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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CALLAWAY GOLF COMPANY,	)	Civil No. 09cv384 L(POR)
	)	
Plaintiff,	)	<b>ORDER GRANTING MOTION TO</b>
	)	<b>TRANSFER [doc. #4]; DENYING</b>
v.	)	<b>WITHOUT PREJUDICE MOTION TO</b>
	)	<b>DISMISS FOURTH CAUSE OF ACTION</b>
CORPORATE TRADE INC.,	)	<b>[doc. #12]; GRANTING <i>EX PARTE</i></b>
	)	<b>MOTION FOR LEAVE TO FILE</b>
Defendant.	)	<b>DECLARATIONS [doc. #24] and FOR</b>
	)	<b>LEAVE TO FILE NEWLY</b>
_____	)	<b>DISCOVERED EVIDENCE [doc. #27]</b>

Defendant Corporate Trade Inc. (“CTI”) moves to dismiss, transfer or stay this action and to dismiss plaintiff’s fourth cause of action under Federal Rule of Civil Procedure 12(b)(6). The motions have been fully briefed; however, plaintiff Callaway Golf Company (“Callaway”) seeks leave to file declarations and newly discovered evidence in support of its opposition to CTI’s motion to dismiss, transfer or stay the case.

**Background**

In September 2001, CTI and Spalding Sports Worldwide, Inc. (“Spalding”), a nonparty, agreed that Spalding would sell its excess sporting goods inventory to CTI in exchange for trade credits that Spalding could use for marketing and advertising that CTI would make available to Spalding. In December 2001, CTI and KSL Media, Inc. (“KSLM”) agreed that KSLM would place media purchases on behalf of CTI’s clients.

Callaway acquired certain of Spaulding’s assets in mid-2003 and sought the assignment

1 and full use of the trade credit balance that CTI held in account for Spaulding. On July 1, 2003,  
2 CTI and Callaway agreed to assign, *inter alia*, the trade credit balance to Callaway. Callaway  
3 alleges in its complaint that the agreement was for CTI to transfer the Spaulding trade credit  
4 balance to Callaway in exchange for Callaway switching its media placement and planning and  
5 all future media trading to CTI's designated media agency, KSLM, once Callaway's media  
6 agreement with Dailey & Associates expired. However, CTI asserts that in consideration for the  
7 assignment and use of the trade credits, Callaway agreed it would provide to CTI either  
8 inventory of products equal to the value of the cash savings on media purchases that Callaway  
9 would realize from the use of the trade credits to purchase media; or alternatively, Callaway  
10 would pay cash to CTI calculated as 95% of the value of the cash savings on media purchases  
11 that Callaway realized from use of the trade credits to purchase media within 48 months of the  
12 use of the trade credits. CTI points to a letter from CTI to Callaway dated July 10, 2003 that it  
13 contends recognizes and confirms the CTI Trade Credit Compensation Agreement. (Exh. 3 to  
14 Declar. of Brian Egan.) It is clear that the parties dispute the terms of the trade credit  
15 assignment.

16 There is no dispute, however, that Callaway executed several media purchase  
17 authorizations for print and broadcast media. CTI sent a letter dated July 28, 2004 to Callaway  
18 that expressly provided an accounting of the cash-flow savings realized by Callaway in 2003 and  
19 2004 from the use of trade credits to purchase media. (Danzig Declar. Exh. Bates stamp  
20 000255.)

21 In April 2008, CTI and Callaway entered into another agreement whereby CTI would  
22 provide information to Callaway concerning KSLM's alleged improper business practices  
23 toward Callaway and Callaway would pay to CTI a percentage of net money Callaway recovered  
24 from KSLM plus a percentage of cost saved based on the receipt of the information from CTI.  
25 ("Confidentiality Agreement"). Callaway recovered or avoided considerable costs from KSLM  
26 and as a result was to pay CTI fees of approximately \$227,862. Callaway proposed a written  
27 mutual release of all remaining claims under the Confidentiality Agreement in exchange for a  
28 one-time payment of \$60,000 and a waiver of all claims and liabilities, including any not yet

1 known or suspected to exist by the parties. (Exh. 7 to Declar. of Brian Egan.) On October 28,  
2 2008, CTI advised Callaway that it was refusing to execute the proposed mutual release because  
3 Callaway had not transferred inventory, nor paid cash, based on the use of trade credits for the  
4 purchase of media as required by the July 2003 assignment of the Spaulding Agreement to  
5 Callaway.

