

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA**

DAVID COHEN AND MARIAN COHEN ) C1:09-CV-1051 AWI DLB  
COHEN )  
Plaintiffs, ) ORDER ON DEFENDANT'S 28  
v. ) U.S.C. § 1404 MOTION, AND  
STATE FARM AND CASUALTY ) TRANSFERRING THIS CASE  
COMPANY, AND DOES 1 ) TO THE DISTRICT OF  
THROUGH 50 ) NEVADA  
Defendants. )

This action arises out of a homeowners' insurance claim submitted by Plaintiffs David and Marian Cohen, ("Plaintiffs") to Defendant State Farm Casualty Company ("State Farm"). In the instant motion, Defendant seeks to transfer the action to the District of Nevada under 28 U.S.C. § 1404. For the reasons that follow, the Court will transfer this action to the District of Nevada.

## BACKGROUND

On May 7, 2009, Plaintiffs filed a complaint in the Superior Court of California, County of Stanislaus. Plaintiffs' complaint alleges that State Farm breached a homeowners' insurance policy ("Policy"), breached the implied covenant of good faith and fair dealing, violated the Nevada Unfair Claims Practices Act, and violated Nevada and California elder abuse laws. Plaintiffs allege that State Farm improperly investigated and wrongly denied their claim and that

1 State Farm owes them benefits under the Policy for property damage and personal property losses  
2 caused by a September 12, 2008 theft at their Las Vegas, Nevada house (“Nevada Property”).  
3 Plaintiffs assert that the property damage and theft were caused by All American Liquidation  
4 (“AAL”), a company that Plaintiffs hired to conduct an estate sale at the Nevada Property. See  
5 David Cohen Dec. (“Cohen Dec.”) ¶ 17. In August 2008, Plaintiffs met with representatives  
6 from AAL in Las Vegas to discuss AAL’s estate sale services. On August 15, 2009, Plaintiffs  
7 and AAL signed a contract. Id. at ¶ 6. On August 20, 2008, Plaintiffs sent a letter to AAL  
8 canceling the contract because Plaintiffs were concerned that AAL had the right to sell all of the  
9 personal property in Plaintiffs’ home, whereas Plaintiffs only wanted to sell specified items. Id.  
10 at ¶¶ 7, 9. Thereafter, AAL called the Plaintiffs and told them that AAL would be willing to  
11 limit the sale of personal property to only the items that were specifically designated by  
12 Plaintiffs. Id. at ¶ 10. AAL representatives, Barbara and Edward Wintringham, met Plaintiffs at  
13 their Nevada Property to go over the specific items that were to be sold. Id. at ¶¶ 10-11. During  
14 the meeting, AAL and Plaintiffs entered into an oral agreement, in which AAL agreed to sell only  
15 specified items. Id. at ¶ 14. After the sale, Plaintiffs discovered that AAL had sold items, that  
16 were not to be sold, and had removed various built-in appliances from the Nevada Property. Id.  
17 at ¶¶ 14, 17.

18 \_\_\_\_\_ In September 2008, Plaintiffs presented their theft claim (“Claim”) under the Policy to  
19 State Farm and alleged that AAL stole their property by trickery and/or false pretenses.

20 In October 2008, Plaintiffs moved to Modesto, California and became residents of  
21 California. See Cohen Dec. ¶¶ 3, 28.

22 On December 17, 2008, after conducting an investigation, State Farm sent a letter to  
23 Plaintiffs denying their Claim on the basis that no theft had occurred because Plaintiffs had  
24 entered into a legally binding contract with AAL.

25 \_\_\_\_\_ On May 7, 2009, Plaintiffs filed this suit. On June 15, 2009, State Farm removed the  
26 action to this court on the basis of diversity jurisdiction. On June 17, 2009, State Farm filed a 28  
27 U.S.C. § 1404(a) motion seeking to transfer this action to the District of Nevada, Las Vegas  
28 division. On July 17, 2009, Plaintiffs filed an opposition to Defendant’s motion. On July 27,

1 2009, Defendant filed a reply.

