BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: **ITT TECHNICAL INSTITUTE WARN ACT LITIGATION**	**MDL No. _____**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF CHRISTIN LONG'S MOTION FOR TRANSFER OF ACTIONS TO THE SOUTHERN DISTRICT OF INDIANA PURSUANT TO 28 U.S.C. § 1407

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I. INTRODUCTION

Pursuant to 28 U.S.C. § 1407 and Rule 6.2(a) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Plaintiff in *Long v. ITT Educational Services, Inc.*, No. 1:16-cv-02399-WTL-DKL (S.D. Ind.), respectfully submits this memorandum of law in support of her motion to transfer all related actions to the Southern District of Indiana, or in the alternative to the Northern District of Indiana.

Plaintiff was employed by Defendant ITT Educational Services, Inc. ("ITT") until September 6, 2016, when ITT abruptly closed the doors of approximately 130 ITT Technical Institute campuses in 38 states without any advance notice. This instantly left over 8,000 workers unemployed. While ITT largely concealed this information from its employees, it was reasonably foreseeable to ITT that such an outcome was inevitable. Indeed, ITT's ability to participate in federal student aid had been in question and conditional since August 2014, and ITT had reason to know that its accreditation was in jeopardy as early as April 2016.

Plaintiff's action is brought – like the other actions subject to this motion – as a result of ITT's failure to provide its workers with the notification required under the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.* (the "WARN Act"), and seeks to recover appropriate relief to remedy this violation.[1] Plaintiff was an employee of Defendant for purposes of the WARN Act, and was terminated as part of a mass layoff or plant closing ordered by ITT. All of the related

[1] While some of the related actions assert claims in addition to the WARN Act (*e.g.*, state law claims), they all relate to ITT's abrupt closure on September 6.

actions allege that ITT violated federal law by failing to give its employees sixty days' advance notice as required by the WARN Act.

In addition to her own case, Plaintiff is aware of three other cases filed on behalf of former ITT employees. All of these cases are purported class action lawsuits. Based on the numerous common questions of fact involved and efficiencies that could be gained by coordinated or consolidated pretrial proceedings, Plaintiff respectfully requests that her motion for § 1407 transfer to a single forum be granted. In addition, because the most logical and convenient location for these proceedings is the Southern District of Indiana (the location of the sole common defendant), Plaintiff respectfully requests these actions be transferred there for coordinated or consolidated pretrial proceedings before the Honorable William T. Lawrence.

II. BACKGROUND

As noted above, Plaintiff's motion for transfer involves at least four actions pending in three different jurisdictions across the United States asserting common factual allegations and involving overlapping claims and legal issues. Plaintiff expects additional actions to be filed in the federal courts alleging similar claims.

A. Plaintiff

The Plaintiff in this litigation has filed her civil action arising from ITT's failure to provide notice to more than 8,000 employees prior to a mass layoff or plant closing. Plaintiffs in all four actions are former ITT employees whose jobs were terminated without notice in a mass layoff or plant closing. Each of these pending

cases presents a common core of facts, in that each (i) alleges that ITT terminated their employment without the sixty-day notice required by the WARN Act; (ii) asserts injury and damages arising from ITT's wrongful conduct; and (iii) alleges the same or similar conduct by ITT. Indeed, the factual allegations in plaintiffs' complaints are nearly identical in numerous critical respects. These four cases were all filed within two days of ITT's announced closure.

The plaintiffs in these federal actions are geographically diverse, residing in California, Ohio, Indiana, Louisiana, and Illinois.

B. Defendant

ITT Educational Services, Inc. is a corporation doing business in 38 states and is organized under the laws of the Delaware, with its principal place of business located at 13000 North Meridian Street, Carmel, Indiana 46032-1404.

C. Overview of Claims

This case arises because Defendant ITT terminated more than 8,000 employees in 38 states on September 6, 2016 without any advance warning when ITT abruptly closed the doors of its approximately 130 ITT Technical Institute campuses. Of those more than 8,000 employees who were terminated without notice, approximately 4,100 were full-time ITT Technical Institute instructors and 4,300 part-time instructors.