6 CTI sent an invoice to Callaway on October 31, 2008, for unpaid fees of \$932,013.65  
7 which represented 95% of the value of cash savings realized by Callaway from the use of trade  
8 credits to purchase media in 2003 and 2004. Callaway questioned the basis of the October 31,  
9 2008 invoice.

10 Defendant states that a phone conversation between CTI and Callaway occurred on  
11 November 22, 2008, in which CTI asserted that it was prepared to send a second invoice to  
12 Callaway based on Callaway's use of the trade credits balance from 2005 through 2008 in the  
13 amount of \$7,981,287.20. In a subsequent phone call on November 26, 2008, Brian Egan of CTI  
14 allegedly told Callaway's counsel that unless both invoices were paid by January 19, 2009, CTI  
15 would sue Callaway for the amounts owed. Although Callaway does not suggest that this  
16 telephonic conversation never occurred, it disputes what was discussed during the call and  
17 strongly denies that a threat of litigation was communicated. (Oppo. Exh. 1, Patrick Swan, Jr.  
18 Declar. at ¶¶ 14-16.)

19 On January 5, 2009, CTI sent a second invoice to Callaway for 95% of the value of cash  
20 savings, \$7,981,287.20, realized by Callaway from the trade credits used to purchase media in  
21 2005 through 2008. Callaway did not communicate with CTI and did not make any payments by  
22 the January 19, 2009 deadline. The next day, January 20, 2009, Callaway filed the present  
23 action in the Superior Court for the State of California, County of San Diego, for declaratory  
24 relief and damages related to the terms of use of trade credits and breaches of contract against  
25 CTI. CTI removed this action on January 26, 2009.

26 On that same date, CTI filed a complaint against Callaway in the United States District  
27 Court for the Southern District of New York, seeking damages for breach of contract, unjust  
28 enrichment, and for an accounting for monies owed under the agreement concerning Callaway's

1 use of trade credits to purchase media. CTI's action was filed less than a week after Callaway's  
2 case was filed here but prior to service of Callaway's complaint.

3 As noted above, CTI seeks to have this case, the first-filed action, transferred to the  
4 District Court for the Southern District of New York. Callaway opposes the motion.

### 5 **Motion to Transfer, Stay or Dismiss**

#### 6 **a. First-to-File Rule**

7 "There is a generally recognized doctrine of federal comity which permits a district court  
8 to decline jurisdiction over an action when a complaint involving the same parties and issues has  
9 already been filed in another district." *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93,  
10 94-5 (9th Cir. 1982). This doctrine, known as the first-to-file rule, "gives priority, for purposes  
11 of choosing among possible venues when parallel litigation has been instituted in separate  
12 courts, to the party who first establishes jurisdiction." *Northwest Airlines, Inc. v. American*  
13 *Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993). The rule "serves the purpose of promoting  
14 efficiency well and should not be disregarded lightly." *Church of Scientology of California v.*  
15 *United States Dep't of Army*, 611 F.2d 738, 750 (9th Cir. 1979).

16 In applying the first-to-file rule, a court looks to three threshold factors: "(1) the  
17 chronology of the two actions; (2) the similarity of the parties, and (3) the similarity of the  
18 issues." *Z-Line Designs, Inc. v. Bell'O Int'l LLC*, 218 F.R.D. 663, 665 (N.D. Cal. 2003). If the  
19 first-to-file rule does apply to a suit, the court in which the second suit was filed may transfer,  
20 stay or dismiss the proceeding in order to allow the court in which the first suit was filed to  
21 decide whether to try the case. *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 622 (9th  
22 Cir.1991). In other words, the court with the first-filed action should normally decide whether  
23 an exception to the first-to-file rule applies. *Pacesetter*, 678 F.2d at 96 (citing *Kerotest Mfg. Co.*  
24 *v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 185, 72 S.Ct. 219 (1952)); see also *Alltrade Inc.*,  
25 946 F.2d at 628.

26 "Circumstances under which an exception to the first-to-file rule typically will be made  
27 include bad faith, anticipatory suit and forum shopping." *Id.* at 628 (internal citations omitted).  
28 Another exception to the first-to-file rule applies if "the balance of convenience weighs in favor

1 of the later-filed action.” *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994). This is  
2 analogous to the “convenience of parties and witnesses” on a transfer of venue motion pursuant  
3 to 28 U.S.C. § 1404(a). *Med-Tec Iowa, Inc. v. Nomos Corp.*, 76 F. Supp.2d 962, 970 (N.D. Iowa  
4 1999); *800-Flowers, Inc. v. Intercontinental Florist, Inc.*, 860 F. Supp. 128, 133 (S.D.N.Y.  
5 1994).

