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UNITED STATES DISTRICT COURT

10

NORTHERN DISTRICT

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SAN FRANCISCO DIVISION

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14 BERNARD PAUL PARRISH, HERBERT
 ANTHONY ADDERLEY, and WALTER
 15 ROBERTS III, on behalf of themselves and
 all others similarly situated,

CIVIL ACTION NO. C07 0943 WHA

16

Plaintiffs,

**PLAINTIFFS' OPPOSITION TO
 DEFENDANT'S MOTION TO TRANSFER
 VENUE**

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NATIONAL FOOTBALL LEAGUE
 PLAYERS INCORPORATED d/b/a
 19 PLAYERS INC, a Virginia corporation,

Date: Thursday, May 31, 2007

Time: 8:00 am

Judge: Honorable William H. Alsup

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Defendant.

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STATUTES

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1 Plaintiffs BERNARD PAUL PARRISH, HERBERT ANTHONY ADDERLEY, and
2 WALTER ROBERTS III, on behalf of themselves and all others similarly situated, respond to
3 Defendant's Motion to Transfer Venue, as follows:

4 **I. INTRODUCTION**

5 Defendant seeks a transfer of venue to either Virginia or Washington, D.C. based upon 28
6 U.S.C. §1404(a). The Supreme Court states that this section's purpose is "to prevent the waste of
7 time, energy, and money and to protect litigants, witnesses and the public against unnecessary
8 inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). In this case, a
9 transfer would not serve these purposes.

10 The Northern District of California is the Plaintiffs' chosen venue, the longtime residence
11 of one of the Plaintiffs, and the location of the Plaintiffs' chosen counsel. Certain key witnesses,
12 including non-party witnesses, and evidence are located in California. California also has an
13 interest in the parties and subject matter of this lawsuit. The parties can also expect a faster
14 resolution in this forum than in the District of Columbia. For these reasons, the Northern District
15 of California should remain the venue of this action.

16 In essence, PLAYERS INC argues that because it and its parent, the NFL Players
17 Association ("NFLPA"), are both incorporated in Virginia and are each headquartered in the
18 Washington, D.C. area, one of these is a more convenient forum. But a change of venue would
19 be more convenient only for Defendant – not for the Plaintiffs or several non-party key witnesses.
20 Furthermore, PLAYERS INC fails to alert this Court to the fact that the NFLPA maintains an
21 office in this District.¹ Additionally, Defendant claims (wrongly) that this dispute is centered on
22 "alleged agreements in dispute" (presumably, the GLAs) which "would be administered" at
23 PLAYERS INC headquarters. This argument reflects a purposeful misunderstanding of the
24 nature of the lawsuit.² Finally, the public interest factors favor California. In short, PLAYERS
25 INC has not met its burden on this motion.

26
27 ¹ These two entities also share at least one member of their respective boards, Gene
Upshaw. *See* Declaration of Ryan S. Hilbert in Opposition to Motion to Transfer, Exs. 1 and 3.

28 ² *See generally*, Opposition To Motion for Judgment on the Pleadings and Opposition to

1 **II. ARGUMENT**

2 **A. Standard to Transfer Venue**

3 As the moving party, PLAYERS INC bears the burden of a “strong showing” that the
4 inconvenience of litigating in this forum favors transfer. The movant bears a heavy burden of
5 showing a clear balance of inconveniences to it. Unless the balance is strongly in favor of the
6 Defendant, Plaintiffs’ choice of forum should not be disturbed. *Decker Coal v. Commonwealth*
7 *Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986); *E. & J. Gallo Winery v. F. & P. S.p.A.*, 899 F.
8 Supp. 465, 466 (E.D. Cal. 1994) (Defendant “bears a heavy burden of showing a clear balance of
9 inconveniences to it.”).

10 In order for a district court to transfer an action under section 1404(a), the court must
11 make the following two findings: (1) that the transferee court is one where the action “might have
12 been brought,” and (2) that the convenience of the parties and witnesses and the interest of justice
13 favor transfer. *Jaco Environmental Inc. v. Appliance Recycling Centers of America, Inc.*, 2007
14 WL 951274, *2 (N.D. Cal. 2007). Plaintiffs concede that this action might have been brought in
15 either Virginia or Washington, D.C. (Likewise, PLAYERS INC has not asserted that this venue
16 is improper.) Thus, the first prong of this standard is not in dispute.

