IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TODD JANSON, GERALD T. ARDREY, CHAD M. FERRELL, and C & J REMODELING LLC, on behalf of themselves and on behalf of all others similarly situated, Plaintiffs, v. LEGALZOOM.COM, INC., Defendant.	Case No. 2:10-cv-04018-NKL

REPLY SUGGESTIONS IN SUPPORT OF DEFENDANT LEGALZOOM'S MOTION TO RECONSIDER OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

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I. THE COURT SHOULD GRANT LEGALZOOM'S MOTION TO DISMISS

In arguing that the proper means of enforcing a forum selection clause is a motion to transfer under 28 U.S.C. § 1404(a) and not a motion to dismiss under § 1406(a), Plaintiffs overstate the significance of the Supreme Court's opinion in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). Whether a motion to dismiss is the proper means of enforcing a forum selection clause was not an issue in the *Stewart* case, and the question was neither briefed nor argued by the parties. The issue was not decided by the *Stewart* Court, nor was it in any way necessary to the Court's decision.

As the Supreme Court stated in *Stewart*, "[t]his case presents the issue whether a federal court sitting in diversity should apply state or federal law in adjudicating a motion to transfer a case to a venue provided in a contractual forum-selection clause." *Id.* at 24. The Northern District of Alabama had denied a motion to dismiss or transfer the case under a forum selection clause placing jurisdiction in Manhattan on the grounds that the issue was controlled by Alabama's policy disfavoring forum selection clauses. *Id.* The Eleventh Circuit reversed, holding that the clause was enforceable as a matter of federal law. *See* 487 U.S. at 26.

The Supreme Court affirmed, laying out an analysis under which courts should inquire whether the federal statute at issue in a diversity case controls the issue and, if so, whether the statute represents a valid exercise of Congress' authority under the Constitution. *Id.* at 26-27. Under the first prong, the Court held that "the first question for consideration should have been whether § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue and transfer this case to a Manhattan court." *Id.* at 29. Finding that § 1404 controlled and that Congress had authority to enact the section, the Court held that federal law governed the decision whether to give effect to a forum selection clause. *Id.* at 31-32.

In the course of its opinion, the Court noted — in a footnote — that "[t]he parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the Northern District of Alabama." *Id.* at 29 n.8. That single sentence constitutes the entirety of the *Stewart* Court's discussion of the propriety of enforcing a forum selection clause *via* a motion to dismiss under section 1406(a). It also forms the entire basis for Plaintiffs' argument that *Stewart* prohibits enforcement of such a clause by means of a motion to dismiss.[1]

The footnote in *Stewart* fits the classic definition of *dictum*: "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . ." BLACK'S LAW DICTIONARY 1177 (9th ed. 2009) ("*obiter dictum*"). The footnote's lack of precedential weight is illustrated by Wright & Miller's observation that "[a] larger number of the courts of appeal, including the Seventh, Ninth, Tenth, and Eleventh Circuits, nevertheless have held that a valid forum selection clause can render venue in the original forum improper; these courts enforce valid clauses under Section 1406(a) or a Rule 12(b)(3) motion to dismiss for improper venue." 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed. 2010); *see* cases collected at *id.* n.73 (citing decisions in Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits, as well as dozens of district court opinions). Indeed, the issue remains open in the Eighth Circuit. *See* Doc. 32 at 2 n.1.[2] Even Plaintiffs concede this. Doc. 36 at 1.

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[1] It is true, as Plaintiffs point out, that the forum selection clause at issue in *Stewart* laid venue in state or federal court in Manhattan. 487 U.S. at 24 n.1. Like the issue of whether a motion to dismiss under § 1406 is a proper means of enforcing a forum selection clause, that fact was not examined by the Court or referenced in connection with § 1406, and in no way informed the issues on appeal or was significant to the Court's decision.

[2] References to "Doc. __ at __" are to documents on the Court's docket in this case.

That *Stewart* does not preclude enforcement of a forum selection clause by a motion to dismiss brought under § 1406 is further demonstrated by decisions holding that dismissal under that section is the only method of enforcing a clause placing venue in a state or federal court. *See* Doc. 32 at 3; *GMAC Commercial Credit, LLC v. Dillard Dep't Stores, Inc.*, 198 F.R.D. 402, 409 (S.D.N.Y. 2001).

Because LegalZoom has previously shown that the forum selection clause contained in the Terms of Service on the LegalZoom.com website is binding on Plaintiffs and enforceable, the Court should dismiss Plaintiffs' action without prejudice to refiling in a state or federal court sitting in the city of Los Angeles, California.