6 There is no dispute concerning the chronology of the two actions; the similarity of the  
7 parties, and the similarity of the issues. Therefore the issue is whether an exception to the first-  
8 to-file rule should be applied which would result in the transfer of this action to the Southern  
9 District of New York. CTI contends that Callaway filed this anticipatory action and engaged in  
10 forum shopping and further asserts that the balance of convenience weighs in favor of transfer of  
11 the first-filed case.

### 12 1. Anticipatory Action

13 A suit is "anticipatory" for the purposes of being an exception to the first-to-file rule if the  
14 plaintiff in the first-filed action filed suit acts on receipt of specific, concrete indications that a  
15 suit by the defendant was imminent. *Ward v. Follett Corporation*, 158 F.R.D. 645, 648 (N.D.  
16 Cal. 1994). Such anticipatory suits are disfavored because they are examples of forum  
17 shopping. *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n. 3 (5th Cir. 1983).  
18 By recognizing this exception to the first-to-file rule, courts seek to eliminate the race to the  
19 courthouse door in an attempt to preempt a later suit in another forum. *Northwest Airlines v.*  
20 *American Airlines*, 989 F.2d 1002, 1007 (8th Cir. 1993).

21 Filing a declaratory action after receipt of an intent to sue letter favors a finding that the  
22 first-filed suit was done for anticipatory, forum shopping purposes. *See Amerada Petroleum*  
23 *Corp. v. Marshall*, 381 F.2d 661, 663 (5th Cir.1967). In *Ward*, the court recognized the need  
24 for "specific, concrete indications that a suit by defendant was imminent [ ]" for a suit to be  
25 declared anticipatory. *Ward*, 158 F.R.D. at 648.

26 As noted above, there a several facts in dispute concerning the terms of the parties’  
27 agreement, the existence of documents and the contents of phone conversations. In briefing,  
28 Callaway accuses CTI of fabrication of evidence. The parties have provided directly conflicting

1 declarations. Of particular importance is CTI's contention that a date certain, January 19, 2009,  
2 was communicated directly to Callaway's counsel as the deadline for payment of the amount it  
3 claims Callaway owed in order to avoid litigation. If January 19 was the specific deadline for  
4 Callaway to make payment in order to avoid litigation, its filing of the present action appears to  
5 be an anticipatory action meant to secure its forum choice.

6 Callaway declares that no such deadline was ever communicated to it by CTI by  
7 telephone conversation, and the January 19 deadline was CTI's invented afterthought in order to  
8 support transfer of this action to New York. Instead, Callaway states that there was no rush to  
9 the courthouse because there was no threat of litigation by CTI but only an unsubstantiated claim  
10 for monies owed.

11 Most all case law addresses whether a written correspondence, such as a cease and desist  
12 letter, acts as specific, concrete indications that a suit by defendant was imminent. Here, there is  
13 no written correspondence concerning a deadline for payment in order to avoid litigation.  
14 Rather, CTI relies on an unrecorded phone call to show that Callaway was aware that litigation  
15 would be imminent. CTI supports its contention that a firm deadline was communicated to  
16 Callaway with the declarations of Egan and Weichert, but Callaway's counsel, a participant in  
17 the phone conversation, declares that there was no discussion of a particular deadline for  
18 payment at all.

19 Upon reviewing the record, the Court cannot make a factual finding that CTI provided  
20 Callaway with specific, concrete indications that a lawsuit was imminent and therefore,  
21 Callaway filed the action in this Court in anticipation of CTI's lawsuit and to forum shop.  
22 Accordingly, the Court finds that departing from the first-to-file rule on this basis is  
23 unwarranted.

## 24 **2. Balance of Convenience**

25 As noted above, another exception to the first-to-file rule applies if "the balance of  
26 convenience weighs in favor of the later-filed action." *Ward v. Follett Corp.*, 158 F.R.D. 645,  
27 648 (N.D. Cal. 1994). This is analogous to the "convenience of parties and witnesses" on a  
28 transfer of venue motion pursuant to 28 U.S.C. § 1404(a). As noted above, the court with the

1 first-filed action should normally weigh the balance of convenience and decide whether this  
2 exception to the first-to-file rule should be applied. *Pacesetter*, 678 F.2d at 96 (citing *Kerotest*  
3 *Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 185 (1952)); see also *Alltrade Inc.*, 946  
4 F.2d at 628.

