

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 SULEIMAN KHUTOB, et al.,
4 Plaintiffs
5 v.
6 L.A. INSURANCE AGENCY
FRANCHISING, LLC,
7 Defendant
8

Case No.: 2:18-cv-01505-APG-PAL

**Order Denying Motion to Dismiss and
Granting Motion to Transfer**

[ECF Nos. 16, 17]

9 Defendant L.A. Insurance Agency Franchising, LLC (LAIA) moves to dismiss or to
10 transfer this case to the United States District Court for the Eastern District of Michigan. LAIA
11 bases its motion on the first-to-file rule. Alternatively, it contends the case should be transferred
12 either because of the forum selection clause in the parties' franchise agreements or for the
13 convenience of the parties under 28 U.S.C. § 1404(a).

14 The plaintiffs respond that the first-to-file rule does not apply because this case and the
15 one LAIA filed against the plaintiffs in Michigan are too dissimilar. Alternatively, they argue
16 that I should not apply the rule because LAIA's Michigan complaint was an anticipatory suit
17 aimed at forum shopping once LAIA suspected the plaintiffs were about to file suit. The
18 plaintiffs also contend equitable factors weigh against applying the rule. As for the forum
19 selection clause, the plaintiffs argue that transfer is not warranted because the clause was the
20 product of fraud or overreaching, the plaintiffs would be deprived of their day in court, and
21 transfer would contravene Nevada policy. The plaintiffs do not specifically address transfer
22 under § 1404(a), but generally argue that convenience and fairness concerns weigh against
23 transfer to Michigan.

1 The parties are familiar with the facts so I will not repeat them here except where
2 necessary. I deny the motion to dismiss and grant the motion to transfer.

3 Under the first-to-file rule, “when cases involving the same parties and issues have been
4 filed in two different districts, the second district court has discretion to transfer, stay, or dismiss
5 the second case in the interest of efficiency and judicial economy.” *Cedars-Sinai Med. Ctr. v.*
6 *Shalala*, 125 F.3d 765, 769 (9th Cir. 1997). In determining whether to apply the first-to-file rule,
7 I analyze three factors: “chronology of the lawsuits, similarity of the parties, and similarity of the
8 issues.” *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015).

9 The rule is based on the premise that “[n]ormally sound judicial administration would
10 indicate that when two identical actions are filed in courts of concurrent jurisdiction, the court
11 which first acquired jurisdiction should try the lawsuit and no purpose would be served by
12 proceeding with a second action.” *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th
13 Cir. 1982). Courts thus “should be driven to maximize economy, consistency, and comity” when
14 deciding whether to apply it. *Kohn Law Grp., Inc.*, 787 F.3d at 1240 (quotation omitted); *see also*
15 *Church of Scientology of Cal. v. U.S. Dep’t of Army*, 611 F.2d 738, 750 (9th Cir. 1979),
16 *overruled on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d
17 987 (9th Cir. 2016) (“The doctrine is designed to avoid placing an unnecessary burden on the
18 federal judiciary, and to avoid the embarrassment of conflicting judgments.”).

19 Given these purposes, the rule “should not be disregarded lightly.” *Alltrade, Inc. v.*
20 *Uniweld Prod., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991) (quotation omitted). But it “is not a rigid
21 or inflexible rule to be mechanically applied.” *Pacesetter Sys., Inc.*, 678 F.2d at 95. Thus,
22 “[c]ircumstances and modern judicial reality . . . may demand that [courts] follow a different
23 approach from time to time.” *Id.* (quotation omitted). Equitable considerations may weigh

1 against applying the rule. *Alltrade, Inc.*, 946 F.2d at 628. Whether to apply the first-to-file rule
2 lies within my discretion. *Pacesetter Sys., Inc.*, 678 F.2d at 95.

3 **A. First in Time**

4 There is no dispute that LAIA’s Michigan complaint was filed first, even though both
5 cases were filed on the same day. The plaintiffs assert that the Michigan complaint has not yet
6 been properly served on them. But even assuming that is true, the first-to-file rule is concerned
7 with which action was first commenced by the filing of a complaint, not which action was first
8 served on the other side. *Pacesetter Sys., Inc.*, 678 F.2d at 96 n.3 (rejecting an argument that the
9 first-to-file rule did not apply where the first action was not served until after the second action
10 was filed because a “federal action is commenced by the filing of the complaint, not by service
11 of process,” and thus it is “the filing of actions in coordinate jurisdictions that invokes
12 considerations of comity”). Moreover, LAIA’s counsel informed the plaintiffs’ counsel of the
13 Michigan suit before the plaintiffs filed their lawsuit when he inquired whether plaintiffs’
14 counsel would accept service on the plaintiffs’ behalf. ECF No. 24-3. This factor therefore
15 supports applying the first-to-file rule.

