

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

RICKY B. PERRITT, Individually; §
The Cupcakery, LLC, a Texas Limited §
Liability Company; Buster Baking, LLC, §
a Texas Limited Liability Company; and the §
Woodlands Baking, LLC, a Texas Limited §
Liability Company, §
§
Plaintiffs, §
§
v. §
§
PAMELA F. JENKINS, Individually; and §
The Cupcakery, LLC, a Nevada Limited §
Liability Company, §
§
Defendants. §

CAUSE NO. 4:11-CV-23

DEFENDANTS PAMELA F. JENKINS AND THE CUPCAKERY, LLC, A NEVADA LIMITED LIABILITY COMPANY’S MOTION TO TRANSFER VENUE TO THE DISTRICT OF NEVADA, LAS VEGAS DIVISION

Defendants Pamela F. Jenkins (“Jenkins”) and The Cupcakery, LLC, a Nevada Limited Liability Company (“Nevada Cupcakery”) (collectively, the “Defendants”) file this motion to transfer venue to the District of Nevada, Las Vegas Division pursuant to 28 U.S.C. § 1404(a) (the “Motion”) against Plaintiffs Ricky B. Perritt (“Perritt”), The Cupcakery, LLC, a Texas Limited Liability Company (the “Texas Cupcakery”), Buster Baking, LLC, a Texas Limited Liability Company (“BLLC”), and the Woodlands Baking, LLC, a Texas Limited Liability Company’s (“WBLLC”) (collectively, Perritt, Texas Cupcakery, BLLC and WBLLC are the “Plaintiffs”) based on the following:

I. Background and Summary of Relevant Venue Facts

At the center of this suit is a contract – a contract that Jenkins negotiated in Las Vegas, Nevada, executed in Las Vegas, Nevada, and which, to date, Defendants perform in Las Vegas, Nevada. Through their Original Complaint, Plaintiffs complain of “threats to harm the name, mark, website and intellectual property of The CupcakeryTM.” *See* Compl. ¶ 9.01.¹ To the extent that Plaintiffs’ claims even remain viable given the Agreed Order (Dkt. No. 23) entered in this case, the website hosting company responsible for maintaining the website at www.thecupcakery.com, is located in Las Vegas, Nevada. The law firm handling The Cupcakery’sTM trademark registration is located in Las Vegas, Nevada. The Defendants’ public relations firm is located in Las Vegas, Nevada. To the extent Plaintiffs complain of conduct or “threats” harming the mark or the website, the majority, if not all, of the witnesses with relevant knowledge and documents would be located in Las Vegas, Nevada.

Plaintiffs also complain of Jenkins’ alleged failure to pay “her share of legal and other expenses to protect [the] tradenames and trademarks.” *See* Compl. ¶ 4.19. Relevant documents, either in the possession of Defendants or the law firm handling the trademark registration, are located in Las Vegas, Nevada.

Las Vegas is a more convenient forum for litigation against the Defendants because Defendants own and operate three (3) stores in Las Vegas, Nevada. By contrast, only one (1)

¹ Through their Original Complaint, Plaintiffs applied for a temporary restraining order and preliminary injunction. *See* Compl. ¶¶ 5.01-5.02. Plaintiffs and Defendants have entered into an Agreed Order (Dkt. No. 23) disposing of Plaintiffs’ Motion for Temporary Restraining Order (Dkt. No. 3). Through their Original Complaint, Plaintiffs also request a declaratory judgment and bring claims for breach of the duty of loyalty, breach of fiduciary duty, and breach of contract. *See* Compl. ¶¶ 6.01-9.03. Defendants have moved to dismiss Plaintiffs’ claims for breach of fiduciary duty and breach of the duty of loyalty as a matter of law (Dkt. No. 21).

store, the Texas Cupcakery, is located in the Eastern District of Texas. According to Plaintiffs' Original Complaint, BLLC has its principal place of business in Dallas County, Texas, and WLLC has its principal place of business in Montgomery County, Texas. *See* Compl. ¶¶ 2.02, 2.03.

The relevant factors to be considered under § 1404(a) weigh heavily in favor of transfer. Defendants' principal place of business, their three (3) stores, their twenty-five (25) employees, and their documents relevant to Plaintiffs' claims are all located in Las Vegas, Nevada. The Nevada Cupcakery is a small business, and Jenkins, a small business owner, is a single mother raising a young child in Las Vegas, Nevada.

Accordingly, for the convenience of the witnesses and the parties and in the interest of justice, Defendants move for a transfer of venue to the Las Vegas Division of the District of Nevada, pursuant to 28 U.S.C. § 1404(a).

II. Venue Should be Transferred Pursuant to 28 U.S.C. § 1404(a)

This case should be transferred for the convenience of the witnesses and the parties and in the interest of justice pursuant to 28 U.S.C. § 1404(a), which 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.²

The Fifth Circuit requires a district court to weigh in the balance a number of case-specific private and public factors when considering a motion to transfer venue under 28 U.S.C.

² The present action against Defendants could have been brought in the District of Nevada under the general venue provisions of 28 U.S.C. § 1391(a). Defendants reside in Las Vegas, Nevada and District of Nevada for venue purposes.

§ 1404(a). The private factors to be considered are: “(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.” *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (hereinafter *Volkswagen I*). The public factors are: “(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law.” *Id.*

A. Plaintiffs’ Choice of Forum is Not an Independent Factor to be Considered in the Transfer Analysis

The Fifth Circuit recently clarified that the plaintiff’s choice of forum is not an independent factor to be considered in the transfer analysis, rather the “good cause” burden of a party moving to transfer venue reflects the deference afforded to the plaintiff’s choice of forum. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314 n.10 (5th Cir. 2008) (hereinafter *Volkswagen II*).

The deference afforded a plaintiff’s choice of forum is similarly reduced when a plaintiff does not reside in the chosen forum. *Goldstein v. Radioshack Corp.*, 2007 WL 1342533, *2 (E.D. Tex. May 1, 2007) (Schneider, J.) (“The significance of the plaintiff’s choice of forum is reduced if the forum is not the plaintiff’s place of residence.”) (citing *Hanby v. Shell Oil Co.*, 144 F. Supp. 2d 673, 677 (E.D. Tex. 2001)). According to Plaintiffs’ Original Complaint, BLLC has its principal place of business in Dallas County, Texas, and WLLC has its principal place of business in Montgomery County, Texas. *See* Compl. ¶¶ 2.02, 2.03. Thus, the good cause

burden Defendants must demonstrate in order to prevail on the motion to transfer should be relaxed in accordance with the lessened deference due the Plaintiffs' choice of forum.

B. Analysis of Relevant Transfer Factors Demonstrates that Las Vegas is a More Convenient Forum

As demonstrated below, the eight factors that must be considered and weighed to determine a transfer motion are either neutral or weigh heavily in favor of transfer of this case, to the Las Vegas Division of the District of Nevada.

1. Relative Ease of Access to Source of Proof

The relative ease of access to sources of proof weighs in favor of transfer. Because the Nevada Cupckaery maintains its principal place of business in Las Vegas, Nevada, all of the documentary evidence pertaining to Jenkins alleged failure to “pay her share of legal and other expenses to protect [the] tradenames and trademarks” is located in the District of Nevada. *See* Compl. ¶ 4.19; Jenkins Aff. ¶ 6. This evidence would include Defendants' accounting records reflecting the payment of legal expenses. Additionally, the law firm handling The Cupcakery'sTM legal pursuits to protect its trademark is located in Las Vegas, Nevada. *See* Jenkins Aff. ¶ 7.

Moreover, due to the nature of the Plaintiffs' claims, it is unlikely that the Plaintiffs will be required to produce significant documentary evidence in support of their claims, and whatever they have will likely be at their residences or places of business, half of which are outside of the Eastern District of Texas. Because virtually all of the documents relevant to Plaintiffs' claims and Defendants' defenses are located in Las Vegas, Nevada, this factor weighs heavily in favor of transfer to the District of Nevada, Las Vegas Division.

2. Cost of Attending for Willing Witnesses

Las Vegas, Nevada is also a more convenient forum for the witnesses than is Sherman, Texas because all of Defendants' party witnesses are in Nevada, and most, if not all, anticipated non-party witnesses are in Nevada. *See* Jenkins Aff. ¶¶ 3, 7-9. Plaintiffs have already indicated they plan to take the deposition of Laura Herlovich with PR Plus. *See* Slater Aff. Ex. C. Ms. Herlovich resides in the Las Vegas, Nevada area. *See* Jenkins Aff. ¶ 8. For any witnesses in Las Vegas, traveling to the Eastern District of Texas will require air travel and hotel lodging. The cost of attending trial in Sherman, Texas for willing witnesses weighs heavily in favor of transfer.

Because Las Vegas, Nevada is more convenient than Sherman, Texas for all of Defendants' party witnesses and non-party witnesses, this factor weighs heavily in favor of transfer to the District of Nevada, Las Vegas Division.

3. Availability of Compulsory Process to Secure the Attendance of Witnesses

The availability of compulsory process also favors transfer of this case to the District of Nevada. *See Volkswagen II*, 545 F.3d at 316. While the parties have yet to exchange Rule 26(a) disclosures, the Original Complaint centers around claims regarding "threats" and conduct harming the website and tradename. Given those allegations and Defendants' defenses, non-party witnesses will likely include persons working with the website host company for www.thecupcakery.com, the law firm handling The Cupcakery's trademark enforcement and trademark application process, as well as persons associated with Defendants' public relations

company, all of whom are within the Las Vegas court's subpoena range. *See Jenkins Aff.* ¶¶ 3, 7-9.

4. All Other Practical Problems that make trial of a Case Easy, Expeditious, and Inexpensive

Because nearly all of the documentary evidence and necessary witnesses are located in the District of Nevada, trial in that forum would be considerably more convenient than transporting the sources of proof and witnesses over 1,000 miles spanning three (3) states to Sherman, Texas. There is simply no aspect of trying the claims against Defendants that would be more convenient in Sherman, Texas than in Las Vegas, Nevada.

5. Administrative Difficulties Flowing from Court Congestion

The administrative difficulties flowing from court congestion weigh slightly in favor of transfer. According to the Federal Court Management Statistics for the 12-month period ending March 31, 2010, the District of Nevada had more pending civil cases than the Eastern District of Texas in 2010, but only by a small margin (3,150 pending in the District of Nevada versus 2,809 in the Eastern District of Texas). *See Slater Aff. Ex. A.* However, the Eastern District saw 57 cases go to trial during the 12 month period ending March 31, 2010, as opposed to the District of Nevada, which only saw 18 cases go to trial during the 12 month period ending March 31, 2010. *See Slater Aff. Ex. B.* Because the Eastern District of Texas has vastly more cases go to trial, District of Nevada, while it has more pending cases, may be less congested. *Id.* This factor weighs in favor of transfer.

6. Local Interest in having Localized Interests Decided at Home

The local interest in having localized disputes decided at home weighs heavily in favor of transfer to the District of Nevada. The contract at the heart of this dispute was negotiated by Jenkins in Las Vegas, Nevada. *See* Jenkins Aff. ¶ 4. Jenkins executed the contract at issue in Las Vegas, Nevada, and to date, Defendants perform the contract in Las Vegas, Nevada. *Id.* at ¶¶ 4-5.

In addition, Plaintiffs have breached confidentiality with regard to Jenkins's and Perritt's settlement agreement and other confidential agreements, causing Jenkins injury in Las Vegas, Nevada. The Las Vegas Sun has run three (3) articles on this suit in Las Vegas, Nevada, some detailing the confidential terms of these agreements. *See id.* at ¶ 10. As a result, Jenkins has been harmed in Las Vegas, Nevada, where she operates her business. This issue is local to Las Vegas, Nevada.

In addition, two (2) of the plaintiffs reside outside of the Eastern District, so they cannot claim a local interest in the Eastern District of Texas for this case. Thus, the District of Nevada has a much stronger interest in deciding Plaintiffs' claims against Defendants than the Eastern District of Texas.

7. Avoidance of unnecessary problems of conflict of laws of the application of foreign law.

These two factors are neutral regarding transfer because Texas or Nevada law will govern the disposition of Plaintiffs' claims, and the Eastern District and District of Nevada are equally well suited to apply these states' laws.

III. Conclusion

For the foregoing reasons, the case against Defendants should be transferred to the District of Nevada pursuant to 28 U.S.C. § 1404(a) for the convenience of the witnesses and the parties and in the interest of justice because the balance of factors in this case weighs heavily in favor of a transfer to the District of Nevada, where Defendants, the sources of proof, and the vast majority of witnesses are located.

Respectfully submitted,

/s/ Jodie A. Slater

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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/s/ Jodie A. Slater

Jodie A. Slater

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Michael J. Whitten, counsel for Plaintiffs, by telephone regarding this Motion pursuant to Local Rule CV-7(h). The conference did not result in agreement. Discussion between counsel on this issue has reached an impasse, and the issue is ripe for the court to decide.

/s/ Jodie A. Slater

Jodie A. Slater