IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMAS A. SIMONIAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: 1:10-cv-01615
	)	
MAYBELLINE LLC,	)	
	)	
Defendant.	)	

REPLY BRIEF IN SUPPORT OF ALTERNATIVE MOTION
TO TRANSFER TO THE SOUTHERN DISTRICT OF NEW YORK

Defendant Maybelline LLC ("Maybelline") hereby submits this reply to plaintiff Thomas A. Simonian's ("Simonian") Response in Opposition to Defendant Maybelline's Motion to Transfer Venue. Simonian's allegation that deference to a plaintiff's home venue "is not overcome . . . merely because the transferee forum is slightly more convenient to the defendant" (Simonian Br. 1) egregiously understates the facts presented by Maybelline in its motion to transfer venue to the Southern District of New York. Simonian relies on assertions that bear no basis in fact, based only on internet postings, and with no context from which Simonian seeks to draw his conclusions. As further demonstrated below, the facts show that the forum requested by Maybelline would be significantly more convenient, and nothing alleged by Simonian demonstrates the contrary. As such, Maybelline's motion to transfer should be granted, and this case should be transferred to the Southern District of New York.

I. Simonian's Choice of Forum Carries Less Weight in This Qui Tam Suit

As Maybelline stated in its motion, the only factor that does not overwhelmingly favor a transfer to the Southern District of New York is the plaintiff's choice of forum. (Maybelline Opening Br. 4). However, in a qui tam suit, the plaintiff's choice of forum is afforded far less weight than it is afforded in other cases. *Id.* at 5; *Simonoff v. Kaplan, Inc.*, 2010 WL 1195855,

*1 (Dkt. 26, Ex. E). Simonian misinterprets the case law discussing the appropriate weight given to the plaintiff's choice of forum in a qui tam action, and in doing so, improperly affords his choice of forum far more weight than it is entitled.

Specifically, Simonian misinterprets *Harrington v. Ciba Vision Corp,* 2008 Dist. LEXIS 64119, *2-3 (W.D.N.C. 2008). In *Harrington*, the court considered a motion to transfer venue in a qui tam action for false marking under 35 U.S.C. § 292(a). 2008 Dist. LEXIS 64119, *2-3. The court stated that "[w]hile the proper weight the Court should provide this factor is no doubt diminished under a false marking action, where the plaintiff himself has not been injured . . . , *some* weight [should] be given to [p]laintiff's choice of forum." *Id.* (emphasis added). Indeed, the court went on to state that in qui tam actions, the choice of forum "is not worthy of 'considerable weight' that a plaintiff's choice of forum usually carries . . . [but it] is afford[ed] some weight." *Id.* Clearly, this is far less than the weight that Simonian asserts should be afforded to its choice of forum. Accordingly, Simonian's "choice of forum" is not a compelling reason to deny the transfer motion, especially in view of the undisputed facts showing material connection between the allegations in the complaint and the Southern District of New York.

II. Simonian's Choice of Forum Carries Less Weight Due to the Southern District of New York's Greater Relationship to the Allegations of the Suit

The plaintiff's choice of forum is also given less deference when another forum "has a stronger relationship to the dispute." *Amorose v.C.H. Robinson Worldwide, Inc.*, 521 F. Supp. 2d 731, 735 (N.D. Ill. 2007). The choice of forum is given minimal deference where none of the accused activities took place in the district. *Chicago, Rock Island and Pacific R.R. Co. v. Igoe,* 220 F.2d 299, 304 (7th Cir. 1955).

Simonian argues that his choice of forum should be given the same weight as is ordinarily given a plaintiff's forum choice in view of the evaluation of the relevant private

factors considered in a Section 1404 motion to transfer venue. Simonian Br. 3-4. Simonian further attempts to argue that the Southern District of New York does not have a much stronger relationship to the litigation than Illinois. *Id*. at 4. Simonian is clearly incorrect; the facts remain that: *all* of the accused marking occurs in or near the Southern District of New York; *all* decisions related to the marking occurred in or near the Southern District of New York; and *all* employees who would have knowledge of the marking reside in or near the Southern District of New York. *See* Declaration of Laura Hastings (Dkt. 26, Ex. A, "Hastings Decl.") ¶¶10-21.

Simonian, lacking any relevant facts, relies on sales that he alleges occur in the Northern District of Illinois. Yet the sales to which Simonian points (*see* Exs. B and C to Simonian Br.) relate to sales of Maybelline products *at Walgreens stores* in Illinois. This is not the same as Maybelline selling the products in this district. Even if Maybelline were making such sales, the issue here is not *jurisdiction*, it is *convenience of the parties and witnesses*. All relevant aspects of the products at issue originate in or near Southern District of New York, and no relevant aspects have a connection with Illinois. Hastings Decl. ¶¶10-21.