17 The second prong of the standard, the determination of “convenience,” turns on a set of
18 private and public factors averred in *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d
19 834, 843 (9th Cir. 1986) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)). The
20 private factors include: (1) relative ease of access to sources of proof; (2) availability of
21 compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing
22 witnesses; (3) possibility of view of premises, if appropriate; and (4) all other practical problems
23 that make trial of a case easy, expeditious and inexpensive. The public factors include:
24 (1) relative court congestion; (2) local interest to resolution of localized controversies at home;
25 (3) interest of having the trial of a diversity case in a forum with governing law over the action;

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Motion for Rule 11 Sanctions. Moreover, the “thrust of the dispute” (as Defendant calls it), is
spread amongst the 50 states, including California, where the injuries to class members have
occurred. The locus of a tort is the place where injury takes effect. *Oppen v. Aetna Ins. Co.*, 485
F.2d 252, 256 (9th Cir. 1973).

1 (4) avoidance of problems with conflict of laws; and (5) unfairness of burdening citizens in an
 2 unrelated forum with jury duty. *Id.* The Court must take into consideration all of the relevant
 3 factors at issue in the present litigation by making an “individualized, case-by-case consideration
 4 of convenience and fairness.” *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964). The
 5 convenience factors must outweigh the deference given to Plaintiffs’ choice of forum to warrant
 6 transfer. *See Decker Coal Co.*, 805 F.2d at 843. As illustrated below, in this case these factors do
 7 not favor transfer.

8 **B. The Northern District of California is the Most Appropriate Forum**

9 1. The Plaintiffs’ Choice of Forum Is Entitled To Deference

10 The Northern District of California is the chosen venue of the named Plaintiffs. Unless
 11 the balance of the §1404(a) factors is strongly in favor of Defendant, Plaintiffs’ choice of forum
 12 should not be disturbed. Defendant argues that Plaintiffs’ choice of forum should be given less
 13 weight because Plaintiffs seek to represent a class. *See* Motion to Transfer, p. 5 (citing *David v.*
 14 *Alphin*, 2007 WL 39400, *3 (N.D. Cal. 2007) and *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir.
 15 1987)). But on this point, *David v. Alphin* actually stated as follows:

16 It has been said that “[p]laintiffs’ choice of forum is entitled to less deference
 17 where, as here, the action is brought on behalf of a nationwide class. . . . Here,
 18 defendants argue that David’s choice of forum should not be given deference
 19 because as a class action, this lawsuit now includes thousands of Plaintiffs spread
 20 across the country. This argument ignores the fact that the class has not yet been
 21 certified. If it is certified and David is appointed class representative, she would
 still bear a great deal of responsibility. Also, these thousands of other class
 members would not need to appear in this action unless they choose to intervene.
 Intervention would be a real possibility, but it has not occurred yet (and the
 residency of any intervenors is speculative at this stage). Accordingly, plaintiff’s
 choice of forum remains entitled to deference and weighs against transfer.

22 *David v. Alphin*, 2007 WL 39400 at *3. While *David v. Alphin* was an ERISA case which gives
 23 greater deference to plaintiff’s choice of forum, similarities exist. For example, in this matter, no
 24 class has been certified. If it is certified, Mr. Roberts and the other named Plaintiffs will bear a
 25 great deal of responsibility, and they are, therefore, entitled to their choice of forum.

26 Moreover, PLAYERS INC’s other case on this point, *Lou v. Belzberg*, 834 F.2d 730, 739
 27 (9th Cir. 1987), is distinguishable. In that case, the Ninth Circuit held that the plaintiff’s choice is
 28 accorded minimal consideration “if the operative facts have not occurred within the forum and the

1 forum has no interest in the parties or subject matter.” *Id.* Given that one of the Plaintiffs is a
2 resident here, and given the other Northern District of California connections described below,
3 that is clearly not the situation here.

4 2. The Private Convenience Factors Favor the Northern District of California.

5 The private convenience and fairness factors, including ease of access to sources of proof,
6 relative convenience to parties, and relative convenience to witnesses favor the Northern District
7 of California.

8 a. The Northern District of California is Convenient for the Witnesses.

9 Courts must consider the effect of transfer on the availability of witnesses to testify at
10 trial, particularly for third-party witnesses. *DeFazio v. Hollister Employee Ownership Trust*, 406
11 F. Supp. 2d 1085, 1090 (E.D. Cal. 2005).

12 (1) The Convenience to the Parties Favors Northern California.