5 Section 1404(a) of Title 28 of the United States Code provides that even when venue is  
6 proper, the court has discretion to transfer an action “[f]or the convenience of parties and  
7 witnesses, in the interest of justice, . . . to any other district or division where it might have been  
8 brought.” 28 U.S.C. § 1404(a). The purpose of this section is to “prevent the waste ‘of time,  
9 energy and money’ and to ‘protect litigants, witnesses and the public against unnecessary  
10 inconvenience and expense.’” *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (quoting  
11 *Continental Grain Co. v. Barge F.B.L.-585*, 364 U.S. 19, 26-27 (1960)). The party requesting  
12 the transfer bears the burden of showing that the balance of conveniences weighs heavily in  
13 favor of the transfer in order to overcome the strong presumption in favor of the plaintiff’s  
14 choice of forum. *Piper Aircraft v. Reyno*, 454 U.S. 235, 255-56 (1981); *Decker Coal Co. v.*  
15 *Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

16 To support a motion to transfer under § 1404(a), the moving party must first show that the  
17 proposed transferee court possesses subject matter jurisdiction over the action, that the parties  
18 would be subject to personal jurisdiction in the transferee court, and that venue would have been  
19 proper in the transferee court. *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960); *A.J. Indus., Inc. v.*  
20 *United States Dist. Ct. for the Cent. Dist. of Cal.*, 503 F.2d 384, 386 (9th Cir. 1974). If this  
21 requirement is established, the Court next looks at whether the convenience of parties and  
22 witnesses, and the interests of justice favor transfer. 28 U.S.C. § 1404(a). Courts in the Ninth  
23 Circuit weigh several considerations when determining whether transfer is appropriate: (1)  
24 plaintiff’s choice of forum; (2) convenience of the parties; (3) convenience of the witnesses and  
25 availability of compulsory process; (4) ease of access to the evidence; (5) feasibility of  
26 consolidation of other claims; (6) familiarity of each forum with the applicable law; (7) any local  
27 interest in the controversy; and (8) the relative court congestion and time of trial in each forum.  
28 *Decker Coal*, 805 F.2d at 843; see *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th

1 Cir.), *cert. denied*, 531 U.S. 928 (2000).

2 **a. Threshold Issue**

3 Transfer under 28 U.S.C. § 1404(a) is limited to courts where the action “might have been  
4 brought.” *Hoffman*, 363 U.S. at 344; *A.J. Indus.*, 503 F.2d at 386. There is no dispute here that  
5 the transferee court has personal jurisdiction over defendants, subject matter jurisdiction over the  
6 claims, and proper venue had the claims originally been brought in that court. *See Hoffman*, 363  
7 U.S. at 343-44.

8 **b. The Convenience of Parties and Witnesses, and the Interests of**  
9 **Justice**

10 As noted above, once the initial inquiry is satisfied, the court then weighs several  
11 practical considerations when determining whether transfer is appropriate.

12 **1. Plaintiff’s Choice of Forum**

13 Courts generally afford considerable weight to a plaintiff’s choice of forum when  
14 deciding a motion to transfer. *Piper Aircraft*, 454 U.S. at 255; *Decker Coal*, 805 F.2d at 843.  
15 But if the transactions giving rise to the action lack a significant connection to the plaintiff’s  
16 chosen forum, the plaintiff’s choice of forum is given considerably less weight. *See Pacific Car*  
17 *& Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968) (a plaintiff’s choice of forum  
18 commands less consideration where the operative facts have not occurred within the forum and  
19 the forum has no particular interest in the parties or subject matter); WILLIAM W. SCHWARZER ET  
20 AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 4:731 at 4-86  
21 (The Rutter Group 2009) The Court must also consider the parties’ business contacts with the  
22 chosen forum, including those relating to the plaintiff’s causes of action. *Pacific Car*, 403 F.2d  
23 at 954.

24 CTI contends that this action has a more significant connection to New York than to  
25 California notwithstanding Callaway’s corporate presence in this district and its contention that  
26 it made all its decisions to enter into the various agreements and transaction from California.  
27 The negotiations and execution of the initial agreement between Spalding and CTI occurred in  
28 New York and there is a choice of law provision indicating that the agreement is governed by



1 New York law. Further, CTI states that negotiation of the Spalding agreement assignment to  
2 Callaway occurred exclusively in New York City.