2 **LEGAL STANDARD**

3 28 U.S.C. § 1404(a) provides: “For the convenience of parties and witnesses, in the  
4 interest of justice, a district court may transfer any civil action to any other district or division  
5 where it might have been brought.” 28 U.S.C. § 1404(a). This statute partially displaces the  
6 common law doctrine of *forum non conveniens*. See Decker Coal Co. v. Commonwealth Edison  
7 Co., 805 F.2d 834, 843 (9th Cir. 1986); Miskow v. Boeing Co., 664 F.2d 205, 207 (9th Cir.  
8 1981). The purpose of § 1404(a) is “to prevent the waste of time, energy, and money and to  
9 protect litigants, witnesses and the public against unnecessary inconvenience and expense.” Van  
10 Dusen v. Barrack, 376 U.S. 612, 616 (1964); Kawamoto v. C.B. Richard Ellis, Inc., 225  
11 F.Supp.2d 1209, 1213 (D. Haw. 2002). “Section 1404(a) is intended to place discretion in the  
12 district court to adjudicate motions for transfer according to an ‘individualized, case by case  
13 consideration of convenience and fairness.’” Stewart Organization, Inc. v. RICOH Corp., 487  
14 U.S. 22, 29 (1988) (quoting Van Dusen, 376 U.S. at 622).

15 In order to transfer a case under § 1404(a), the “defendant must make a strong showing of  
16 inconvenience to warrant upsetting the plaintiff’s choice of forum.” See Decker, 805 F.2d at  
17 843. The district court must weigh numerous factors when deciding whether to transfer a case  
18 under § 1404(a):

19 A motion to transfer venue under § 1404(a) requires the court to weigh multiple  
20 factors in its determination whether transfer is appropriate in a particular case.  
21 For example, the court may consider: (1) the location where the relevant  
22 agreements were negotiated and executed, (2) the state that is most familiar with  
23 the governing law, (3) the plaintiff’s choice of forum, (4) the respective parties’  
24 contacts with the forum, (5) the contacts relating to the plaintiff’s cause of action  
in the chosen forum, (6) the differences in the costs of litigation in the two  
forums, (7) the availability of compulsory process to compel attendance of  
unwilling non-party witnesses, and (8) the ease of access to sources of proof.  
Additionally, the presence of a forum selection clause is a “significant factor” in  
the courts § 1404(a) analysis . . . [and] the relevant public policy of the forum  
state, if any, is at least as significant a factor in the § 1404(a) balancing.

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26 Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000). The Court may also  
27 consider the convenience of parties and witnesses, feasibility of consolidation of other claims,  
28 local interest in the controversy, and the court congestion of the two forums. See Williams v.

1 Bowman, 157 F.Supp.2d 1103, 1106 (N.D. Cal. 2001).

2 **DISCUSSION**

3 (1) The location where the relevant agreements were negotiated and executed

4 The Policy was purchased in Nevada and signed by Plaintiffs and Defendant in Nevada.  
5 Plaintiffs and AAL negotiated and finalized the underlying contracts pertaining to the estate sale  
6 in Nevada. Plaintiffs submitted their Claim to State Farm's Nevada operations center. Since the  
7 Policy was purchased in Nevada and the AAL agreements were negotiated in Nevada, this factor  
8 weighs in favor of transferring the case to Nevada.

9 (2) The state that is most familiar with the governing law

10 Plaintiffs' suit is based on Nevada and California law. Plaintiffs' second, third, and  
11 fourth causes of action allege that Defendant violated the Nevada Unfair Claims Practices Act,  
12 Nevada elder abuse laws, and breach of fiduciary duty under California law and/or Nevada law.  
13 Since this Court sits in California, the Eastern District of California is less familiar with the law  
14 governing Plaintiffs' second, third, and fourth causes of action because they are based on Nevada  
15 state law. Plaintiffs, however do not specify under what law they seek to bring their first cause of  
16 action for breach of contract. If it is based on California law, then this Court would be more  
17 familiar with the law governing that claim. Accordingly, because the majority of Plaintiffs'  
18 claims (as alleged in the complaint) are based on Nevada law, this factor weighs in favor of  
19 transfer to Nevada.