Simonian further argues that "the harm caused by the mismarking is felt by consumers in this district." Simonian Br. 4. This assertion fails on two grounds: (1) Simonian did not allege in his complaint any harm to any members of the consuming public (*see* Maybelline's Motion to Dismiss at 3-6); and (2) to the extent that any harm is felt by a consumer in the Northern District of Illinois, it is not any greater than in any other district of the United States.

Accordingly, the Southern District of New York has a far greater relationship to this dispute than does this district.

III. The Convenience of the Parties Weighs Strongly in Favor of Transfer

Despite Simonian's assertions to the contrary, the convenience of the parties weighs strongly in favor of transfer to New York. As an initial matter, Simonian attempts to manufacture sufficient ties to the Northern District of Illinois through alleged sales in the district, and the presence of a research laboratory in Chicago that Simonian asserts "does patent work." (Simonian Br. 5.) While it is true that Maybelline product is sold in the Northern District of Illinois, this is equally true for every other district in the United States. And it is flat-out false (and unsupported) to claim that "patent work" is performed by Maybelline in this district. *See* Second Declaration of Laura Hastings, Ex. A ("Second Hastings Decl.") ¶¶3-5.

Simonian's reliance on a job posting by L'Oréal USA for a research lab in Chicago (Simonian Br. Ex. E) is misplaced. The laboratory is run by L'Oréal USA Products, Inc., and is known as the L'Oréal Institute for Ethnic Hair and Skin Research ("Institute"). *See* Second Hastings Decl. at ¶3. It researches science related to the skin and hair of people of ethnic descent. *Id.* Further, that laboratory does not do "patent work" (whatever that is) as alleged by Simonian. *Id.* at ¶¶3-5. No preparation of patent applications or prosecution of patents occurs at the Institute. *Id.* at ¶3. In addition to conducting research, the Institute supports educational activities that provide healthcare professionals, researchers, and consumers with information about personal care issues specific to people of ethnic descent, such as hair loss and skin discoloration. *Id.* No activity relating to the creation of packaging for products, including the placing of patent numbers on the packaging of products, occurs at the Institute. *Id.* Nothing done by that laboratory, and none of the employees employed by that laboratory, have any relationship to the present suit, to Maybelline, to Maybelline's products, to Maybelline's sales, to Maybelline's marking, to Maybelline's marketing, or in any way to any issues that even arguably

come within the scope of Simonian's suit. *Id.* at ¶¶4-5. No research and development of any Maybelline products, let alone those at issue in the present suit, occurs at the L'Oréal Institute for Ethnic Hair and Skin Research. All development of Maybelline products sold in the United States occurs in Clark, New Jersey. *Id.* at ¶4. As such, it has no bearing on Maybelline's motion to transfer to the Southern District of New York.

Similarly, Simonian's attempt to reply on Maybelline's New York Color Studio (Simonian Brief Ex. C) is unavailing. Maybelline's New York Color Studio is a mobile marketing effort that travels to various locations. The employees responsible for Maybelline's New York Color Studio work at Maybelline's offices in New York. Maybelline's marketing department is located in New York. Maybelline's New York Color Studio has no responsibility for patenting of products, marking of patents on products or packaging, or shipment of packaged products. Second Hastings Decl. at ¶ 7.

Maybelline's assertion that the Southern District of New York is the proper venue is not based, as Simonian asserts (Simonian Br. 5), solely on the location of its corporate headquarters. As set forth in Maybelline's brief in support of its motion to dismiss, all employees with knowledge of the relevant facts are in or near New York. All marking decisions are generated in or near New York. A large percentage of the manufacturing is done in nearby New Jersey. All documents related to (a) marking, (b) decisions to mark, (c) manufacturing, and (d) marketing/sales are located in or near New York. Maybelline Opening Br. 2-3; Hastings Decl. ¶¶10-21. While Simonian seeks to invent contacts to Illinois through internet fishing expeditions, Maybelline has alleged real facts that demonstrate a clear advantage of convenience for the Southern District of New York.

Simonian does not effectively rebut Maybelline's arguments regarding the other false marking suits filed against Maybelline. (Simonian Br. 6.) The fact remains that Maybelline is facing multiple suits in different jurisdictions based on activities that all find their basis in New York. All of those cases should be transferred to the Southern District of New York, and Maybelline is seeking exactly that.[1] The mere fact that profit-seeking qui tam plaintiffs are located in different jurisdictions is insufficient to force Maybelline to be prejudiced by defending itself in multiple jurisdictions at once.

