

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

No. 5:12-CV-192-F

NUTRITION & FITNESS, INC., )

Plaintiff, )

v. )

PROGRESSIVE EMU, INC. and )  
CHRIS BINKLEY, )

Defendants. )

**ORDER**

This matter is before the court on the Plaintiff's Status Report [DE-33].

On May 25, 2012, this matter came before the court for a hearing on the Motion to Dismiss or Transfer [DE-20] and the Motion for Reconsideration [DE-22] filed by Progressive Emu, Inc. and Chris Binkley (hereinafter individually referred as "Pro Emu" or "Binkley" or collectively referred as "Defendants"). The court found in the hearing, and memorialized in an order filed on June 7, 2012, that this case falls squarely within the purview of the first-filed rule. The court ordered that the action be stayed, pending the decision of the Northern District of Alabama on the appropriate forum and whether an exception to the first-filed rule is applicable. The court also directed Plaintiff Nutrition & Fitness, Inc., ("NFI" or "Plaintiff") to submit a status report of the Alabama proceedings no later than 60 days from June 7, 2012, and every 60 days thereafter until such proceedings were concluded. *See* June 7, Order [DE-31] at p. 5.

On August 20, 2012, NFI filed its Status Report [DE-33] and attached thereto the Northern

District of Alabama's June 26, 2012 Order [DE-33.1]. In that order, United States District Judge William M. Acker, Jr., found that (1) the first-filed rule was applicable; (2) no exceptions to the first-filed rule were applicable; and (3) NFI failed to meet its burden in showing that the Eastern District of North Carolina is a more convenient forum. *Id.* at pp. 4-7. Accordingly, Judge Acker denied NFI's motion to dismiss the Alabama action, and also denied its alternative request to transfer venue to the Eastern District of North Carolina. *Id.* at p. 11. NFI represents in its status report that it has filed an answer and asserted counterclaims in the Alabama action.

Having received notice that the Alabama court has issued a ruling on NFI's motion to dismiss, the court ORDERS that the stay in this action is lifted. Rather than dismissing this case, the court finds that transfer of this action for all further proceedings pursuant to 28 U.S.C. § 1404(a) to be appropriate.<sup>1</sup> *See, e.g., Nutrition & Fitness, Inc. v. Blue Stuff, Inc.*, 264 F. Supp. 2d 357, 360 (W.D.N.C. 2003)(“Where the same parties have filed similar litigation in separate federal fora, . . . the later-filed action should be stayed, transferred, or enjoined.”); *Hardee's Food Sys., Inc. v. Rosenblatt*, 44 F. Supp. 2d 767, 770 (E.D.N.C. 1998)(explaining that in determining whether a transfer is appropriate, the relevant factors include the convenience of the witnesses, where the events occurred that gave rise to the action, the residences of the parties, a plaintiff's initial choice of forum, the availability of compulsory process, and the law which will govern the dispute). *See also* Northern District of Alabama's Order [DE-33.1] at pp. 6-7 (noting that the contract at issue was executed and allegedly breached in Alabama, most of the documents relating to this action will likely

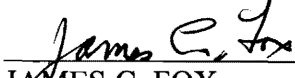
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<sup>1</sup> The court notes that although NFI has asserted counter-claims in the Alabama action, there is no indication as to what counterclaims it has asserted, and whether those counterclaims differ from the claims asserted in the instant action. Nor is there any indication that it has asserted claims against Chris Binkley in the Alabama action.

be found in Alabama, and that “many, if not most, of the potential witnesses are located in Alabama”). Accordingly, the court TRANSFERS this civil action to the United States District Court for the Northern District of Alabama, pursuant to 28 U.S.C. § 1404(a), for all further proceedings. The Clerk of Court is DIRECTED to forward the entire case file to the Clerk of the Northern District of Alabama.

SO ORDERED.

This the 23<sup>rd</sup> day of August, 2012.

  
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JAMES C. FOX  
Senior United States District Judge