II. THE COURT SHOULD GRANT LEGALZOOM'S MOTION TO TRANSFER

In arguing that LegalZoom's alternative motion to transfer under 28 U.S.C. § 1404(a) should be denied, Plaintiffs rely extensively on this Court's decision 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). Quoting or citing the *Osment* decision some half dozen times or more, Plaintiffs argue that the present case is nothing more than a garden-variety transfer motion, in which the court makes a discretionary assessment of the statutory factors of convenience of the parties, convenience of witnesses, and the interests of justice — factors upon which, Plaintiffs argue, the party seeking transfer bears the burden of showing that the proposed transferee forum is more convenient. Doc. 36 at 4-5.

What Plaintiffs neglect to remind the Court, however, is that *Osment* did not involve a forum selection clause. As the Supreme Court held in *Stewart*, "[t]he presence of a forum-selection clause such as the parties entered into in this case will be a *significant factor* that *figures centrally* in the district court's calculus" under section 1404(a). 487 U.S. at 29 (emphasis

added). While the Eighth Circuit has not resolved the issue, *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 695-96 (8th Cir. 1997), other circuits have held that a forum selection clause shifts the burden of proof to the party resisting enforcement of the clause. On appeal after the remand in *Stewart*, the Eleventh Circuit held that "when a motion under section 1404(a) seeks to enforce a valid, reasonable choice of forum clause, the opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute." *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989). The court concluded that, "while other factors might 'conceivably' militate against a transfer . . . , the clear import of the [Supreme] Court's opinion [in *Stewart*] is that the venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors." *Id.* *See also Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995) ("Where the forum selection clause is valid, . . . the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum.") (citation omitted); *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 922 F. Supp. 1334, 1367 (N.D. Iowa 1996); *but see Hoffman v. Minuteman Press Int'l, Inc.*, 747 F. Supp. 552, 554 (W.D. Mo. 1990) (declining to follow *Ricoh*).

As this Court has recognized, "'[f]orum selection clauses are prima facie valid and are enforced unless they are unjust or unreasonable or invalid. Where . . . the forum selection clause is the fruit of an arm's length negotiation, the party challenging the clause bears an especially heavy burden of proof to avoid its bargain.'" *Pub. Sch. Ret. Sys. of Missouri v. State Street Bank & Trust Co.*, No. 09-4214-CV-C-NKL, 2010 WL 318538, at *2 (W.D. Mo. Jan. 21, 2010), quoting *Servewell Plumbing, LLC v. Federal Ins. Co.*, 439 F.3d 786, 789 (8th Cir. 2006).

LegalZoom's prior briefing has demonstrated not only that the forum selection clause at issue here is reasonable and valid, but also that Plaintiffs have failed to meet the burden of

showing why they should not be bound by their contractual choice of forum. If the Court concludes, however, that the burden of proof does not shift to the party resisting enforcement of a forum selection clause, the analysis still weighs in favor of transfer, for Plaintiffs' assessment fails to take into account what the *Stewart* Court labeled the "significant" and "central" factor of the parties' forum selection clause. Even if Plaintiffs are correct that other factors are neutral, the forum selection clause constitutes the decisive factor tipping the balance in favor of transfer.

A. Convenience of the Parties and Witnesses Favors Transfer

In responding to LegalZoom's argument that the factor of convenience of the parties favors transfer, Plaintiffs advance three arguments. First, they argue, citing *Jitterswing, Inc. v. Francorp, Inc.*, No. ED93045, 2010 WL 933763 (Mo. App. Mar. 16, 2010), that a forum selection clause cannot be enforced when a claim for the unauthorized practice of law is asserted.[3] In prior briefing, LegalZoom explained that the *Jitterswing* case was based on a forum selection clause that was, unlike the one here, not broad enough to encompass tort claims. Doc. 26 at 6-7. LegalZoom also explained that, while the alleged practice of law without a license in *Jitterswing* occurred in Missouri, here Plaintiffs have agreed that their "viewing and use of LegalZoom occurs solely within the County of Los Angeles in the State of California, and that all content and services shall be deemed to be served from, and performed wholly within, Los Angeles, California, as if I had physically traveled there to obtain the service." *Id.*; *see* Doc. 17-1, Exhibits B and C, LegalZoom Terms of Service ¶ 3. Finally, even if *Jitterswing* was correct (it was not) that Illinois courts cannot apply Missouri law, Plaintiffs cannot dispute that "federal courts routinely apply the law of foreign jurisdictions." *ASAI, Inc. v. Guest Reddick, Inc.*, No.