Simonian also puts forth the disingenuous argument that transfer should not be granted based on the relative size of Maybelline against that of Simonian. (Simonian Br. 6). This argument is wholly without merit, particularly in light of Simonian's recent activities. Since February of this year, Simonian has brought 40 different false marking suits in the Northern District of Illinois against different defendants. *See* Ex. B, collection of filings by Thomas Simonian, retrieved from PACER. As such, it is apparent that Simonian is prepared to go forward with discovery against 40 different defendants, located all over the country, including depositions of witnesses with knowledge of facts. It is also apparent that Simonian has access to sufficient legal fees to litigate 40 different false marking suits. This is anything but the normal David versus Goliath situation in which a single plaintiff finds itself in litigation against a large corporation. If Simonian is able to commit to conducting discovery across the country in dozens of false marking suits, any arguments based on an inability to litigate in New York are unfounded (particularly in light of the witnesses' locations in or around New York).

Simonian is correct that "the convenience of all parties and witnesses must be considered." Simonian Br. 6. Where Simonian is mistaken is in his erroneous, and in some

[1] Maybelline's motion for severance and transfer in *San Francisco Tech., Inc. v. Glad Prods. Co.*, Civ. No. 5:10-cv-966-JF (N.D. Cal.) is currently pending and scheduled for oral argument on July 8, 2010.

instances disingenuous, assertions that those factors do not overwhelmingly favor transfer to the Southern District of New York.

IV. The Ease of Access to Sources of Proof and Situs of Material Events Weighs In Favor of Transfer

The mere fact that Maybelline product may be sold in the Northern District of Illinois (by a third party) does not by itself demonstrate that documents reside in the forum. In fact, all documents related to sales and marketing are maintained by Maybelline in or near New York. Hastings Decl. at ¶ 21. Simonian relies on the existence of electronic discovery as a reason to deny the requested transfer. Simonian Br. 7. This, however, does not account for the witnesses that will be deposed, all of whom are located in or near New York, and does not in any way negate the prejudice faced by Maybelline in being forced to litigate in Illinois.

Simonian seeks to create an inconvenience by relying on Maybelline's presumed deposition of Simonian. Simonian Br. 7. Simonian is one witness, and it has not been established whether or not Maybelline will seek to depose him. Further, all of the relevant Maybelline witnesses are located in or near New York. Hastings Decl. at ¶¶ 10, 17-18, 20. As such, the factor of deposition locations favors grant of Maybelline's requested transfer.

Simonian also relies on the location of "injury to the public." Simonian Br. 7-8. However, as stated in Maybelline's Motion to Dismiss, Simonian never alleged an injury to the public. Dkt. 20 at 3-6. Nor has he identified a particular member of the public who has been injured. Further, to the extent a member of the public may have been injured as described, there is no reason to expect it is any more likely that such a member of the public would be located in the Northern District of Illinois instead of the Southern District of New York. As such, this argument is unavailing.

Simonian asserts that "there will clearly be extensive discovery taking place in this forum" (Simonian Br. 8), but does not assert facts that back it up. Other than Simonian's location in the Northern District of Illinois, all identified witnesses to this point are located in or near New York, all documents are located in or near New York, and to the extent that anything else of relevance might exist in the Northern District of Illinois, the same—or more—can be said of the Southern District of New York.

V. Public Interest Factors

Despite Simonian's assertions to the contrary, this factor does not weigh in favor of maintaining the litigation in the Northern District of Illinois. If anything, the time to disposition and time to trial prove only that generally the two districts are very similar in the speed in which they reach resolution. *See* Dkt. No. 26 at Exs. I and J. Simonian points to a 3.6 month difference in time from filing to trial for 2009 as an indication that Southern District of New York is significantly slower, while avoiding the years 2007, 2006, 2005, and 2004, in which the Southern District of New York had a shorter time from filing to trial. In fact, if the average time to trial per year is taken over the period from 2004 to 2009, the average pendancy from filing to trial in the Northern District of Illinois is 27.8 months, while the same time period reveals an average pendancy for the Southern District of New York of about 25.6 months. Further, the difference for 2009 between the two districts in overall time from filing to disposition is a scant 0.2 months, or approximately 6 days. *Id.* Therefore the difference in speed by which the two districts reach disposition is negligible. When coupled with the fact that all relevant witnesses and documents are located in or around New York, the Southern District of New York becomes the overwhelmingly more convenient forum.

VI. Conclusion

The Southern District of New York is clearly a more convenient forum for this litigation than the Northern District of Illinois. All of the relevant witnesses and documents are located in or around New York, and all of the relevant decisions related to markings are made in or around New York. The only tie to this forum is the plaintiff's residence, which is afforded less weight in this qui tam case. As such, transfer is appropriate, and Maybelline respectfully reaffirms its request that this case be transferred to the Southern District of New York.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey M. Drake, caused to be served a copy of the foregoing:

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by filing same with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record:

/s/ Jeffrey M. Drake