Notwithstanding the lack of any forewarning to its employees, it was reasonably foreseeable to ITT that it would not be financially viable for its school to continue operating. Indeed, ITT's ability to participate in federal student aid

programs had been in question and conditional since August 2014. Beginning in August 2014, the United States Department of Education required ITT to pose an irrevocable surety in order to participate in federal student aid programs, a surety which the Department of Education twice raised in June 2016 and August 2016. Also beginning in August 2014, ITT was subject to increased Department of Education monitoring of its operations and finances.

Furthermore, ITT had reason to know that its accreditation was in jeopardy as early as April 2016, when its accreditor directed ITT to show cause why ITT's grant of accreditation should not be withdrawn. Also in June 2016, the National Advisory Council on Institutional Quality and Integrity recommended to the Department of Education that it not re-recognize ITT's accreditation agency. Following a hearing in August 2014, ITT's accreditor determined ITT had failed to meet the accreditor's requirements.

Due to ITT's failure to meet its accreditor's requirements, on August 25, 2016, the Department of Education advised ITT it would not be permitted to enroll new students under federal student aid programs and imposed additional requirements in order to maintain ITT's certification to participate in federal student aid programs. On that same date, the Department of Education raised ITT's required surety for the second time, as described above.

Notwithstanding its ongoing turmoil, ITT continued to operate. Employees were given no advance notice or warning that ITT was closing its facilities. In an email sent to employees by ITT's CEO on Friday, September 2, 2016, employees were

told they were being given an extra paid holiday on September 6, 2016 in order for them to "pause and spend time with . . . family." Instead, on September 6, 2016, employees received an email informing them "It has become necessary to permanently eliminate your position due to . . . a company-wide reorganization to cease operations and close the business, including the location at which you work." The termination was effective immediately and employees were paid only through September 6, 2016, the same date the termination email was sent to employees.

Plaintiff brings her action individually and on behalf of all other former ITT employees nationwide who were terminated by ITT with no advance notice on September 6, 2016 as part of a mass layoff or plant closing. Plaintiff seeks damages in the amount of sixty days' pay and benefits, by reason of Defendant's violation of the WARN Act.

D. Status of the Actions

These cases were filed in district courts in Indiana, Delaware, and Illinois within two days of ITT's September 6, 2016 closure. Each case was filed no later than September 7, 2016. Given the infancy of these cases, no discovery has been taken; nor have any other actions occurred on the progress to trial such that transfer would be unduly prejudicial or inefficient. That all cases are at the same early procedural stage provides another basis to coordinate them.

III. ARGUMENT

Section 1407 authorizes the transfer of two or more civil actions, pending in different districts, for coordinated or consolidated pretrial proceedings, when (1)

the "actions involv[e] one or more common questions of fact;" (2) transfer "will be for the convenience of parties and witnesses;" and (3) transfer "will promote the just and efficient conduct of such actions." "The multidistrict litigation statute, 28 U.S.C. § 1407, was enacted as a means of conserving judicial resources in situations where multiple cases involving common questions of fact were filed in different districts." *Royster v. Food Lion (In re Food Lion)*, 73 F.3d 528, 531-32 (4th Cir. 1996). Two critical goals of Section 1407 are to promote efficiency and consistency. *Illinois Mun. Ret. Fund v. Citigroup, Inc.*, 391 F.3d 844, 852 (7th Cir. 2004). The statute "was [also] meant to 'assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation[,]'" and "[w]ithout it, 'conflicting pretrial discovery demands for documents and witnesses' might 'disrupt the functions of the Federal courts.'" *In re Phenylpropanolamine Prod. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir. 2006) (quoting H.R. Rep. No. 1130, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899). The alternative to appropriate transfer is '"multiplied delay, confusion, conflict, inordinate expense and inefficiency."' *Id.* (quoting *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 495 (J.P.M.L. 1968)).