20 (3) The plaintiff's choice of forum

21 The third factor weighs in favor of Plaintiffs as they chose the California forum.  
22 However, "where the forum lacks any significant contact with the activities alleged in the  
23 complaint, plaintiff's choice of forum is given considerably less weight, even if the plaintiff is a  
24 resident of the forum." Knapp v. Wachovia Corp., 2008 U.S. Dist. LEXIS 41000, \*5 (N.D. Cal.  
25 May 12, 2008); Amazon.com v. Cendant Corp., 404 F. Supp. 2d 1256, 1261 (W.D. Wash. 2005);  
26 Hernandez v. Graebel Van Lines, 761 F.Supp. 983, 990 (E.D. N.Y. 1991). As discussed *infra*,  
27 the Eastern District of California has no contacts with the contractual activities related to the  
28 Policy, no contacts related to the underlying negotiations and agreements with AAL, and

1 insignificant contacts with the Defendant's claims-handling process and denial of the Claim.  
2 Moreover, even though Plaintiffs currently reside in California, Plaintiffs did not become  
3 residents until after the Policy was executed, after the AAL agreements were negotiated, after the  
4 alleged theft, and after the claims-handling process had been significantly under way. Therefore,  
5 since Nevada has a much greater connection to Plaintiffs' claims, this factor weighs against  
6 transfer but on a significantly diminished basis.

7 (4) The respective parties' contacts with the forum

8 Plaintiffs were residing in Nevada at the time the relevant contracts were negotiated,  
9 when the Claim was submitted, and during the majority of the claims-handling process.  
10 Plaintiffs purchased the Policy from a State Farm Agent in Nevada. Plaintiffs met with AAL  
11 employees in Nevada. The property at issue is located in Nevada and the alleged theft occurred  
12 in Nevada. Plaintiffs submitted their Claim to State Farm's Nevada Operations Center.  
13 Defendant asserts that the Claim was investigated and adjusted by State Farm's employees who  
14 are located in Nevada.<sup>1</sup> Defendant also asserts that the denial of the Claim occurred in Nevada.  
15 Because the majority of the parties' contacts are with Nevada and not California, this factor  
16 weighs in favor of transfer.

17 (5) The contacts relating to the plaintiff's cause of action in the chosen forum

18 The Policy was purchased and signed in Nevada. The AAL negotiations and agreements  
19 were carried out in Nevada. The alleged theft occurred in Nevada. The property losses for which  
20 Plaintiffs seek to recover from are located at the Nevada Property. The Claim was adjusted and  
21 investigated in Nevada. In essence, the breach of contract, bad faith, and other wrongs asserted  
22 in Plaintiffs' complaint were allegedly committed in Nevada, by persons located in Nevada.  
23 Accordingly, the Court does not see any meaningful contacts with the Eastern District of  
24 California relative to Plaintiffs' claims. This factor heavily favors transfer.

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27 <sup>1</sup>Defendant asserts that the vast majority of the Claim was handled by Ms. Holloway  
28 under the supervision of Team Manager Andrew Woodard and that all substantive decisions as  
the claim were made by Ms. Holloway and Mr. Woodard. See Andrew Woodard Dec.  
("Woodard Dec.") ¶ 7.

(6) The differences in the costs of litigation in the two forums/Relative court congestion

It is unknown what the differences in costs of litigation would be between the Eastern District of California or the District of Nevada. In terms of court congestion, however, the Eastern District has a congested docket. As of June 2008, the Eastern District had 6522 civil cases pending cases while the District of Nevada had 2825 civil cases pending.<sup>2</sup> See Federal Caseload Statistics 2008, Table C at p. 24;<sup>3</sup> see also Western Oilfields Supply Co. v. Goodwin, No. 1:07-CV-1863, 2009 WL 161068, \*3-4 (E.D. Cal. Jan. 22, 2009); G. Boswell Tomato Company-Kern, LLC v. Private Label Foods, Inc., 2008 U.S. Dist. LEXIS 66103, \*45 (E.D. Cal. July 31, 2008). This factor weighs in favor of transfer.