16 **B. Same Parties**

17 There is no dispute the parties in the two lawsuits are identical. This factor therefore
18 supports applying the first-to-file rule.

19 **C. Same Issues**

20 The issues in the two cases “need not be identical, only substantially similar.” *Kohn Law*
21 *Grp., Inc.*, 787 F.3d at 1240. “To determine whether two suits involve substantially similar
22 issues, [I] look at whether there is substantial overlap between the two suits.” *Id.* at 1241
23 (quotation omitted).

1 The two lawsuits involve substantially similar issues. LAIA’s Michigan lawsuit seeks
2 declaratory relief regarding the enforceability of the franchise agreements, including declarations
3 about the parties’ post-termination rights and obligations. ECF No. 16-1 at 9-10. It also asserts a
4 claim for breach of the franchise agreements. *Id.* at 22-24. The plaintiffs’ first amended
5 complaint in this case asserts claims that call into question the franchise agreements’
6 enforceability. ECF No. 1-3 at 33-34 (deceptive trade practices claim asserting LAIA made false
7 representations to induce the plaintiffs to enter into the franchise agreements); *id.* at 35
8 (fraudulent inducement claim making the same assertion); *id.* at 40-43 (requesting declaratory
9 judgment that the franchise agreements are “voidable and unenforceable”). Other claims
10 indirectly implicate the agreements’ enforceability. For example, the plaintiffs’ claims for
11 intentional interference with existing contractual relations and prospective economic advantage
12 raise the potential that LAIA will claim its conduct was privileged due to the franchise
13 agreements’ non-compete clauses. *See id.* at 32-33. The conversion claim asserts LAIA
14 wrongfully exerted control over commissions owed to the plaintiffs, but LAIA has argued the
15 franchise agreements allow it to do so. *See id.* at 38; ECF No. 12 at 7. All of the claims in both
16 lawsuits arise out of the parties’ franchise relationship.

17 The similarity of issues weighs in favor of applying the first-to-file rule. Judicial
18 economy and comity are best served by one court resolving the enforceability of the franchise
19 agreements in one case that will comprehensively dispose of the parties’ various disputes arising
20 from their franchise relationship. Additionally, one court resolving these issues will avoid the
21 potential embarrassment of two courts reaching inconsistent decisions on the same issue.

22 Consequently, the first-to-file rule applies.

23

1 **D. Equitable Considerations**

2 I “can, in the exercise of [my] discretion, dispense with the first-filed principle for
3 reasons of equity.” *Alltrade, Inc.*, 946 F.2d at 628. Typically, such reasons would include “bad
4 faith, . . . anticipatory suit, and forum shopping.” *Id.*

5 Although some circumstances here that suggest LAIA’s Michigan suit was anticipatory,
6 the evidence overall does not support dispensing with the first-to-file rule. Before four of the
7 five franchise agreements expired in March 2018, LAIA wrote to the plaintiffs advising that the
8 agreements were expiring and that LAIA intended to enforce the agreements post-termination.
9 ECF No. 16-1 at 7. After those four agreements expired, the parties agreed to continue the status
10 quo while they negotiated a resolution. ECF No. 21-1 at 6. Plaintiff Suleiman Kutob avers that
11 during an April 23, 2018 meeting, he told LAIA that the plaintiffs “were prepared to sue if an
12 agreement was not reached.” *Id.* at 3-4. However, Kutob apparently did not state that a suit was
13 imminent or that he would file suit in Nevada instead of Michigan (which would be consistent
14 with the forum selection clause). *See id.*; ECF No. 21-3 (the plaintiffs’ transactional counsel
15 averring that Kutob told LAIA at the April 23 meeting that he would litigate to protect the
16 plaintiffs’ interests, but “he agreed not to in the near-term,” and instead would “continue trying
17 to reach a settlement”).

18 In June, the parties exchanged settlement offers, with the last one coming from LAIA
19 with a July 4 deadline. ECF Nos. 21-2 at 3, 6-9; 16-2 at 2. LAIA indicated in its final offer that
20 “[i]f we are unable to reach an agreement, [LAIA] will move to enforce its rights under the
21 respective franchise agreements.” ECF No. 16-2 at 2. The plaintiffs did not respond to that offer.
22 Instead, on July 11, the plaintiffs’ counsel sent an email to LAIA’s counsel asking whether LAIA
23 had been forging Kutob’s signature on documents. *Id.* That email did not threaten imminent

1 litigation nor did it indicate a lawsuit would be filed in Nevada. LAIA filed the Michigan
2 complaint approximately two weeks later on July 24. ECF No. 16-1.