3 But Callaway contends that all of the written contractual negotiations were exchanged  
4 between CTI in New Jersey and Callaway in California; Callaway decided to engage KSL Media  
5 in California; and it placed its media orders with KSL Media in California. How Callaway  
6 engaged and made use of its contacts with KSL is not of particular importance. The  
7 agreement(s) made between Callaway and CTI are the focus of the action and Callaway's choice  
8 of forum does not have a significant connection to those agreements in terms of contract  
9 formation and execution. Thus, while giving Callaway's choice of forum some weight, the  
10 Court finds that the weight is not significant.

## 11 **2. Convenience of the Parties**

12 A defendant wishing to transfer an action must show that the burden on the plaintiff if the  
13 action is transferred is less than the burden on defendant if the action is not transferred. *See*  
14 *Merchants Nat. Bank v. Safrabank (California)*, 776 F. Supp. 538, 541-42 (D. Kan. 1991); *Fink*  
15 *v. Declassis*, 738 F. Supp. 1195, 1198 (N.D. Ill. 1990); *Kirschner Bros. Oil, Inc. v. Pannill*, 697  
16 F. Supp. 804, 807 (D. Del. 1988). Here, because both parties are corporations, Callaway  
17 suggests the relative means and burdens on the parties are inconsequential. As CTI notes,  
18 however, it is a small business – “a one-man corporation” – unlike Callaway. As a result of the  
19 disparity in size, CTI notes that litigating this action in California will disrupt its business unlike  
20 any burden Callaway may experience having to litigate in New York. Because CTI has minimal  
21 contacts in California and it would be classified as a small business, the burden of cost for  
22 defending this action in California would be significant on CTI but the burden on a national  
23 corporation such a Callaway to appear in New York would be insignificant. Thus, this factor  
24 weighs in favor of transfer.

## 25 **3. Convenience of the Witnesses and Availability of** 26 **Compulsory Process**

27 One of the most important factors in weighing whether to transfer an action is the  
28 convenience of the witnesses. *In re Eastern Dist. Repetitive Stress Injury Litig.*, 850 F. Supp.

1 188, 194 (E.D.N.Y. 1994). To demonstrate inconvenience, the moving party:

2 should produce information regarding the identity and location of the  
3 witnesses, the content of their testimony, and why such testimony is  
4 relevant to the action. [citation] The court will consider not only the  
number of witnesses located in the respective districts, but also the nature  
and quality of their testimony in relationship to the issues in the case.

5 *Steelcase, Inc. v. Haworth, Inc.*, 41 U.S.P.Q.2d 1468, 1470 (C.D. Cal. 1996).

6 Defendant provides what it contends are 10 key witnesses who reside within 100 miles of  
7 the Southern District of New York, including Ron Drapeau, Callaway’s former CEO who  
8 currently resides in Connecticut.<sup>1</sup> The witnesses it discusses are relevant to the issues involved  
9 in this case and they reside in or near New York. Although Callaway suggests that CTI’s  
10 representations concerning where relevant witnesses reside “cannot be taken at face value,”  
11 Callaway has not made a showing that CTI’s statements are suspect. Therefore, the Court finds  
12 that CTI has made a showing for transfer of this action to New York.

#### 13 **4. Relative Ease of Access to the Evidence**

14 The location of evidence is not a significant factor in a basic contract interpretation case  
15 such as this one. Accordingly, this factor is neutral with respect to transfer.

#### 16 **5. Familiarity of Each Forum with the Applicable Law**

17 Either court is equally competent to address claims arising out of state law whether that  
18 law is from New York or California. Therefore, this factor is neutral with respect to transfer.

#### 19 **6. Relative Court Congestion**

20 Although CTI does not address the factor of relative court congestion, the Court takes  
21 judicial notice that the time to trial for a civil case is essentially the same in the Southern District  
22 of California and the Southern District of New York. Accordingly, this factor is neutral with  
23 respect to transfer.

#### 24 **7. Interest of Justice**

25 “The question of which forum will better serve the interest of justice is of predominant  
26 importance on the question of transfer, and the factors involving convenience of parties and

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27  
28 <sup>1</sup> The parties dispute whether Mr. Drapeau is within the subpoena power of the New  
York district court.

1 witnesses are in fact subordinate.” *Madani v. Shell Oil Co.*, 2008 WL 268986, \*2 (N.D. Cal.,  
2 Jan. 30, 2008) (quotation omitted); *see also Mussetter Distrib., Inc. v. DBI Beverage Inc.*, 2009  
3 WL 1992356, \*6 (E.D. Cal., July 8, 2009); *Amazon.com v. Cendant Corp.*, 404 F. Supp.2d 1256,  
4 1261 (W.D. Wash.2005).