13 California is the residence of one named Plaintiff. Putting aside the years he spent playing
14 professional football, Walter Roberts III has been a resident of California since he was nine years
15 old. *See* Declaration of Walter Roberts III in Support of Plaintiffs’ Opposition to Defendant’s
16 Motion to Transfer Venue (“Roberts Decl.”) ¶ 3. Mr. Roberts, who is a former California state
17 long-jump champion, attended San Jose State University from 1960 to 1964 before embarking on
18 a 7-year professional football career. *Id.* ¶ 4. Following his professional football career, Mr.
19 Roberts returned to Southern California in 1971 before moving to Northern California in 1979.
20 *Id.* ¶ 5. Mr. Roberts has resided in Northern California since 1979, and currently resides in San
21 Jose, California. *Id.* ¶ 3. Any records Mr. Roberts has in connection with this case are located in
22 San Jose. *Id.*

23 In the early 1980s, Mr. Roberts co-founded a building supplies company called JR
24 Builders Specialties, Inc., which was located on Third Avenue in San Mateo, California. Roberts
25 Decl. ¶ 5. This company was in business until the late 1980s. *Id.* Since that time, Mr. Roberts
26 has worked in various jobs throughout Northern California, including as a carrier for the San
27 Francisco Chronicle. *Id.* ¶ 6. It would be difficult for Mr. Roberts to serve as a class
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1 representative if this case was litigated on the East Coast because of his ties to Northern
2 California. *Id.*

3 As far as the other two named Plaintiffs are concerned, neither resides in Virginia or
4 Washington, D.C. However, both have chosen Northern California as the venue for this action
5 and, thus, their level of convenience is subsumed within that choice.

6 The convenience of Defendant's witnesses is entitled to little weight because the
7 witnesses are employees of the party seeking transfer, and the Defendant will be able to compel
8 their testimony at trial. *See Jaco Environmental Inc. v. Appliance Recycling Centers of America,*
9 *Inc.*, 2007 WL 951274 *4 (N.D. Cal. 2007) (the convenience of Defendants' party witness is
10 entitled to little weight because the witness is an employee of the party seeking transfer, and
11 Defendants will be able to compel his testimony at trial). Furthermore, the Defendant does not
12 state that it would encounter any burden by having to litigate in this forum. *See* Declaration of
13 Joe Nahra in Support of Defendant's Motion to Transfer Venue ("Nahra Decl."); Declaration of
14 Gene Upshaw in Support of Defendant's Motion to Transfer Venue ("Upshaw Decl.").

15 Defendant also neglects to mention that the NFLPA – which owns 79% of Defendant
16 PLAYERS INC (First Amended Complaint, ¶ 1) – has a West Coast office located at 423
17 Washington Street, Suite 700 in San Francisco. *See* Declaration of Ryan S. Hilbert in Opposition
18 to Motion to Transfer ("Hilbert Decl."), Ex. 1. Moreover, Gene Upshaw is an officer of both of
19 these entities: Mr. Upshaw is the Executive Director of the NFLPA and the Chairman of
20 PLAYERS INC. *See* Hilbert Decl. Exs. 1 and 3.

21 It is also worth noting that Plaintiffs' choice of class counsel, Ronald Katz and Manatt,
22 Phelps and Phillips, LLP are located in nearby Palo Alto, California. Because of Plaintiffs'
23 counsel's proximity to this Court, a significant amount of time and expense would be eliminated
24 for Plaintiffs. Each of the law firms representing Defendant also has offices located in Northern
25 California, and lawyers from those offices have appeared in this matter.

26 (2) California is Also Convenient for Third Party Witnesses.

27 California is the residence of several key non-party witnesses, whose testimony is
28 anticipated. For example, Plaintiffs have reason to believe that two key witnesses, Doug Allen

1 and Pat Allen, the former President and Executive Vice President of PLAYERS INC,
2 respectively, reside in California. See Hilbert Decl. ¶ 4. In addition, Howard Skall, a former VP
3 for PLAYERS INC, is currently employed by Creative Artists Agency, which is headquartered at
4 2000 Avenue of the Stars, Los Angeles, CA 90067. See *id.* ¶ 5. Plaintiffs have alleged that each
5 of these individuals resigned from Defendant in 2006 after the United States Department of Labor
6 imposed new, more stringent disclosure requirements on the NFLPA. First Amended Complaint,
7 ¶¶ 11, 18. Testimony from each of these non-party witnesses is necessary and significant to this
8 matter.

9 Northern California (Redwood City) also is the headquarters of Electronic Arts, which is
10 believed to be one of the largest licensees – if not *the* largest licensee – of Defendant PLAYERS
11 INC.³ The LM-2 Form filed in 2006 by the NFLPA states that Electronic Arts paid the NFLPA
12 \$33,487,103 in 2005 alone. See Hilbert Decl. ¶ 6.