(7) The availability of compulsory process to compel attendance of unwilling non-party witnesses/Convenience of Witnesses

To show inconvenience to witnesses, the moving party should state the witnesses' identities, locations, and content and relevance of their testimony. See Florens Container v. Cho Yang Shipping, 245 F.Supp.2d 1086, 1092-93 (N.D. Cal. 2002); Williams, 157 F.Supp.2d at 1108. Additionally, it is "the convenience of non-party witnesses, rather than that of employee witnesses, however, that is the more important factor and is accorded greater weight." See Gundel v. Fireman's Fund Insurance Co., 844 F.Supp. 1163, 1166 (S.D. Tex. 1994). Defendant identifies at least seven material non-party witnesses who are expected to testify that reside in Nevada. Defendant specifies that these non-party witnesses, include: AAL and its employees, the neighbors who witnessed and possibly attended the sale, the witnesses who purchased the allegedly stolen items, the police officer who interviewed the Plaintiffs about the alleged theft, the attorneys retained by the Plaintiffs and by State Farm during the claims-handling process, and the loan modification agent who the Plaintiffs hired to assist them in the making of their Claim. See Woodward Dec. ¶ 11. Defendant asserts that it would be burdensome, expensive, and inconvenient for these seven Nevada witnesses to travel over 800 miles round-trip to attend trial

<sup>2</sup>The Eastern District of California has 10 District Judges, both senior and active. The District of Nevada also has 10 District Judges, both senior and active.

<sup>3</sup>This table may be found at the United States Courts website: <http://www.uscourts.gov/stats/june08/C00Jun08.pdf>.

1 in California. Id. at ¶ 14. Defendant also identifies at least five party-affiliated witnesses that are  
2 located in Nevada, including the State Farm agent from whom the Plaintiffs purchased the Policy  
3 and all but one of the State Farm employees who participated in the handling of the Claim.<sup>4</sup> In  
4 contrast, Plaintiffs do not identify any third-party witnesses, who are located in California or  
5 would find California to be a more convenient forum.

6 Moreover, it appears that this Court cannot exercise jurisdiction over the twelve witnesses  
7 identified by Defendant because they all reside in Nevada. The Nevada District Court, however,  
8 would have the ability to exercise jurisdiction over these same witnesses and compel their  
9 attendance. Because all of the material witnesses identified by Defendant are located in Nevada,  
10 and given this court's lack of jurisdiction over these witnesses, this factor weighs in favor of  
11 transfer.

12 (8) The ease of access to sources of proof

13 The eighth factor appears to be a wash. Defendant indicates that Nevada will provide the  
14 parties with greater ease of access to sources of proof, such as AAL's documents and the  
15 documents of third-parties who attended the sale and purchased the stolen items. Plaintiffs argue  
16 that Defendant has not proven that such documents exist. Clearly this will be a document  
17 sensitive case, but it is unknown if voluminous amounts of paper are involved. Neither party  
18 goes into sufficient detail regarding the sources of proof and there is no explanation as to the  
19 quantity of proof. The Court will regard this factor as neutral.

20 Convenience of the Parties

21 Plaintiffs reside in California. Mr. Cohen declares that his elderly age (81 years old) and  
22 Mrs. Cohen's age (63 years old), their health problems, and financial limitations make it  
23 extremely difficult for them to travel to Las Vegas and prosecute their case since the District of  
24 Nevada, Las Vegas Division is approximately 1000 miles round-trip from their home in

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26 <sup>4</sup>Defendant asserts that the only pertinent State Farm employee located in California is  
27 Doug Beauchamp, who took the Plaintiffs' recorded statement. Defendant declares that Mr.  
28 Beauchamp's participation in the case was limited to the taking of Plaintiffs' statement, using in  
large part questions given to him by Ms. Holloway. Defendant contends that Mr. Beauchamp's  
involvement in the Claim was due entirely to the fact that the Plaintiffs had moved to California.  
The location where the recorded statement occurred had no bearing on the Claim or the Policy.  
See Woodard Dec. ¶ 3.