5 “An important consideration in determining whether the interests of justice dictate a  
6 transfer of venue is the pendency of a related case in the transferee forum.” *Madani*, 2008 WL  
7 268986, \*2); *Bratton v. Schering-Plough Corp.*, 2007 WL 2023482, \*5 (D. Ariz., July 12, 2007)  
8 (“In general, cases should be transferred to districts where related actions are pending.”). “The  
9 feasibility of consolidation is a significant factor in a transfer decision, although even the  
10 pendency of an action in another district is important because of the positive effects it might  
11 have in possible consolidation of discovery and convenience to witnesses and parties.” *A.J.*  
12 *Indus., Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 503 F.2d 384, 386-87 (9th Cir. 1974)  
13 (citations omitted). “In addition to the possible consolidation of discovery and the conservation  
14 of time, energy and money, centralizing the adjudication of similar cases will also avoid the  
15 possibility of inconsistent judgments.” *Mussetter Distrib.*, 2009 WL 1992356, \*5; *see also Jolly*,  
16 2005 WL 2439197,\*2 (“Litigation of related claims in the same tribunal is strongly favored  
17 because it facilitates efficient, economical and expeditious pre-trial proceedings and discovery  
18 and avoids duplic[ative] litigation and inconsistent results.”); *Argonaut Ins. Co. v. MacArthur*  
19 *Co.*, 2002 WL 145400, \*4 (N.D. Cal., Jan.18, 2002) (“The best way to ensure consistency is to  
20 prevent related issues from being litigated in two separate venues.”).

21 Here, it is undisputed that CTI’s case against Callaway is currently pending in the United  
22 States District Court for the Southern District of New York. The Court finds that the transfer of  
23 this action to the Southern District of New York would serve the interest of justice due to the  
24 possible consolidation of discovery and the conservation of time, energy and money, and the  
25 avoidance of the possibility of inconsistent judgments.

### 26 c. Summary

27 Having balanced the material circumstances of this case in light of the factors relevant to  
28 motions to transfer under section 1404(a), the Court finds that a transfer of the action to the

1 Southern District of New York would be for the convenience of the parties and witnesses and  
2 would serve the interest of justice.

3 Transfer of the first-filed Callaway action is appropriate because New York is the place  
4 where the majority of witnesses are located; consolidation of the first-filed action with the New  
5 York action is feasible; the New York district court has personal jurisdiction over Callaway; and  
6 the suit could have been properly brought in New York. The burden on CTI to litigate in  
7 California is substantially greater than the burden on Callaway.

8 The Court is satisfied that CTI has met its burden of demonstrating the balance of  
9 conveniences weighs in favor of transfer and equitable considerations favor of a departure from  
10 the first-to-file rule. Accordingly, the motion to transfer will be granted.

### 11 **Motion to Dismiss Plaintiff's Fourth Cause of Action**

12 Because the Court finds transfer of this action to the District of New York is appropriate,  
13 the court need not reach the parties' dispute concerning the sufficiency of plaintiff's fourth cause  
14 of action under Federal Rule of Civil Procedure 12(b)(6).

### 15 ***Ex Parte* Motions**

16 Callaway has filed two *ex parte* motions concerning additional evidence it would like to  
17 present in opposition to CTI's motion to transfer venue. The Court has considered the materials  
18 sought to be introduced, CTI's objections thereto and will allow the documents to be filed.

### 19 **CONCLUSION**

20 For the reasons set forth above, **IT IS ORDERED:**

- 21 1. CTI's motion to transfer venue to the United States District Court for the Southern  
22 District of New York is **GRANTED**. The Clerk of the Court is directed to  
23 **TRANSFER** the above-captioned case to the Southern District of New York  
24 forthwith. Upon transfer, this action shall be closed.
- 25 2. CTI's motion to dismiss plaintiff's fourth cause of action is **DENIED WITHOUT**  
26 **PREJUDICE**.

27 ///

28 ///

1 3. Callaway's *ex parte* motions to file declarations and newly discovered evidence is  
2 **GRANTED.**

3 **IT IS SO ORDERED.**

4 DATED: March 1, 2010

5   
6 M. James Lorenz  
United States District Court Judge

7 COPY TO:

8 HON. LOUISA S. PORTER  
9 UNITED STATES MAGISTRATE JUDGE

10 ALL PARTIES/COUNSEL

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