IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TODD JANSON, et al., on behalf of themselves and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 2:10-cv-04018-NKL
LEGALZOOM.COM, INC.	)	
Defendant.	)	

Plaintiffs' Suggestions in Opposition to Defendant LegalZoom's Motion to Reconsider or, in the Alternative, to Transfer Venue

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I. Introduction.

Defendant LegalZoom, Inc. ("LegalZoom") has moved for the Court to reconsider its order denying LegalZoom's motion to dismiss. In the alternative, LegalZoom has moved for transfer to the United States District Court for the Central District of California. The Court should deny both requests.

The Court should deny LegalZoom's motion to reconsider because, as recognized in the Court's order of June 1, 2010, a motion to dismiss under 28 U.S.C. § 1406 or Fed. R. Civ. P. 12(b)(3) is not the proper procedure to a enforce forum-selection clause. The Court should deny LegalZoom's motion to transfer under 28 U.S.C. § 1404(a) because the forum-selection clause is unenforceable, and because the factors to be considered for transfer under 28 U.S.C. § 1404 strongly favor venue in this Court.

II. Under Supreme-Court Precedent, the Proper Procedure to Enforce a Forum-Selection Clause is a Motion to Transfer Under 28 U.S.C. § 1404(a).

On June 1, 2010, this Court denied LegalZoom's motion to dismiss for improper venue. It held that a motion to dismiss under 28 U.S.C. § 1406 or Fed. R. Civ. P. 12(b)(3) is not the proper procedure for enforcing a forum-selection clause. The Court's ruling was correct and should not be reconsidered.

If venue is proper under 28 U.S.C. § 1391, then dismissal is improper. While the issue has not been decided definitely in the Eighth Circuit, the Supreme Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) controls. In *Stewart*, the Court held that the proper procedural mechanism for enforcing a forum-selection clause is a motion to transfer under 28 U.S.C. § 1404. *Id.* at 29 n.8.

Consistent with the Supreme Court's holding in *Stewart*, a significant number of federal courts have considered the issue of whether a motion to dismiss or a motion to transfer is the proper procedure for the enforcement of a forum-selection clause. These courts, like this Court, held that if venue is properly vested in accordance with the venue statute, a motion to transfer under 28 U.S.C. § 1404(a) rather than a motion to dismiss for improper venue is the proper procedural procedure for enforcing a forum-selection clause.[1]

For example, in *Jumara v. State Farm Insurance Co.*, 55 F.3d 873 (3d Cir. 1995), the court reversed the district court, finding that the dismissal of a case based on a forum-selection clause for improper venue was error. The court determined that dismissal is improper if venue is proper where the suit was originally filed, stating:

> Since venue is proper in the Eastern District where the action commenced, the district court's effective dismissal of the action constituted an error of law. The District Court should instead have applied the appropriate balancing test under 28 U.S.C. § 1404(a) to determine whether the case should proceed in the Eastern District or be transferred to the Middle District.

Id. at 879. Other courts have reached the same result. *See, e.g., Tel-Phonic Servs., Inc. v. TBS Int'l*, 975 F.2d 1134, 1141 n.7 (5th Cir. 1992) (28 U.S.C. § 1404(a) applied when venue is proper despite forum-selection clause designating another jurisdiction); *AC Controls Co. v. Pomeroy Computer Res., Inc.*, 284 F. Supp. 2d 357, 359 (W.D.N.C. 2003) (court could not dismiss for improper venue when venue was proper under venue statute); *Shaw Group, Inc. v. Natkin & Co.*, 907 F. Supp. 201, 203 (M.D. La. 1995) (forum-selection clause does not make venue in non-contractual forum improper); *Huntingdon Eng'g & Envtl., Inc. v. Platinum Software Corp.*, 882 F. Supp. 54, 56-57 (W.D.N.Y. 1995) (forum-selection clause does not make venue improper and

[1] LegalZoom does not dispute that under 28 U.S.C. § 1391, venue is proper in this Court.

motion to dismiss denied); *National Micrographics Sys., Inc. v. Canon USA, Inc.*, 825 F. Supp. 671, 678-680 (D.N.J. 1993) (motion to dismiss for improper venue denied because forum-selection clause did not make venue improper).

Thus, consistent with the Supreme Court's decision in *Stewart*, and the weight of other authority, the Court should deny LegalZoom's motion to reconsider.

LegalZoom also argues that the Court should reconsider because if the Court transfers under § 1404(a) rather than dismisses, Plaintiffs would be deprived of their right to bring their claims in either state or federal court in Los Angeles. Putting aside the irony of LegalZoom's new-found solicitude for Plaintiffs' choice of forum, § 1404(a) is the proper procedure for enforcing a forum-selection clause regardless of whether the forum-selection clause at issue gives the parties the option of filing in state or federal court.

This was precisely the circumstances in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). There, the forum-selection clause gave exclusive jurisdiction to any appropriate state or federal district court located in Manhattan. *Id.* at 24 n.1. Confronted with these facts, the Supreme Court did not adopt the rule advocated by LegalZoom, that § 1404 is the procedural mechanism if the forum-selection clause provides for federal court only, but that § 1406 is the procedural mechanism if the forum-selection clause provides for federal or state court. Instead, the Supreme Court stated, "We hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to a court in Manhattan." *Id.* at 32.

Because the Supreme Court held that 28 U.S.C. § 1404(a) governs district courts' decisions on effecting parties' forum-selection clauses, this Court's June 1 order was correct and the Court should deny LegalZoom's motion to reconsider.

If the Court were to reconsider its determination that 28 U.S.C. § 1404(a) is the proper procedure, under 28 U.S.C. § 1406 or Fed. R. Civ. P. 12(b)(3), dismissal is unwarranted because the forum-selection clause is unenforceable. As set forth in Plaintiffs' Suggestions in Opposition to Defendants' Motion to Dismiss for Improper Venue, (Doc. 24), which is incorporated by reference, the forum-selection clause is unenforceable because contracts for the unauthorized practice of law are *per se* invalid. Further, the forum-selection clause cannot be enforced because it is both unfair and unreasonable. When such a clause directly contravenes a significant public policy, such as protecting the public from the unauthorized practice of law, it cannot be enforced. Lastly, the forum-selection clause is not enforceable because it is vague and ambiguous, referring only to "the courts of the city of Los Angeles."

III. LegalZoom's Motion to Transfer Venue under 28 U.S.C. § 1404(a) Should Be Denied.

LegalZoom's motion to transfer should be denied. The statute provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). An analysis of the three factors enumerated in § 1404 (a) demonstrates that transfer is unwarranted.[2]

To decide a motion to transfer "the court may consider a myriad of factors, including the convenience of the parties, the convenience of the witnesses, the availability of judicial process

[2] If it is assumed that the forum-selection clause is enforceable, which Plaintiffs deny, the existence of such a clause bears only upon the first factor, the convenience of the parties, and does not impact the analysis of the remaining two factors, the convenience of witnesses and the interest of justice. *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 757-58 (3d Cir. 1973); *IFC Credit Corp. v. Burton Industries, Inc.*, No. 04 C 5906, 2006 WL 1302362, *1-2 (N.D. Ill. May 5, 2006).

to compel attendance of unwilling witnesses, the governing law, the relative ease of access to sources of proof, the possibility of delay and prejudice if a transfer is granted, and practical considerations indicating where the case can be tried more expeditiously and inexpensively." *Osment Model Trains, Inc. v. Mike's Train House, Inc.*, No. 09-4189-CV-C-NKL, 2010 WL 386182 (W.D. Mo. Jan. 27, 2010) (quoting *Houk v. Kimberly-Clark Corp.*, 614 F. Supp. 923, 927 (W.D. Mo. 1985). The trial court has discretion in deciding whether to grant or deny a motion to transfer. *Hubbard v. White*, 755 F.2d 692, 694 (8th Cir. 1985).

The party seeking to transfer venue bears the burden of proving that "a transfer is warranted, which it must do by clearly showing that the balance the interests weighs in its favor." *Id.; Houk v. Kimberly-Clark, Corp.*, 613 F. Supp. 923, 927 (W.D. Mo. 1985); *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir.1986) (the party seeking transfer has the burden of establishing, by reference to particular circumstances, that the transferee forum is clearly more convenient). Here, LegalZoom has failed to show that transfer to the Central District of California is "clearly" more convenient.

A. Transfer Is Not Warranted Based on Convenience of the Parties.

Legal Zoom does not address the question of which forum is most convenient for the parties, but merely asserts that its forum-selection clause is determinative of the issue. As addressed in Plaintiffs' previous brief (Doc. 24), incorporated by reference here, the forum-selection clause, for a number of reasons, should not be enforced. *See Jitterswing, Inc. v. Francorp, Inc.*, __ S.W.3d __, No. ED 93045, 2010 WL 933763 (Mo. App., Mar. 16, 2010) (declining to enforce forum-selection clause designating Illinois courts where claim for unauthorized practice of law asserted).

There is little question that litigation in California would impose a significantly greater burden to Plaintiffs than continued litigation in Missouri would impose on LegalZoom. Plaintiffs submitted affidavits with their suggestions in opposition to Legal Zoom's motion to dismiss that described the financial hardship they would face should the Court transfer this matter to California. Indeed, Plaintiffs candidly admit that if this case were transferred to California, it would be cost-prohibitive for them to pursue this litigation. The case would be effectively terminated.

In any event, it cannot be disputed that Missouri is a more convenient forum for Plaintiffs, while California, the site of LegalZoom's corporate headquarters, is more convenient to LegalZoom. This does not, however, provide a basis for transfer. "A transfer should not be granted if it 'would merely shift the inconvenience from one party to another.'" *Osment Model Trains* at *2 (citing *Houk v. Kimberly-Clark Corp.*, 613, F. Supp 923, 932 (W.D. Mo. 1985). In short, the "convenience of the parties" does not justify transfer.

B. Transfer Is Not Warranted Based on Convenience of the Witnesses.

LegalZoom identified eight persons as witnesses, all employees of LegalZoom, whose testimony may be relevant. LegalZoom has not identified any third-party witness who may have relevant information. For their part, Plaintiffs have identified themselves and a third-party witness who may have relevant testimony. All of Plaintiffs' witnesses are in Missouri.

Although LegalZoom has identified more witnesses, this is not controlling. In *Osment Model Trains*, the party seeking transfer, Mike's Train House, Inc., identified more witnesses than did the plaintiff Osment Model Trains, Inc. This Court, however, determined that a greater number of witnesses was not dispositive. "Although Mike's Train submits the names of more witnesses than the plaintiffs, motions for transfer are not a 'battle of numbers.'" *Id.* at *1. The

court determined that because each party had identified witnesses with critical information, the "convenience of the witnesses" factor was neutral. Here, as in *Osment Model Trains,* this factor is not determinative.

LegalZoom suggests that documents relevant to this proceeding are in California and for that reason transfer should be granted. LegalZoom cites *In re Apple, Inc.*, 602 F.3d 909, 914 (8th Cir. 2010), for the proposition that if original documents need to be referenced, transfer should be made to the forum where the documents are located. LegalZoom, however, does not identify what "original" documents may need to be referred to. As stated in Plaintiffs' complaint, Plaintiffs' communication and transactions with LegalZoom occurred entirely on computers via the internet. There are no documents, such as original legal instruments, at issue in this case. As recognized in *Osment Model Trains,* electronic presentation of documents is available, documents are readily transportable, and their location is not entitled to great weight. *Osment Model Trains*, 2010 WL 386182 at *2. In sum, the location of documents does not favor transfer.

C. Transfer is Not Warranted Based on the Interest of Justice.

The "interest of justice" factor under § 1404(a) includes the following considerations:

> (1) judicial economy, (2) the plaintiff's choice of forum, (3) the comparative costs to the parties of litigating in each forum, (4) each party's ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law.

Terra Int'l, Inc. v. Mississippi Chem. Corp., 119 F.3d 688, 696 (8th Cir. 1997). In this case, examination of these factors militates heavily against transfer.

First, regarding judicial economy, the parties have already agreed to a trial date of August 22, 2011. Therefore, judicial economy is not served by transfer. In *Osment Model Trains, Inc. v. Mike's Train House, Inc.*, No. 09-4189-CV-C-NKL, 2010 WL 386182 (W.D. Mo. Jan. 27,

2010), this Court found that where the parties had agreed to a scheduling order specifying a trial date, "judicial economy does not weigh in favor of transfer." *Id.* at *2. As in *Osment,* this factor weighs against transfer.