1 California. See Cohen Decl. ¶¶ 2, 31-33. Mr. Cohen declares that he has colon cancer (for  
2 which he is not currently undergoing any treatment) and a heart condition (for which he takes  
3 medications). Plaintiffs declare that Mrs. Cohen has had lumbar surgery, which prevents her  
4 from sitting for long periods of time. Id. at ¶¶ 29, 31-32.

5 Plaintiffs rely on Tyrill v. Alcoa Steamship Co., 158 F. Supp. 853, 854-855 (S.D.N.Y.  
6 1958), where the court found that a plaintiff's medical problem weighed against travel.  
7 However, while this Court agrees that in certain situations, a medical condition can weigh against  
8 travel, the facts of Tyrill are distinguishable from the facts of this case. In Tyrill, the plaintiff  
9 resided in New York and was a paraplegic, and the defendants sought to transfer the case to the  
10 District of the Virgin Islands. Additionally, the Tyrill plaintiff provided documentation from his  
11 doctor that stated that plaintiff's life would be endangered if he were to travel to the Virgin  
12 Islands. Id. at 854. Here, Plaintiffs do not assert or provide medical documentation that their  
13 lives will be endangered if they travel. Rather, Plaintiffs allege that traveling to Las Vegas for  
14 court proceedings would exacerbate their health problems. See Mr. Cohen Decl. at ¶¶ 31-31.  
15 Plaintiffs also rely on Brownell v. LaSalle Steel Co., 128 F. Supp. 548 (D. Del. 1995), where the  
16 court found a prospective witness's health condition to be one factor in the court's decision to  
17 transfer venue from Delaware to Illinois. Brownell is not dispositive in the present case because  
18 the Brownell court only viewed a health condition as one factor in the venue equation.  
19 Furthermore, the Brownell court noted that travel from Delaware to Illinois would be highly  
20 dangerous to the witness's physical well-being. Here, the Plaintiffs have not shown that travel to  
21 Las Vegas would be highly dangerous to their physical well-being.

22 Plaintiffs also allege that their financial conditions prevent them from prosecuting their  
23 action in Nevada because they cannot afford to fly and stay in Las Vegas to attend court  
24 proceedings. Although Plaintiffs declare that they live on a fixed income from the Social  
25 Security Administration, they do not provide any specific details concerning their monthly  
26 expenses or monthly income. Additionally, as noted by both Plaintiffs and Defendant,  
27 technological advances (i.e. electronic filing, video and tele-conferencing, express mail services,  
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1 faxes, etc.) have substantially reduced the burden of having to litigate in a distant forum.<sup>5</sup>  
2 Additionally, Plaintiffs are being represented by counsel, who can presumably attend court  
3 proceedings on their behalf, which will reduce Plaintiffs' need to travel. Accordingly, after  
4 reviewing Plaintiffs' declarations and opposition, it does not appear that Plaintiffs' ages, health  
5 issues, or financial conditions preclude them from prosecuting the matter in Nevada.

6 In contrast, State Farm asserts that litigation in Nevada would be more convenient  
7 because all five of its material party-witnesses work in Nevada, including those State Farm  
8 employees responsible for the claims-handling, denial of the Claim, and the agent from whom  
9 the Plaintiffs purchased the Policy and to whom the Plaintiffs reported their loss. Defendant  
10 points out that both Plaintiffs' and Defendant's counsel will need to travel to Nevada to pursue  
11 the necessary discovery (i.e. deposing the witnesses, examining documents, and conducting a site  
12 inspection of the Nevada Property). Moreover, Plaintiffs do not dispute that a substantial portion  
13 of the events giving rise to this lawsuit occurred in Nevada, nor do they dispute Defendant's  
14 contention that the Nevada court will be able to exercise jurisdiction.