A. The Cases Should Be Transferred to a Single Forum

These actions assert overlapping claims, based on multiple common factual allegations, and will involve common legal theories and themes. Consolidated pretrial treatment under Section 1407 will assist the parties and the courts in avoiding duplicative and conflicting rulings on the common issues in dispute.

Granting this motion will also serve the convenience of the parties and witnesses and promote the just and efficient resolution of the litigation.

1. These Cases Involve Common Questions of Fact

The threshold requirement for centralization pursuant to Section 1407 is the presence of common questions of fact. *See* 28 U.S.C. § 1407. Although common questions must predominate, the statute does not require a "complete identity or even [a] majority" of common questions of fact to justify transfer. *In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1381 (J.P.M.L. 2004).

Here, the common core of operative factual allegations—principally, whether ITT violated the WARN Act in eliminating the jobs of more than 8,000 employees without notice—predominate over individual questions of fact in each of the cases. Likewise, any potential defenses to the WARN Act that could be raised by ITT will depend upon the same evidence. To the extent that differences among the cases exist, the transferee judge has broad discretion to employ any number of pretrial techniques to address those differences and efficiently manage the various aspects of the litigation. *See, e.g., In re Lehman Bros. Holdings, Inc.*, 598 F. Supp. 2d 1362, 1364 (J.P.M.L. 2009). Centralization in one district, with coordinated discovery, is highly appropriate because it will minimize duplication of effort and burden on all parties. *See In re "Factor VIII or IX Concentrate Blood Prods." Prod. Liab. Litig.*, 853 F. Supp. 454, 455 (J.P.M.L. 1993).

Moreover, centralization will minimize the risk of inconsistent rulings. All pending actions rely upon similar legal theories of recovery and seek certification

under Rule 23. These theories include WARN Act violations and, in some of the actions, state labor law or wage law violations. All share related underlying legal theories of liability, which is ITT's failure to notify its employees prior to a mass layoff or plant closing. As the Panel has previously stated, "the presence of additional or differing legal theories is not significant when the actions still arise from a common factual core . . . ." *In re Oxycontin Antitrust Litig.*, 542 F. Supp. 2d 1359, 1360 (J.P.M.L. 2008). Because numerous common issues of fact exist among these cases, the pending actions clearly satisfy the first element of the transfer analysis under Section 1407.

2. Transfer Will Serve the Convenience of the Parties and Prevent Duplicative Discovery

The convenience of the parties and prevention of duplicative discovery also favor transfer. *See* 28 U.S.C. § 1407. At present all of the cases are in their infancy, having all been filed within the three days. If these cases continue to proceed separately, there will be substantial duplicative discovery because of the many overlapping issues of fact and law. Multiple cases could involve the repetitive depositions of the same ITT company representatives, other current and former employees, and expert witnesses, as well as production of the same records, and responses to duplicative interrogatories and document requests in jurisdictions around the country. *See, e.g.*, *In re: Pilot Flying J Fuel Rebate Contract Litig.*, 11 F. Supp. 3d 1351, 1352 (J.P.M.L. 2014) ("Centralization will avoid repetitive depositions of Pilot's officers and employees and duplicative document discovery regarding the

alleged scheme."). Absent transfer, the federal court system will be forced to administer—and ITT will be compelled to defend—these related actions across multiple venues, all proceeding on potentially different pretrial schedules and subject to different judicial decision-making and local procedural requirements.

None of the pending cases have progressed to the point where significant efficiencies will be forfeited through transfer to an MDL proceeding. This Panel has routinely recognized that consolidating litigation in one court benefits ***both*** plaintiffs and defendants. For example, pretrial transfer would reduce discovery delays and costs for plaintiffs, and permit plaintiffs' counsel to coordinate their efforts and share the pretrial workload. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F. Supp. 2d 1377, 1379 (J.P.M.L. 2001) ("And it is most logical to assume that prudent counsel will combine their forces and apportion their workload in order to streamline the efforts of the parties and witnesses, their counsel and the judiciary, thereby effectuating an overall savings of cost and a minimum of inconvenience to all concerned."); *In re Baldwin-United Corp. Litig.*, 581 F. Supp. 739, 741 (J.P.M.L. 1984) (same). As for ITT, national or "generic" expert depositions will be coordinated, document production will be centralized, and travel for its former employees and executives will be minimized, since it will only have to appear in one location rather than multiple districts around the country.

