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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MABLE OERTELL,

Plaintiff,

v.

SIX FLAGS ENTERTAINMENT
CORPORATION, et al.,

Defendants.

No. 3:16-cv-4002 CRB

**ORDER DENYING MOTION TO
DISMISS, STAY, OR TRANSFER
UNDER FIRST-TO-FILE RULE AND
GRANTING MOTION TO TRANSFER
UNDER 28 U.S.C. § 1404(a)**

Plaintiff Mable Oertell (“Oertell”) brought this action against Defendants Six Flags Entertainment Corporation, Park Management Corporation, Dippin’ Dots, LLC, Foto Fantasy, Inc., Panda Restaurant Group, Inc, Cold Stone Creamery Restaurant, and Kahala Restaurant Franchising, LLC based on alleged denials of access to public facilities to the physically disabled, per California Civil Code §§51–55; California Health & Safety Code §§ 19953 et seq., the Americans with Disabilities Act (“ADA”) of 1990, 42 U.S.C. §§ 12181 et seq., and Title 24 of the California Code of Regulations. See Compl. (dkt. 1) ¶¶ 2–3.

Six Flags Entertainment Corporation, Park Management Corporation, and Kahala Restaurant Franchising, LLC (together “Six Flags”)¹ move to dismiss, stay, or transfer this case to the United States District Court the Eastern District of California (“Eastern District”)

¹ The other defendants have either joined in the motion or made clear that they do not oppose it. See, e.g., Joinder (dkt. 37); Non-Opp’n (dkt. 32).

1 under the “first-to-file” rule. They argue that Oertell pleads substantially similar claims to
2 those filed in the Eastern District by Carol Murray (“Murray”), see Carol Murray v. Park
3 Management Corp., 15cv-02105-TLN-DB. See MTD (dkt. 29) at 1. Alternatively, Six Flags
4 seeks a transfer to the Eastern District pursuant to 28 U.S.C. section 1404(a). See id.

5 **I. BACKGROUND**

6 **A. The Murray Case**

7 On October 8, 2015, Carol Murray (“Murray”), who uses a wheelchair, filed a
8 complaint in the Eastern District. See Murray Compl. (dkt. 1) ¶ 10. She alleges that on
9 April 9, 2015 various barriers denied her full and equal access at the amusement park “Six
10 Flags Discovery Kingdom” (“the Park”). See id. ¶ 10. Murray alleges violations of (1) the
11 ADA; (2) California’s Unruh Civil Rights Act, and (3) California Health and Safety Code
12 section 19955(a). Id. ¶ 16–45. Murray seeks damages, injunctive and declaratory relief, and
13 attorney’s fees and costs. Id. ¶ 1–9.

14 The parties have conducted two site inspections of all areas of the Park open to the
15 public. See Grunvald Decl. (dkt. 29–1) ¶ 6. The parties have conducted initial disclosures
16 and filed four joint reports advising the Eastern District of the status for the case. See id.
17 Counsel have engaged in meet and confer efforts to attempt resolving the injunctive relief
18 portion of this case. See id. On October, 18, 2016, the court stayed discovery pending the
19 parties’ efforts the resolve the case. See Murray Order (dkt. 21). Those efforts have stalled.
20 See Status Rpt. (dkt. 42) at 2.

21 **B. This Case**

22 Plaintiff Mable Oertell, who also uses a wheelchair, filed this case on July 15, 2016,
23 seeking injunctive relief and damages, as well as reasonable attorney fees, litigation expenses
24 and costs. Compl. ¶ 1. On July 4, 2015 and October 24, 2015, Oertell visited the Park with
25 her daughter. Id. ¶ 12. Oertell alleges that she encountered “multiple physical barriers on
26 each of her visits, which caused her and her eight-year-old daughter whom she was caring
27 for, to be unable to use certain facilities, or to use them on a less than ‘full and equal’ basis.”
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1 Id. ¶ 17. These barriers included “excessive distance between the closest accessible parking
2 and the entrance [,] and poorly trained employees who attempted to prevent [her] from using
3 a disabled parking spot.” Id. ¶ 12. Oertell alleges that before she reached the main entrance,
4 she was forced to wait near a trash can in the “designated” spot for disabled individuals
5 waiting to board a bus to the Park’s entrance. Id. ¶ 14.

6 Oertell further claims that despite having a “Season Pass” to the Park, she was not
7 advised of the need or availability of any special procedures for physically disabled people to
8 follow in connection with using the Park attractions or rides. Id. ¶ 14. Once inside the Park,
9 staff members told Oertell that in order to take her daughter onto attractions, which had
10 inaccessible main entrances, she would need to enter through the exits, as well as obtain a
11 “disabled” certificate from an office. Id. ¶ 15.

12 During her second visit to the Park, on October 24, 2015, Six Flags told her that she
13 would again need to establish the fact of her disability at the “Outpost.” Id. ¶ 16. It also
14 indicated that she would have to go through these procedures each time she visited the Park,
15 despite having purchased annual passes for her and her daughter. Id. ¶ 16. Oertell
16 encountered other barriers to access as well. For example, she claims that a restroom was
17 inaccessible in multiple respects; the path of travel onto the “Explorer’s Outpost” exceeded
18 the 5% maximum slope; and the Guest Relations counter—where defendants may inquire
19 about “accessibility information”—was wholly inaccessible to her.² Id. ¶ 18.