[3] As LegalZoom has previously pointed out, this argument improperly asks the Court to assume the ultimate issue to be determined in this case — that LegalZoom engaged in the unauthorized practice of law. *See* Doc. 26 at 3.

09-0041-CV-W-FJG, 2009 WL 1657436, at *3 (W.D. Mo. June 10, 2009).

Plaintiffs' second and third arguments lean heavily on *Osment*, utterly disregarding the existence and effect of the forum selection clause. Thus, Plaintiffs point to the affidavits of two named Plaintiffs stating (in a way that can only be described as self-serving) that they will not pursue the case if it is transferred to California. Plaintiffs also argue, citing *Osment*, that transfer should not be granted if it would merely shift inconvenience from one party to the other.

LegalZoom has shown in prior briefing that a forum selection clause will be enforced both when transfer would merely shift inconvenience from one party to another and when transfer would be more inconvenient to the party opposing transfer. Doc. 32 at 7-8. Analogizing to *Osment*, a simple transfer case without a forum selection clause, Plaintiffs ignore precedent holding that assent to a valid forum selection clause constitutes a waiver of a party's right to argue its own inconvenience on a transfer motion. *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989); *Greatamerica Leasing Corp. v. Davis Lynch, Inc.*, No. 10-CV-13-LRR, 2010 WL 2652222, at *7 n.6 (N.D. Iowa June 30, 2010); *ELA Med., Inc. v. Advanced Cardiac Consultants*, No. 09-3027, 2010 WL 2243435, at *5 (D. Minn. June 1, 2010); *Midwest Mech. Contractors, Inc. v. Tampa Constructors, Inc.*, 659 F. Supp. 526, 532 (W.D. Mo. 1987).

Plaintiffs also point to *Osment* in arguing that transfer is not favored by the greater number of witnesses in California disclosed by LegalZoom. Doc. 36 at 6. With the exception of one third-party witness who assisted a named Plaintiff in using the LegalZoom website, however, Plaintiffs' witnesses in Missouri are only Plaintiffs themselves. Given that assent to a valid forum selection clause constitutes a waiver of a party's right to argue its own inconvenience on a transfer motion, Plaintiffs cannot argue the same point — and potentially escape their contractual obligations — in the guise of witnesses.

Finally, Plaintiffs note that this Court held in *Osment* that the location of documents was a neutral factor in light of the availability of photocopying and electronic presentation of evidence. *See Osment*, 2010 WL 386182, at *2. While LegalZoom does not argue that this factor is dispositive, it reiterates that in *In re Apple, Inc.*, 602 F.3d 909, 914 (8th Cir. 2010), which was decided after this Court's *Osment* decision, the Eighth Circuit disagreed with a district court's assessment of the factor as neutral and held that the location of documents does indeed favor transfer to the forum where such documents are located. *See* Doc. 32 at 7 n.3.

B. The Interests of Justice Favor Transfer

Under the heading of judicial economy, Plaintiffs point to this Court's holding in *Osment* that caseload statistics do not favor transfer because a trial date has been set under the Court's Scheduling Order. Doc. 36 at 7-8. While LegalZoom does not argue that considerations of judicial economy are dispositive, it is noteworthy that the Eighth Circuit held in *Apple* that "[d]ocket congestion is a permissible factor to consider in deciding a § 1404(a) motion." 602 F.3d at 915 (citing *Terra*, 119 F.3d at 696). The measure of judicial economy relied on by the district court in *Apple* — median time from filing to trial — favors transfer to the Central District of California, where in 2008 civil actions proceeded to trial 7.5 months more quickly. *See* http://www.uscourts.gov/cgi-bin/cmsd2008.pl.

Similarly, under the heading of plaintiff's choice of forum, Plaintiffs quote this Court's observation that "Plaintiff's choice of forum is entitled to great weight." *Osment*, 2010 WL 386182, at *2. Once again, however, Plaintiffs ignore the legal effect of the forum selection clause:

> In attempting to enforce the contractual venue, the movant is no longer attempting to limit the plaintiff's right to choose its forum; rather, the movant is trying to enforce the forum that the plaintiff had already chosen: the contractual venue. In such cases, we see no reason why a court should accord deference to

> the forum in which the plaintiff filed its action. Such deference to the filing forum would only encourage parties to violate their contractual obligations, the integrity of which [is] vital to our judicial system.