13 PLAYERS INC argues that “if the parties wish to obtain evidence from the NFLPA,
14 former employees of Players Inc. and any other third parties, the chosen forum would be
15 inconvenient.” See Motion to Transfer, p. 6 (citing *David v. Alphin*, 2007 WL 39400, at *4).⁴
16 But this argument is unsupported.

17 Although the NFLPA is not a party to this lawsuit, it is closely related to Defendant.
18 When faced with a similar situation, at least one court has determined that this fact weighs against
19 a transfer of venue. In *Apex Sales Agency v. Phoenix Sintered Metals, Inc.*, 2006 WL 3022987 *2
20 (N.D. Ohio 2006), the Court said:

21 Defendants argue that the action would be more convenient in the Western District
22 of Pennsylvania because only one party, Plaintiff, resided in Ohio, while Defendant
23 companies are both Pennsylvania corporations and the individual defendants reside
24 in Pennsylvania. Defendants are related entities and individuals with aligned
25 interests, however, and, thus, cannot assert that they are truly multiple parties for
purposes of a transfer analysis. This is not a case, for instance, where a single
plaintiff has sued many otherwise unrelated entities and charged them with parallel
or similar conduct. As such, this Court finds that a transfer of venue would merely

26 ³ Because of various group licensing deals around the country, however, it is likely that
non-party witnesses and documentary evidence will be sought from numerous districts.

27 ⁴ In *David v. Alphin*, the court granted transfer only after finding that “the large number of
28 witnesses and parties located in North Carolina favors transfer,” a situation that is inapposite here.

1 shift the burden of inconvenience, vis-a-vis the parties, from one group of aligned
2 Defendants to Plaintiff. That is not the result that Section 1404(a) was intended to
3 promote.

4 PLAYERS INC fails to specifically identify any other third party witnesses or testimony
5 that would be adversely affected by a California venue. *See Nahra Decl. and Upshaw Decl. In E.*
6 *& J. Gallo Winery v. F. & P. S.p.A.*, 899 F. Supp. 465, 466 (E.D. Cal. 1994), the court noted that
7 to meet the burden on a Motion to Transfer under §1404(a), affidavits or declarations are required
8 to identify key witnesses and a generalized statement of their anticipated testimony. Because the
9 defendant in *E. & J. Gallo Winery* mentioned only the potential for testimony by retailers who
10 purchased defendant's rice in the Los Angeles area, but failed to identify specific witnesses and
11 their anticipated testimony, the court denied the motion to transfer. *Id.* Without such
12 information, the court stated "it is difficult to evaluate the role of these witnesses and realize the
13 impact of a venue change on their function." *Id.* Likewise, other than the NFLPA, Defendant has
14 failed to identify specific third-party witnesses or anticipated testimony.⁵ Once again, this factor
15 does not warrant transfer.

16 b. Sources of Proof/Location of Documents

17 There is no single location that would provide the easiest access to all of the relevant
18 evidence. Plaintiffs will likely have proof located in various jurisdictions. Furthermore, sources
19 of proof obtained from Electronic Arts and possibly other non-party witnesses will be available in
20 this District.

21 Defendant claims that "the vast majority of PLAYERS INC's staff and all relevant
22 documents and files" are in the Washington, D.C. area, but technological advances virtually
23 eliminate this burden, of which Defendant has presented no evidence. *See Nahra Decl. and*
24 *Upshaw Decl. In David v. Alphin*, 2007 WL 39400 (N.D. Cal. 2007), the court said:

25 ⁵ PLAYERS INC also claims that "Plaintiffs have not identified any third party witnesses
26 that are located in their chosen district." Motion to Transfer, p. 6. This statement is inapt,
27 because it is the Defendant which has the burden of proof on this Motion. In any event, Plaintiff
28 has certainly identified third-party witnesses that are located in this district, including the NFLPA
and Electronic Arts.

1 With technological advances in document storage and retrieval, transporting
 2 documents does not generally create a burden. Defendants argue that most of the
 3 evidence related to Plaintiffs' claims, specifically documents related to
 4 administration of the plans, is located in Charlotte, North Carolina. Defendants do
 5 not contend that transporting documents would cause them hardship, so this factor
 6 does not favor transfer.