20 **II. LEGAL STANDARD**

21 Pursuant to Federal Rule of Civil Procedure 12(b)(3), a party may raise a defense
22 based on improper venue. A defendant may raise the motion in his first responsive pleading
23 or by a separate pre-answer motion. See Fed. R. Civ. P. 12(b)(3). Once the defendant
24 challenges venue, the plaintiff bears the burden of establishing that venue is proper.
25 Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 496 (9th Cir. 1979). The

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27 ² Besides her two visits in 2014, Oertell visited the Park approximately five times in 2014, and
28 encountered similar problems. Compl. ¶ 17.

1 pleadings need not be accepted as true, and the court “may consider facts outside of the
2 pleadings.” Richardson v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir. 1998).

3 **III. DISCUSSION**

4 Six Flags moves to dismiss, stay or transfer this case under the “first-to-rule” as well
5 as to transfer the case under 28 U.S.C. § 1404(a). The Court will consider each in turn.

6 **A. First-to-File Rule**

7 The first-to-file rule may be applied “when a complaint involving the same parties and
8 issues has already been filed in another district.” Alltrade, Inc. v. Uniweld Prods. Inc., 946
9 F.2d 622, 625 (9th Cir. 1991). Courts thus consider three factors in determining whether to
10 apply the first-to-file rule: “(1) chronology of the actions; (2) similarity of the parties; and (3)
11 similarity of the issues.” Wallerstein, 967 F. Supp. 2d 1289, 1292–93 (N.D. Cal. 2013);
12 Schwartz v. Frito-Lay N. Am., No. 12-cv-02740 EDL, 2012 WL 8147135, at *2 (N.D. Cal.
13 Sept. 12, 2012) (citing Alltrade, 946 F.2d at 625). Rather than requiring “exact identity,” the
14 same-parties requirement is met if the parties are “substantially similar.” Microchip Tech.,
15 2011 WL 2669627, at * 3 (N.D. Cal. July 7, 2011). But here Murray and Oertell are not
16 substantially similar people. They are strangers filing individual lawsuits that happen to
17 involve similar claims. The first-to-file rule does not apply.³

18 **B. 28 U.S.C. § 1404(a)**

19 Section 1404(a) permits a court to transfer actions to any district where the action
20 might have been brought for “the convenience of parties and witnesses . . . in the interest of
21 justice.” 28 U.S.C. § 1404(a). The purpose of this statute is “to prevent the waste of time,
22 energy and money and to protect litigants, witnesses and the public against unnecessary
23 inconvenience and expense.” Gillespie v. Prestige Royal Liquors Corp., 2016 WL 5673230,
24

25 ³ Cases where courts hold that two parties are “substantially similar” under the first-to-file rule
26 tend to involve overlapping plaintiff classes or corporate subsidiaries. See, e.g., Medlock v. HMS Host
27 USA, Inc., 2010 U.S. Dist. LEXIS 133143, *8–10 (E.D. Cal. Dec. 16, 2010) (overlapping plaintiff
28 classes); Microchip Tech., 2011 WL 2669627, at * 3 (corporate subsidiaries). Murray and Oertell do
not represent overlapping plaintiff classes and, of course, are not corporate subsidiaries of one another.

1 at *3 (N.D. Cal. Oct. 3, 2016) (citing Van Dusen v. Barrack, 376 U.S. 612, 616 (1964)). The
2 decision to transfer is within the discretion of the court. 28 U.S.C. § 1404(b); King v.
3 Russell, 963 F.2d 1301, 1304 (9th Cir. 1992). That said, “unless the balance is strongly in
4 favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” Norwood
5 v. Kirkpatrick, 349 U.S. 29, 35 (1955).

6 Six Flags argues that transfer under §1404(a) is appropriate because the Park is
7 located in Vallejo, California, which falls within the Eastern District’s jurisdiction. See
8 MTD at 11. It also stresses that witnesses will suffer “great inconvenience if the case is not
9 transferred as the transfer will avoid duplicative discovery and the need to be deposed and
10 eventually testify at trial in two different locales.” Id. at 12. In response, Oertell explains
11 that she wants to take advantage of the “unique procedures we enjoy here in the Northern
12 District” so that her case will not take as long to resolve as Murray’s. Opp’n (dkt. 34) at 7.
13 She also noted at the hearing on February 3, 2017 that she resides in the Northern District.

14 Although the Court would normally defer to a plaintiff’s chosen forum, the former
15 arguments persuade it to do otherwise here. These cases concern mostly the same barriers at
16 the very same amusement park. See, e.g., MTD at 5–6 (making side-by-side comparison of
17 Murray’s and Oertell’s complaints). The same court should preside over them. What is
18 more, transfer from a Northern District courthouse in San Francisco to an Eastern District
19 courthouse in Sacramento will, at the very least, spare Oertell the trip across the Bay Bridge
20 from her home in Contra Costa County.⁴

21 **IV. CONCLUSION**

22 For the foregoing reasons, the Court DENIES the motion to dismiss, stay, or transfer
23 the case under the first-to-file rule but GRANTS the motion to transfer the case to the Eastern
24 District of California pursuant to 28 U.S.C. section 1404(a).

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27 ⁴ The Court takes judicial notice of terrible traffic on the Bay Bridge, as that fact is “generally
28 known”—and known all too well— within this jurisdiction. See Fed. R. Evid. 201(b)(1).

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IT IS SO ORDERED.

Dated: February 7, 2017



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE