

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

THE SCOOTER STORE, INC. *et al.*,

Plaintiffs,

v.

**Civil Action 2:10-cv-00018
Judge Algenon L. Marbley
Magistrate Judge E.A. Preston Deavers**

SPINLIFE.COM, LLC,

Defendant.

ORDER OVERRULING PLAINTIFFS' OBJECTIONS

This matter is before the Court for consideration of Plaintiffs' Objections (ECF No. 76) to the United States Magistrate Judge Elizabeth A. Preston Deavers' September 1, 2010 Opinion and Order (ECF No. 71). In this Opinion and Order, Judge Deavers denied Plaintiffs' Motion for Re-Transfer (ECF No. 36), finding no applicable exception to the law-of-the-case doctrine. The Court has reviewed the Magistrate Judge's Opinion and Order in light of Plaintiffs' Objections and finds that the Magistrate Judge's denial of Plaintiffs' Motion was neither clearly erroneous, nor contrary to law. Accordingly, the Court **OVERRULES** Plaintiffs' Objections (ECF No. 76) and **AFFIRMS** the Magistrate Judge's Opinion and Order (ECF No. 71).

I.

Plaintiffs, The Scooter Store, Inc., and The Scooter Store, Ltd., originally filed this lawsuit in the Western District of Texas, asserting state and federal unfair competition and trademark claims against Defendant, Spinlife.com, LLC. Defendant subsequently filed a motion

for transfer, which The Honorable Harry Lee Hudspeth of the United States District Court for the Western District of Texas granted. (ECF No. 25.)

On January 6, 2010, the district court for the Western District of Texas transferred this action to this Court. Then, on January 8, 2010, Defendant filed its Answer and Counterclaim. (ECF No. 29.) Defendant pleads in its Counterclaim claims for Sherman Act attempted monopolization, Ohio Unfair Competition, and declaratory judgment of invalidity, non-infringement, and unenforceability. On February 22, 2010, Plaintiffs filed a motion seeking to re-transfer this action back to the Western District of Texas. Defendant opposed Plaintiffs' Motion for Re-Transfer.

The Magistrate Judge issued an Opinion and Order on September 1, 2010, denying retransfer. (ECF No. 71.) She analyzed Judge Hudspeth's decision and found that his "determination that the convenience of the parties and witnesses and the interest of justice required transfer was not clearly erroneous" and that Defendant's "assertion of counterclaims does not frustrate the purpose of transfer." (September 1, 2010 Opinion and Order 4, 10, ECF No. 71.)

On September 20, 2010, Plaintiffs filed Objections to the Magistrate Judge's Opinion and Order, asserting that her decision was clearly erroneous in finding that Judge Hudspeth's decision was not clearly erroneous and that she erred in concluding that Defendant's counterclaims did not frustrate the purpose of transfer. (ECF No. 76.) Plaintiffs' Objections are fully briefed and ripe for review.

II.

In this instance, the Magistrate Judge's Opinion and Order involved a nondispositive preliminary matter. When a party objects to a magistrate judge's opinion on a nondispositive

issue, “[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A). “‘The ‘clearly erroneous’ standard applies only to factual findings made by the Magistrate Judge, while her legal conclusions will be reviewed under the more lenient ‘contrary to law’ standard.’” *Candela Management Group, Inc. v. Taco Maker, Inc.*, No. 2:08-cv-1138, 2010 WL 1253552, at *3 (S.D. Ohio March 31, 2010) (quoting *Gandee v. Glaser*, 785 F.Supp. 684, 686 (S.D. Ohio 1992)).

“A factual finding is clearly erroneous where, although there is evidence to support that finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. Russell*, 595 F.3d 633, 646 (6th Cir. 2010) (quoting *United States v. Ware*, 282 F.3d 902, 907 (6th Cir. 2002)) (internal quotation omitted). “A district court’s review under the ‘contrary to law’ standard is plenary, and the court may set aside any legal conclusions that ‘contradict or ignore applicable precepts of law, as found in the Constitution, statutes, or case precedent.’” *Ridenour v. Collins*, 692 F. Supp.2d 827, 829 (S.D. Ohio 2010) (quoting *Gandee v. Glaser*, 785 F.Supp. 684, 686 (S.D. Ohio 1992)).

III.

As set forth above, Plaintiffs advance two objections. First, Plaintiffs assert that the Magistrate Judge misapplied the law to rule that the post-transfer filing of Defendant’s permissive, Texas-based counterclaims frustrates the purpose of the original transfer. Second, Plaintiffs assert that the Magistrate Judge committed clear error in failing to find that Judge Hudspeth committed clear error. The Court addresses Plaintiffs’ objections in turn.

The Court finds that the Magistrate Judge did not commit clear error in finding that Defendant’s post-transfer filing of counterclaims did not frustrate the purpose of the transfer.

The Magistrate Judge examined the law-of-the-case doctrine and those circumstances when a court will disregard the law of the case, including the frustration of purpose exception. She then analyzed Plaintiffs' contention that Defendant's post-transfer filing of the counterclaims frustrated the purpose of the transfer as follows:

The Court also rejects Plaintiffs' assertion that "the purpose of the original transfer to this Court has been frustrated by the post-transfer filing of Defendant's Texas-based Counterclaims." (Pls.' Am. Mem. in Support of Mot. to Re-Transfer 5.) Although, as discussed above, re-transfer could be proper because of changed circumstances, the changed circumstances must be "unforeseen," or "most impelling and unusual." *Koehring*, 382 U.S. at 365; *In re Cragar Industries*, 706 F.2d at 505; *Skill Corp*, 541 F.2d at 558. This Court, like the majority of courts, finds that the mere filing of a counterclaim does not constitute an extraordinary, unforeseen, or "most impelling and unusual circumstance." *See e.g., Murray v. Scott*, 176 F.Supp.2d 1249, 1254–55 (M.D. Ala. 2001) (finding that the purpose of the original transfer was not frustrated by a counterclaim, noting that "[a] counterclaim is not unanticipatable in the least"). Further, in the instant case, the evidence suggests that Plaintiffs *did* anticipate Defendant's counterclaim. For example, Defendant filed the Affidavit of Lisa Stein, its Chief Executive Officer, in support of its motion for transfer. Ms. Stein stated that "[s]everal of SpinLife's high-level employees, all located in Ohio, may have knowledge relevant to the claims in this lawsuit, SpinLife's defenses thereto, *and SpinLife's anticipated counterclaims against Plaintiffs*." (Def.'s Reply in Support of Transfer at Ex. 1, Stein Aff. ¶ 3, Doc. 25-23 at 24 (emphasis added)). Finally, Judge Hudspeth emphasized that "[t]he convenience of the non-party witnesses is accorded the greatest weight." (Dec. 19, 2009 Transfer Order at 12.) Defendant's assertion of a counterclaim does not change the weight accorded to this factor—the location of Mr. Trautman, the only non-party witness. For these reasons, the Court finds that Defendant's assertion of counterclaims does not frustrate the purpose of transfer.

(*Id.* at 9–10).

Plaintiffs, in their Objections, maintain that the Magistrate Judge erred in failing to consider "the important distinction between compulsory . . . and permissive counterclaims, which . . . are unanticipatable at the time of the original transfer." (Pls.' Objections 10–11, ECF No. 76.) The Court finds Plaintiffs' fixation on the classification of the Defendant's counterclaims unwarranted given that (1) Plaintiffs have failed to supply any authority for the

proposition that the nature of the counterclaim determines whether the filing of a counterclaim is “unanticipatable” for purposes of a retransfer inquiry; and (2) the Magistrate Judge found that the counterclaims were not unanticipatable in this action because Defendant filed the Stein Affidavit in support of its motion for transfer, in which Ms. Stein represented that Defendant anticipated filing counterclaims against Plaintiffs. Accordingly, the Court adopts the Magistrate Judge’s analysis and **OVERRULES** Plaintiffs’ first objection.

The Court likewise concludes that the Magistrate Judge did not commit clear error or subject Plaintiffs to a manifest injustice in finding that Judge Hudspeth’s decision was not clearly erroneous and did not result in a manifest injustice. Plaintiffs’ arguments concerning this Objection are virtually identical to those set forth in its Motion to Retransfer. Having reviewed these arguments and the Magistrate Judge’s Opinion and Order, the Court adopts the Magistrate Judge’s analysis and **OVERRULES** Plaintiff’s second objection.

IV.

In sum, the Court finds that the Magistrate Judge’s denial of Plaintiffs’ Motion was neither clearly erroneous, nor contrary to law. Accordingly, the Court **OVERRULES** Plaintiffs’

Objections (ECF No. 76) and **AFFIRMS** the Magistrate Judge's Opinion and Order (ECF No. 71). This case therefore remains proper venued before this Court.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT COURT

DATED: March 21, 2011