While Plaintiffs anticipate there will be additional case filings, even the current level of litigation would benefit from transfer and coordinated proceedings, given the allegations of these complaints. *See In re First Nat'l Collection Bureau, Inc.*,

11 F. Supp. 3d 1353, 1354 (J.P.M.L. Apr. 8, 2014) ("Although there are relatively few parties and actions at present, efficiencies can be gained from having these actions proceed in a single district," such as "eliminat[ing] duplicative discovery; prevent[ing] inconsistent pretrial rulings . . . and conserv[ing] the resources of the parties, their counsel and the judiciary."); *In re Hyundai & Kia Fuel Econ. Litig.*, 923 F. Supp. 2d 1364 (creating multidistrict litigation for less than 15 pending actions); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 572 F. Supp. 2d 1380, 1381 (J.P.M.L. 2008) (granting transfer and consolidation of three cases and six potential tag-alongs because of the "overlapping and, often, nearly identical factual allegations that will likely require duplicative discovery and motion practice. Centralizing these actions under Section 1407 will ensure streamlined resolution of this litigation to the overall benefit of the parties and the judiciary."); *In re Amoxicillin Patent & Antitrust Litig.*, 449 F. Supp. 601, 603 (J.P.M.L. 1978) (granting transfer and consolidation of three cases "[b]ecause of the presence of complex factual questions and the strong likelihood that discovery concerning these questions will be both complicated and time-consuming, we rule that transfer under Section 1407 is appropriate at the present time even though only three actions are presently involved."); *In re Ford Motor Co. Defective Spark Plug & 3–Valve Engine Prods. Liab. Litig.*, 844 F. Supp. 2d 1375, 1376 (J.P.M.L. 2012) (granting transfer and consolidation of three cases).

Transfer of these actions would serve the convenience of the parties and eliminate duplicative discovery, saving the parties—and the courts—significant time, effort, and money.

3. Transfer Will Promote the Just and Efficient Conduct of These Actions

The Panel recognizes multiple factors as informing whether the just and efficient conduct of a litigation will be advanced by transfer, including: (i) avoidance of conflicting rulings in various cases; (ii) prevention of duplication of discovery on common issues; (iii) avoidance of conflicting and duplicative pretrial conferences; (iv) advancing judicial economy; and (v) reducing the burden on the parties by allowing division of workload among several attorneys. *See*, *e.g.*, *In re: Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369, 1369 (J.P.M.L. 2010); *In re Bristol Bay, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 506 (J.P.M.L. 1976).

All of these factors will be advanced by transfer here. Plaintiffs are aware of four cases presently filed across the country and there will likely be more filings in the coming weeks. Under this *status quo*, at least three different federal district courts will be ruling on the many common factual and legal issues presented in these cases. The presence of numerous counsel, plaintiffs, and courts currently involved in this litigation creates a clear risk of conflicting rulings, with the potential to generate significant confusion and conflict among the parties, as well as inconsistent obligations on the defendant.

The prospect of inconsistent rulings also encourages forum and judge shopping (including, for example, manipulation of non-congruent discovery limits, approaches to electronically stored information, and protective order issues). By contrast, a single MDL judge coordinating pretrial discovery and ruling on pretrial motions in all of these federal cases at once will help reduce witness inconvenience, the cumulative burden on the courts, and the litigation's overall expense, as well as minimizing this potential for conflicting rulings. *In re: Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 65 F. Supp. 3d 1402, 1405 (J.P.M.L. 2014) ("Issues concerning the development, manufacture, regulatory approval, labeling, and marketing of Xarelto thus are common to all actions. Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel and the judiciary."); *In re Tylenol Mktg., Sales Practices & Prods. Liab. Litig.*, 936 F. Supp. 2d 1379, 1380 (J.P.M.L. 2013) ("Centralization will . . . prevent inconsistent pretrial rulings (on *Daubert* issues and other matters) . . . .").