7 *Id.* at 3; *see also*, *Apex Sales Agency v. Phoenix Sintered Metals, Inc.* 2006 WL 3022987 *3
 8 (N.D. Ohio 2006) (the location of documentary evidence is only a minor consideration because
 9 documents can "easily be sent by mail, copied, or even faxed" to another location). PLAYERS
 10 INC has not contended that transporting documents would cause hardship, so this factor does not
 11 favor transfer.⁶

12 As demonstrated above, the private convenience factors do not warrant transfer. Even
 13 assuming inconvenience for PLAYERS INC, at best, a transfer "would merely shift rather than
 14 eliminate the inconvenience." *Decker Coal Co.*, 805 F.2d at 843.

15 3. The Public Factors Favor Northern California.

16 The public factors favor California as well. Specifically, the factors of relative court
 17 congestion; local interest; choice of law, and unfairness of burdening citizens favor California.
 18 The "thrust of the dispute," as Defendant calls it, is not altogether centered on its Washington
 19 D.C. office; instead, the locus of the dispute is likely spread amongst the 50 states, including
 20 California, where the injuries to class members have occurred. *See Oppen v. Aetna Ins. Co.*, 485
 21 F.2d 252, 256 (9th Cir. 1973) ("The locus of a tort is the place where injury takes effect."). Until
 22 a class is certified, the situs of injury is in California (as well as Florida and New Jersey).

23
 24 ⁶ PLAYERS INC also relies on *Tropos Networks, Inc. v. IPCO, LLC*, 2006 WL 1883316 at
 25 4 (N.D. Cal. 2006) and *Greenwell v. Belkin*, 2006 WL 2884393 at 2 (N.D. Cal. 2006) for the
 26 proposition that access to its own records is a consideration. While this may be true as a general
 27 proposition, *Tropos Networks, Inc.* actually held that where sources of proof derive from both
 28 fora, this factor is determined to be "neutral" in evaluating a motion to transfer. *See Tropos
 Networks, Inc. v. IPCO, LLC*, 2006 WL 1883316 at 4. In *Greenwell v. Belkin*, the court
 transferred venue where there was an identical, earlier-filed action pending in the transferee
 district and the plaintiff filed no objection to the Motion to Transfer Venue. *Greenwell v. Belkin*,
 2006 WL 2884393.

1 Furthermore, California law presumptively applies to this dispute.⁷ In short, these factors do not
2 favor transfer.

3 Secondly, PLAYERS INC seeks a transfer to the Eastern District of Virginia, in great part
4 due to its “rocket docket”. But despite the historically fast resolution of cases in the Eastern
5 District of Virginia, that district has no particular interest in this dispute, other than the fact that
6 the Defendant and its parent are incorporated in Virginia. As explained above, PLAYERS INC
7 has not shown that Virginia is particularly convenient to the Plaintiffs or other key non-party
8 witnesses.

9 Between this District and the District of Columbia, this District historically resolves cases
10 faster. *See Hilbert Decl., Ex. 2* The median time interval in months for trial in this district is 27.5
11 months. The median time interval for trial in the District of Columbia is 34.5 months. As above,
12 this factor does not favor transfer.

13 In sum, neither the private nor public “convenience” factors provide enough support for
14 transfer of the California action to Virginia or Washington, D.C. The Defendant has not met its
15 burden on this Motion.

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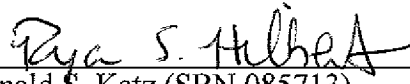
22 ⁷ It is well-settled that California courts apply a “governmental interest” approach to
23 resolution of conflict of law issues. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 579 (Cal. 1974).
24 Under such an approach, a court must first determine if a true conflict between two states’ laws
25 exist. *Id.*, 11 Cal. 3d at 579. If so, it will then analyze the respective interests of the states
26 involved and determine which has an overriding interest in having its law applied. *Id.* However,
27 if no true conflict exists, a forum is “entitled to apply its own law.” *Insurance Co. of North*
28 *America v. Federal Express Corp.*, 189 F.3d 914, 921 (9th Cir. 1999) (*citing Rivera v. Southern*
Pacific Transp. Co., 217 Cal. App. 3d 294, 299 (Cal. App. 1990)). PLAYERS INC concedes that
no true conflict exists between California and Virginia; in fact, it admits that the laws of both
states are “substantially the same”. *See Defendant’s Motion for Judgment on the Pleadings*, p. 6,
n. 5. Thus, by PLAYERS INC’s own argument, California law governs the resolution of this
matter.

1 **III. CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request that Defendant's Motion to
3 Transfer Venue be DENIED.

4 Respectfully submitted,

5
6 Dated: May 10 2007



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