' counsel is in Chicago, the fact remains that unlike Cleveland, Chicago is centrally-located in the middle of the country, and is serviced by two large commercial airports (O'Hare and Midway International) which make Chicago much more easily accessible for all parties and counsel from around the country. *In re Air Cargo Shipping Servs. Antitrust Litig.*, 435 F. Supp. 2d at 1345 (noting "easily accessible" venue); *In re: The TJX Cos., Inc., Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 505 F. Supp. 2d 1379, 1380 (J.P.M.L. 2007) (citing central location of transferee court as a factor in its selection); *In re African-American Slave Descendants Litig.*, 231 F. Supp. 2d at 1358 (noting that the "geographically central [Northern District of Illinois] will be a convenient location for a litigation becoming nationwide in scope"). There are currently an average of four hundred twenty-six (426) cases pending per judgeship in the Northern District of Illinois, which is lower than the average in the Northern District of Ohio (488). *See* Doc. 1-12 (Exhibit to Plaintiff's Motion.) Currently, Northern District Judges Darrah, Dow and Kendall do not have MDL assignments. *See* Exhibit D attached hereto (Distribution of Pending MDL Dockets (as of November 4, 2010)). Any of these District Judges would be excellent candidates for the assignment of these cases.

V. CONCLUSION

For all of the foregoing reasons, the Panel should transfer the actions and any future-filed actions to the Middle District of North Carolina for consolidated or coordinated pre-trial proceedings. Alternatively, the District of New Jersey (Judge Pisano), the Southern District of

Florida (Judge Seitz) or the Northern District of Illinois, Eastern Division are more appropriate transferee courts for these cases than the Northern District of Ohio.

Dated: December 29, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2010, a copy of the foregoing *Defendants' Response to Plaintiff Yeshai Michael Kutoff's Motion for Transfer of Actions to the Northern District of Ohio, Eastern Division and for Coordination or Consolidation of All Pretrial Proceedings Pursuant to 28 U.S.C. § 1407* was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Mark P. Miller _____