In re Ricoh Corp., 870 F.2d at 573; *see also Jumara*, 55 F.3d at 880 ("while courts normally defer to a plaintiff's choice of forum, such deference is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue"); *Terra*, 922 F. Supp. at 1367.

In addition, Plaintiffs have agreed that their use of LegalZoom occurred, and all LegalZoom's services were provided, in Los Angeles. As this Court held in *Williams v. Advance America, Cash Advance Ctrs. of Missouri, Inc.*, No. 07-04187-CV-C-NKL, 2007 WL 3326899, at *2 (W.D. Mo. Nov. 6, 2007), where "all of the actions forming the basis for the present suit occurred outside of this District, [Plaintiffs'] choice of forum is given less weight."

Plaintiffs next argue that the comparative cost to the parties of litigating in each forum disfavors transfer, referring again to the affidavits of the two named Plaintiffs and asserting that LegalZoom is "a company with a national presence." Doc. 36 at 8. First, LegalZoom's "national presence" is online and hence entirely "virtual." As Plaintiffs have agreed, LegalZoom's services are "performed wholly within" the city of Los Angeles. Moreover, whether or not Plaintiffs are correct that the relative means of the parties may be considered in a standard motion to transfer,[4] once again the calculus is different when there is a forum selection clause: "The financial difficulty that a party might have in litigating in the selected forum is not a sufficient ground by itself for refusal to enforce a valid forum selection clause." *P&S Bus. Machs., Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003).

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[4] *See JTH Tax, Inc. v. Lee*, 482 F. Supp. 2d 731, 738 (E.D. Va. 2007) ("[franchisor's] status as a corporation with sufficient resources to defend in a foreign forum is not a factor that this court considers in a transfer analysis"); *IntraNexus, Inc. v. Siemens Med. Solutions Health Servs. Corp.*, 227 F. Supp. 2d 581, 584 (E.D. Va. 2002) (that plaintiff "is a small business owned and operated by a single individual" while "Defendant is a large, billion dollar company, with considerable resources" does "not favor either forum").

Finally, Plaintiffs argue that transfer is disfavored both by conflict of law issues and by the preference for having a court in Missouri decide questions of Missouri law. On choice of law, Plaintiffs cite *American Standard, Inc. v. Bendix Corp.*, 487 F. Supp. 254, 263-64 (W.D. Mo. 1980), a case in which the contract between the parties contained neither a forum selection clause nor a choice of law provision. The court was influenced by a conflict between authorities as to whether the substantive law and choice of law rules of the transferor court or the transferee court should apply after transfer. 487 F. Supp. at 263-64.

Since the *American Standard* case was decided, the United States Supreme Court has resolved part of that conflict in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), which held that, when a case is transferred under section 1404(a), the transferee court must follow the choice of law rules of the transferor court. And the Terms of Service to which Plaintiffs assented in purchasing documents on the LegalZoom website states that "I agree that California law shall govern any disputes arising from my use of this website." To the extent there remains any issue as to which law applies, the Central District of California is as capable as this Court of resolving that issue. *Vernon v. Qwest Commc'ns Int'l, Inc.*, 643 F. Supp. 2d 1256, 1271 (W.D. Wash. 2009) ("Whether the case is transferred or not, Washington choice of law rules will be applied to determine the applicable state law. . . . Courts in both forums are equally equipped to apply these rules to determine which state's laws govern Plaintiffs' claims and to apply that law.").

As to Plaintiffs' argument that a court sitting in Missouri should decide questions of Missouri law, this Court stated in *Osment* that "this factor is given little weight where, as here, the law to be applied is 'neither complex nor unsettled.'" 2010 WL 386182, at *2. To the extent questions of Missouri law will need to be decided in this case, there is nothing sufficiently complex or unsettled about either Missouri's unlawful practice of law statute or the

Merchandising Practices Act to preclude a judge of the Central District of California from construing and applying those laws.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in LegalZoom's Suggestions in Support, LegalZoom requests that the Court reconsider its Order denying LegalZoom's motion to dismiss and grant LegalZoom's motion, dismissing Plaintiffs' action without prejudice to refiling the action in a state or federal court sitting in the city of Los Angeles, California. In the alternative, LegalZoom requests the Court to transfer this action to the Central District of California pursuant to 28 U.S.C. § 1404(a)

Dated: July 14, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2010, the foregoing was electronically filed with the Clerk of Court and served by operation of the Court's electronic filing system upon all counsel of record.

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