Accordingly, transfer to a single district court is appropriate for the just and efficient resolution of these cases.

B. The Most Appropriate Transferee Forum is the Southern District of Indiana

The district court with the strongest nexus to the litigation is often selected as the transferee court. *See, e.g., In re: Reciprocal of Am. (ROA) Sales Practices Litig.*, 281 F. Supp. 2d 1356, 1358 (J.P.M.L. 2003). For the following reasons, the Southern District of Indiana has the strongest nexus to the litigation.

1. ITT, the sole common Defendant, is Headquartered and Maintains Substantial Operations in the Southern District of Indiana

ITT has been headquartered in Carmel, Indiana for almost fifty years. As such, it is likely that those ITT employees who made the decision to shutter ITT Technical Institutes and terminate more than 8,000 employees effective immediately without advance notice are located in Indiana. Likewise, a significant portion of the events leading to ITT's termination of more than 8,000 employees likely occurred in Indiana. As such, it is likely Indiana has more relevant witnesses than any other state.

In addition to operating its central hub in Indiana, ITT also operated six ITT Technical Institute campuses in Indiana, including two in the Southern District of Indiana.[2] More than 12,000 of the approximately 40,000 students who attended ITT Technical Institute as of September 6, 2016 attended schools in Indiana and it is likely that a similar proportion of ITT's instructors were located there. A significant portion of ITT's central, administrative, and support staff was likely located at its headquarters in Indiana. As such, it is likely Indiana has more class members than any other state.

Notably, two of the plaintiffs in the related actions reside in Indiana. Plaintiff Donna L. Lindsay, who filed a case against ITT on September 7, 2016, under docket number 1:16-cv-00790-UNA in the District of Delaware and Plaintiff Allen Federman, who filed a case against ITT on September 6, 2016, under docket number 1:16-cv-00780-UNA in the District of Delaware were both employed at ITT's headquarters in

[2] ITT Technical Institute campuses in Indiana are located in Fort Wayne, Indianapolis, Greenwood, Merrillville, Newburgh/Evansville, and South Bend. The Indianapolis and Newburgh/Evansville campuses are located within the Southern District of Indiana.

Carmel, Indiana, which is located in the Southern District of Indiana. The other plaintiffs in those two District of Delaware actions worked variously at ITT campuses in Louisiana and California. Defendant has no nexus to the District of Delaware except the fact of its incorporation there. According to ITT's website, there were no ITT Technical Institutes in Delaware,[3] making that state one of only twelve states without one.

2. The Southern District of Indiana is a convenient forum for all litigants

The Southern District of Indiana is plainly a centralized and convenient location for all counsel and witnesses. It is serviced by the Indianapolis International Airport (IND). Indeed, the Panel has recognized previously that the Southern District of Indiana is a "readily accessible district." *In re Method of Processing Ethanol Byproducts & Related Subsystems*, 730 F. Supp. 2d 1379, 1380 (J.P.M.L. 2010) (transferring actions to Senior Judge Larry J. McKinney of the Southern District of Indiana).

And, as noted above, the Southern District of Indiana contains the headquarters and center of ITT's operations. *In re GAF Elk Cross Timbers Decking Mktg., Sales Practices & Prods. Liab. Litig.*, 65 F. Supp. 3d 1407, 1408 (J.P.M.L. 2014) (transferring MDL to the District in which the common defendant was headquartered); *In re Bluetooth Headset Prods. Liab. Litig.*, 475 F. Supp. 2d 1403, 1404 (J.P.M.L. 2007) (transferring MDL to the District in which a critical defendant was headquartered); *In re RC2 Corp. Toy Lead Paint Prods. Liab. Litig.*, 528 F. Supp. 2d 1374,

[3] *See* http://programinfo.itt-tech.edu/consumerinfo/campus.cfm.