3 While one might infer LAIA filed the Michigan suit in response to the email asking about
4 forged signatures, the overall course of the parties' conduct suggests the Michigan suit was
5 neither an anticipatory strike nor forum shopping. LAIA indicated before the agreements ever
6 expired that it expected the plaintiffs to comply with the franchise agreements' post-termination
7 provisions. The parties agreed to maintain the status quo while they discussed settlement, but in
8 LAIA's final offer, it stated that if the parties could not agree, LAIA would "move" to enforce its
9 rights. That suggests that LAIA intended to file suit if its final offer was not accepted. The
10 plaintiffs did not accept the offer or otherwise respond before the July 4 deadline. LAIA soon
11 thereafter filed suit.

12 The July 11 email about forged signatures does not specifically threaten an imminent
13 lawsuit nor does it indicate any lawsuit would be filed in Nevada. Thus, LAIA's suit was neither
14 anticipatory nor forum shopping. *See Williamson v. Am. Mastiff Breeders Council*, No. 3:08-cv-
15 336-ECR-VPC, 2009 WL 634231, at *3 (D. Nev. Mar. 6, 2009) (gathering cases for the
16 proposition that mere contemplation of litigation is insufficient to show an anticipatory suit and
17 the plaintiff in the second-filed suit must have indicated suit was "imminent, such that the
18 plaintiff's motive for filing suit first was to shop for the forum of its choice"). To the contrary,
19 LAIA reasonably could have expected any lawsuit against it would be filed in Michigan,
20 consistent with the forum selection clause in the franchise agreements.

21 I therefore apply the first-to-file rule. In doing so, I decline to address the parties'
22 arguments about the appropriate forum related to the convenience of the parties or the
23 enforceability of the forum selection clause. Those are questions for the Michigan court to

1 entertain. *See Pacesetter Sys., Inc.*, 678 F.2d at 96 (“[N]ormally the forum non conveniens
2 argument should be addressed to the court in the first-filed action.”).

3 **E. Transfer is Appropriate**

4 LAIA requests that I either dismiss this case or transfer it to Michigan. “Although the
5 first-to-file rule guides the district court’s exercise of discretion in handling related cases, the
6 requirements of § 1404(a) cabin the exercise of that discretion.” *In re Bozic*, 888 F.3d 1048, 1054
7 (9th Cir. 2018). I have discretion to transfer this action only “to any other district or division
8 where it might have been brought.” *Id.* (quoting 28 U.S.C. § 1404(a)). That means a district
9 where the plaintiffs “could have originally filed suit.” *Id.* at 1053.

10 The plaintiffs could have originally filed suit in the Eastern District of Michigan. The
11 parties are diverse and the amount in controversy is satisfied. *See* ECF No. 1. Diversity
12 jurisdiction therefore exists. 28 U.S.C. § 1332. There is no dispute that LAIA is subject to
13 personal jurisdiction in the Eastern District of Michigan. Additionally, venue is proper there, as
14 the only defendant resides there and the plaintiffs allege that is where they signed four of the
15 franchise agreements. *See* ECF No. 1-3 at 14; 28 U.S.C. §§ 1391(b)(1)-(2). I therefore exercise
16 my discretion to transfer this action to the United States District Court for the Eastern District of
17 Michigan.

18 **F. Conclusion**

19 IT IS THEREFORE ORDERED that defendant L.A. Insurance Company’s motion to
20 dismiss **(ECF No. 16) is DENIED.**

21 IT IS FURTHER ORDERED that defendant L.A. Insurance Company’s motion to
22 transfer **(ECF No. 17) is GRANTED. The clerk of court is instructed to TRANSFER this**
23 **case to the United States District Court for the Eastern District of Michigan.**

1 IT IS FURTHER ORDERED that to preserve the status quo pending transfer, my
2 temporary restraining order (ECF No. 14) remains in effect but shall expire once the papers from
3 this case “are physically docketed in the office of the receiving court,” because that is when the
4 transfer to the Eastern District of Michigan is complete. *Wilson v. City of San Jose*, 111 F.3d
5 688, 692 (9th Cir. 1997). I leave for the Michigan judge to decide whether to extend the TRO,
6 convert it into a preliminary injunction, or schedule a hearing based on the parties’ stipulation
7 (ECF No. 18).

8 DATED this 7th day of September, 2018.



ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23