15 On the balance, after weighing Plaintiffs' inconvenience in having to travel to Nevada  
16 and State Farm's inconvenience in having to transport five out-of-state party witnesses to  
17 California, the court finds that this factor weighs slightly in favor of the Plaintiffs and thus  
18 against transfer.

19 Public Policy Considerations Of The Forums/Local Interest In The Controversy

20 California has an interest in ensuring that its citizens have a litigation forum. However,  
21 Nevada also has an interest in ensuring proper performance of a contract entered into and  
22 executed within its state, and in investigating an alleged theft committed by one of its citizens.  
23 Additionally, Defendant asserts that they may have a subrogation interest against AAL if the fact  
24 finder ultimately finds that a theft occurred and that State Farm is liable. Defendant contends  
25 that if the action remains in California, State Farm cannot file a cross-complaint against AAL

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27 <sup>5</sup> Defendant indicates that technological advances (i.e. electronic filing, video and tele-  
28 conferencing, etc.) will reduce Plaintiffs' burden of having to litigate in Nevada. See  
Defendant's Reply at page 7. The court reads Defendant's reply to mean that it will not oppose  
Plaintiffs' use of such electronic methods, to the extent Plaintiffs choose to utilize them. As  
such, the court relies upon the Defendant's representation in deciding this motion.

1 because it does not appear that this Court has jurisdiction over AAL. However, if this matter is  
2 transferred to Nevada, Defendant could file a cross-complaint and avoid duplicative litigation  
3 and prevent the waste of party and judicial resources. Williams, 157 F.Supp.2d at 1106. On the  
4 balance and given the limited contacts with California, the Court believes that the interest of  
5 Nevada is greater than that of California. This factors weighs in favor of transfer.

6 Analysis

7 From the submissions and filings, it is clear that the transactions between Plaintiffs and  
8 Defendant occurred primarily in Nevada. In terms of the Jones factors, as discussed above, the  
9 Court views the eighth Jones factor as neutral.

10 Jones factor three and the convenience of the parties weighs against transfer. However,  
11 the third Jones factor, consideration of the plaintiff's choice of forum, is given less weight than  
12 usual because of the lack of significant contact between California and the transaction(s) that  
13 forms the basis of this case. Accordingly, two considerations weighs against transfer and one  
14 weighs against transfer in a diminished capacity.

15 Jones factors one, two, four, five, six, and seven, and the policy/local interest of the  
16 forums weigh in favor of a transfer. Of particular weight is factor five since California's  
17 involvement relative to the basis of this lawsuit is *de minimis*. The Court also finds that the  
18 interest of Nevada in this case is significant given State Farm's subrogation rights against AAL  
19 and this court's inability to assert jurisdiction over AAL and the potential duplicative litigation  
20 and waste of judicial resources that may result if State Farm is not able to file a cross-complaint  
against AAL in this action.

21 There are thus seven considerations that weigh in favor of transfer. Since only two  
22 considerations weigh against transfer and one receives less weight than it otherwise would, the  
23 Court finds that the seven considerations in favor of transfer substantially outweigh the two  
24 considerations against transfer. Accordingly, the Court will transfer this case to the District of  
25 Nevada.

26 CONCLUSION

27 There are numerous factors associated with a 28 U.S.C. § 1404(a) convenience transfer.  
28 Plaintiffs rely heavily on the inconvenience to themselves because of their age, limited income,

1 and health issues. These factors, however, are only one factor in this Court's determination of  
2 whether a transfer is warranted. Considering all of the factors, the Court finds that the factors in  
3 favor of transfer substantially outweigh the factors against transfer.

4 Accordingly, IT IS HEREBY ORDERED that this case is transferred as per 28 U.S.C. §  
5 1404(a) to the Federal District of Nevada.

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7 IT IS SO ORDERED.

8 **Dated: August 13, 2009**

9 **/s/ Anthony W. Ishii**  
10 CHIEF UNITED STATES DISTRICT JUDGE

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