Second, Plaintiffs' selection of Missouri as the forum is a significant factor supporting the denial of transfer. As noted by this Court: "Plaintiff's choice of forum is entitled to great weight." *Id.* (citing *Terra*, 119 F.3d at 695); *Employers Reinsurance Corp. v. Massachusetts Mut. Life Ins. Co.*, No. 06-0188-CV-W-FJG, 2006 WL 1235957 at *1 (W.D. Mo. May 4, 2006) (plaintiff's choice of forum entitled to great weight, "particularly where plaintiff is resident of judicial district where suit is brought"). Because all Plaintiffs are residents of Missouri, their choice of forum should be accorded significant deference.

Third, the "comparative cost to the parties of litigating in each forum" does not support transfer. Where disparity exists between the parties, such as an individual plaintiff suing a large corporation, the relative means of the parties may be considered in determining whether transfer is warranted. *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 370 (E.D. N.Y. 2009); *Sparks v. Goalie Entertainment, Inc.*, No. 4:06-cv-006020-JEG, 2007 WL 962946 at *6 (S.D. Iowa Mar. 30, 2007). Here, where Plaintiffs are suing a company with a national presence, the Court should consider that Plaintiffs do not have the means to litigate their relatively small dollar-amount claims in a court 1,700 miles distant.[3]

Fourth and fifth, the ability of each party to enforce a judgment and the obstacles to a fair trial, are not at issue here. They neither favor nor disfavor transfer.

[3] Plaintiffs Todd M. Janson and Chad M. Ferrell stated by affidavit they would not pursue this case if it were transferred to California because of the expense of travel. (Doc. No. 24, Exs. 1, 2).

Sixth, regarding conflict-of-law issues, LegalZoom contends that California law governs as provided by the "Terms of Service" to which Plaintiffs assented. This contention highlights the incongruity of LegalZoom's position, namely, that a California court should apply California law to claims entirely premised on the violation of Missouri statutes. Will LegalZoom assert that California law governing the practice of law controls in this case? That a California statute of limitations applies to Plaintiffs' claims? Where uncertainty exists as to which law applies, including choice-of-law rules, transfer is disfavored. *American Standard, Inc. v. Bendix Corp.*, 487 F. Supp 254, 263-64 (W.D. Mo. 1980).

Seventh, the advantages of having a court sitting in Missouri determine questions of Missouri law is of substantial importance here. When assessing the appropriateness of transfer, it is in the interest of justice for a court with the most familiarity with the applicable state law to hear the case. *United Rentals, Inc. v. Pruett*, 296 F. Supp. 2d 220, 230 (D. Conn. 2003). A California court is unlikely to be familiar with the Missouri statute prohibiting the unlawful practice of law, § 484.010, RSMo., or the Missouri Merchandising Practices Act, §407.010 *et seq.*, RSMo. To require a California court to determine whether a putative class of Missouri consumers are entitled to recover on claims premised on Missouri law does not further the interest of justice.

Furthermore, a court sitting in Missouri has a greater stake than a court sitting in California in advancing Missouri's long-recognized state interest in protecting members of the public from the unauthorized practice of law. As noted in Plaintiffs' previous memorandum, (Doc. 24), California's regulatory scheme concerning the practice of law is entirely different from Missouri's. It should not be left to a California court to determine the rights of Missouri consumers under a Missouri statute. The Supreme Court has held "there is a local interest in

having local controversies decided at home." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947); *Rice v. Bellsouth Adver. & Publ'g Corp.*, 240 F. Supp. 2d 526, 531 (W.D.N.C. 2002) (transfer to Georgia denied and forum-selection clause not given effect where North Carolina had strong interest in resolving consumers complaints in North Carolina). This case is brought by Missouri residents under Missouri law and should remain in Missouri.

IV. Conclusion

The Court properly denied LegalZoom's motion to dismiss for improper venue, and the Court should not reconsider. Furthermore, the Court should deny LegalZoom's motion for transfer under 28 U.S.C. § 1404(a). As a threshold matter, the forum-selection clause is unenforceable because it is part of an illegal contract. And even if the Court were to enforce it, transfer does not support the convenience of parties, the convenience of witnesses, or the interest of justice. For the foregoing reasons, the Court should deny LegalZoom's motion to reconsider, or in the alternative, to transfer venue.

Respectfully submitted,

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Certificate of Service

I certify that on July 8, 2010, I filed the foregoing with the Clerk of the Court using the CM/ECF system. The system sent notification of this filing to the following:

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