UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIESTI ASSOCIATES, INC.,

Plaintiff,

v.

MCGRAW-HILL GLOBAL EDUCATION HOLDINGS, LLC, et al.,

Defendants.

Case No. 16-cv-07315-RS

ORDER DENYING MOTION TO TRANSFER AND MOTION TO DISMISS

Pursuant to Civil Local Rule 7-1(b), defendants' motions to transfer and motion to dismiss are suitable for disposition without oral argument, and the hearing set for April 7th, 2017 is hereby vacated. Both motions will be denied.

Motion to transfer

Defendants seek to transfer this action to the District of Colorado, pursuant to 28 U.S.C. §1404(a), which vests courts with discretion to order such transfers "[f]or the convenience of the parties and witnesses and in the interest of justice . . . ." Defendants rely on the facts that (1) there is no particular connection between this district and the parties or the subject matter of the complaint, and (2) plaintiff has previously litigated related and/or similar claims against defendants and others in the District of Colorado, which is where plaintiff is based. Defendants also characterize plaintiff's election to bring suit in this District as "forum shopping"—accusing plaintiff of seeking to take advantage of a relatively recent Ninth Circuit ruling that may support a

conclusion that plaintiff has standing to bring this action.[1]

Under § 1404(a), the district court has discretion "to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' " Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir.2000) (quoting Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29 (1988)). The court must weigh multiple factors in determining whether transfer is appropriate in a particular case. Jones, 211 F.3d at 498.

Those factors may include:

> (1) The location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' 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.

Jones, 211 F.3d at 498 (citing Stewart, 487 U.S. at 29–31).

A plaintiff's choice of forum ordinarily is given substantial weight. See Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986). That is less so, however, where the plaintiff does not reside in the forum and/or there is no particular connection between the controversy and the forum. See Williams v. Bowman, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)("[t]he degree to which courts defer to the plaintiff's chosen venue is substantially reduced where the plaintiff does not reside in the venue or where the forum lacks a significant connection to the activities alleged in the complaint.")

Here, defendants have made no showing that any of the relevant factors tip strongly in favor of a Colorado venue other than, perhaps, it might be more convenient for plaintiff to litigate there, in its home state. Plaintiff, however, has disclaimed any interest in any such advantages to it.

[1] In prior litigation in Colorado, plaintiff received unfavorable rulings on the standing issue.

Defendants' primary argument is their accusation that plaintiff is engaged in "forum shopping"—looking for a venue that may be more hospitable with respect to standing issues. Defendants have not shown, however, there to be anything improper about plaintiff electing to file a new case in a venue that undisputedly is not an improper forum, even assuming plaintiff was motivated largely by a perception that the law of that circuit may be advantageous to it. While "forum shopping" involving any manipulation or gaming of the system is discouraged, defendants have not shown the circumstances here rise to that level. Accordingly, the motion to transfer is denied.

Motion to dismiss

Defendants move to dismiss on res judicata grounds, arguing that in prior Colorado litigation, plaintiff was found to lack standing to bring similar claims.[2] The particular claims for relief plaintiff is now pursuing, however, arose after the prior cases were decided. Because neither the factual situation nor the law necessarily is the same as when the prior cases were decided, there is no basis to conclude the claims are not tenable.[3] Accordingly, the motion to dismiss is denied.

IT IS SO ORDERED.

Dated: April 4, 2017

RICHARD SEEBORG
United States District Judge

[2] Defendants rely in part on litigation between plaintiff and a third-party. That action would, at most give rise to collateral estoppel (issue preclusion), not res judicata (claim preclusion), as the parties are not identical. Regardless of nomenclature, however, defendants have not shown the present action is barred by any of the prior cases.

[3] Defendants also argue that, in light of the prior rulings on standing, plaintiff must do more than plead the bare fact that it owns the copyrights in issue. Defendants have not shown, however, how the results of earlier cases somehow changes pleading standards in this case. The factual allegation of copyright ownership is sufficient at this juncture.