1375 (J.P.M.L. 2007) (same); *In re Investors Funding Corp. of New York Sec. Litig.*, 437 F. Supp. 1199, 1203 (J.P.M.L. 1977) (same); *In re Falstaff Brewing Corp. Antitrust Litig.*, 434 F. Supp. 1225, 1230-31 (J.P.M.L. 1977) (same).

3. Judge William T. Lawrence is an outstanding jurist who will efficiently and effectively manage the consolidated litigation

Plaintiff's case was assigned to Judge William T. Lawrence. Judge Lawrence is highly experienced and uniquely suited to efficiently and effectively manage this consolidated litigation.

Judge Lawrence has been on the bench for two decades. In 1996, he was elected Judge of the Marion County Circuit Court from 1996 to 2002, after serving as Master Commissioner in Marion County for more than thirteen years.[4] After serving as Judge of the Marion County Circuit Court for six years, Judge Lawrence was appointed United States Magistrate Judge in the Southern District of Indiana in 2002 and presided there for six years until he was sworn in as Judge of the United States District Court for the Southern District of Indiana on June 26, 2008.[5] Judge Lawrence was the first Magistrate Judge to become a District Court Judge in the Southern District of Indiana.[6]

Judge Lawrence has handled several prominent cases. Notably, he presided over a Fair Labor Standards Act case by members of the University of Pennsylvania women's track team against the National Collegiate Athletic Association ("NCAA")

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4 *See* http://www.insd.uscourts.gov/content/judge-william-t-lawrence.

5 *Id.*

6 *Id.*

and 123 NCAA member schools.[7] Judge Lawrence also presided over a Fair Labor Standards Act case brought by a class of workers who contested their classification as "independent workers" and below-minimum-wage pay.[8] As a result of such judicial experience, Judge Lawrence is well-suited to oversee the wage and employment claims against ITT.

The Panel has previously entrusted complex MDL cases to Judge Lawrence, including *In re Cobra Tax Shelters Litigation,* No. 1727, which Judge Lawrence concluded on April 14, 2009.[9] Notably, Judge Lawrence is not assigned an MDL matter at present.

4. In the alternative, the Panel should transfer the actions to the Northern District of Indiana

The Northern District of Indiana also has a strong nexus to this litigation. It sits in close proximity to the headquarters of ITT in Carmel, Indiana and therefore also to many of the witnesses and much of the evidence that will likely be involved in this litigation. Furthermore, it contains four ITT Technical Institute campuses at Fort Wayne, Greenwood, Merrillville, and South Bend.

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7 *Berger v. NCAA*, No. 1:14-cv-1710-WTL-MJD, 2016 U.S. Dist. LEXIS 18194 (S.D. Ind. Feb. 16, 2016).

8 *Morse v. Mer Corp.*, No. 1:08-cv-1389-WTL-JMS, 2010 U.S. Dist. LEXIS 55636 (S.D. Ind. June 4, 2010).

9 *See In re Cobra Tax Shelters Litig.*, No. 1:05-ml-9727-WTL-TAB (S.D. Ind.). This case was originally assigned to Judge Daniel Tinder, but subsequently reassigned to Judge Lawrence following Judge Tinder's appointment to the United States Court of Appeals for the Seventh Circuit.

IV. CONCLUSION

Plaintiff respectfully requests that the Panel transfer the four actions, and any subsequent tag-along actions involving ITT's allegedly wrongful conduct in eliminating the jobs of more than 8,000 employees without notice to the Southern District of Indiana for coordinated or consolidated pretrial proceedings before Judge Lawrence. In the alternative to the Southern District of Indiana, the Panel should transfer the actions to the Northern District of Indiana.

Dated: September 9, 2016

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