IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

The Hispanic Leadership Fund, Inc.,	Civil Case No. 4:12-cv-00339-JAJ-TJS
Plaintiff,	
v.	**RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE**
Federal Election Commission,	
Defendant.	

The U.S. District Court for the Southern District of Iowa should deny Defendant Federal Election Commission's Motion to Transfer Venue under 28 U.S.C. §§ 1404(a) and 1406(a) because venue is proper in the Southern District of Iowa under 28 U.S.C. § 1391(e), and Defendant has failed to show that a transfer of venue is clearly more convenient for the parties and in the interest of justice.

28 U.S.C. §1404(a) provides, "For the convenience of 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 or to any district or division to which all parties have consented." 28 U.S.C. § 1406(a) provides, "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

As the moving party, Defendant bears the burden of establishing that transfer of venue is proper. *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F. 3d 688, 695 (8th Cir. 1997); *Milliken & Co. v. FTC*, 565 F. Supp. 511, 517 (D. S.C. 1983). Further, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp.*

v. Gilbert, 330 U.S. 501, 508 (1947); *see also Terra Int'l*, 119 F. 3d at 695 ("In general, federal courts give considerable deference to a plaintiff's choice of forum . . . ."); *Golconda Mining Corp. v. Herlands*, 365 F. 2d 856, 857 (2nd Cir. 1966) ("plaintiff's choice of forum is a factor to be accorded substantial weight"); *Milliken*, 565 F. Supp. at 515; *Sissel v. Klimley*, No. 08-62, 2009 U.S. Dist. LEXIS 28426, at *5-7 (S.D. Iowa Mar. 16, 2009).

Venue is proper in the Southern District of Iowa. The very purpose of 28 U.S.C. § 1391(e) "was indeed to broaden the number of places where federal officials and agencies could be sued." *Reuben H. Donnelley Corp. v. FTC*, 580 F. 2d 264, 267 (7th Cir. 1978); *see Stafford v. Briggs*, 444 U.S. 527, 544 (1980) ("Without doubt, under § 1391(e), venue lies in every one of the 95 federal districts, and suits may be pending in a dozen or several dozen at any one time."). Under 28 U.S.C. § 1391(e)(1), because Defendant is an agency of the United States, this action is proper in a judicial district where "a substantial part of the events or omissions giving rise to the claim occurred." Venue is not proper only where most of the events giving rise to the claim occurred in the best forum, but venue lies in any district where a substantial part of the events giving rise to the claim occurred. *Setco Enter., Corp. v. Robbins*, 19 F. 3d 1278, 1281 (8th Cir. 1994) ("we ask whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts"); *Catipovic v. Turley*, No. 11-3074, 2012 U.S. Dist. LEXIS 79824, at *41-44 (N.D. Iowa June 8, 2012); *Wells' Dairy, Inc. v. Estate of Richardson*, 89 F. Supp. 2d 1042, 1052-54 (N.D. Iowa 2000). Venue focuses on the actions of the defendant to prevent the defendant being sued in a court that has no connection to the claim. *Woodke v. Dahm,* 70 F. 3d 983, 985-86 (8th Cir. 1995) (holding that mere residence of the plaintiff in a judicial district was insufficient to establish venue based on a "substantial part of the events or omissions

giving rise to the claim").[1] A "substantial part" of the events can be as minimal as receiving a letter in a certain district where receipt of a letter is part of the claim, or holding a meeting to agree to a business relationship in a certain district even though all other events giving rise to the claim occurred outside the district. *Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 867-68 (2nd Cir. 1992); *Andrean v. Sec'y of the U.S. Army*, 840 F. Supp 1414, 1422-23 (D. Kan. 1993) (describing what constitutes a "substantial part"); *Catipovic*, 2012 U.S. Dist. LEXIS, at *41-57.

The injury to Plaintiff's constitutional rights is occurring in the state of Iowa, in particular the Southern District of Iowa, where Plaintiff wishes to distribute its proposed advertisements. See Affidavit of Mario Lopez, attached as Exhibit 9. If Plaintiff entered into a contract with television stations in Iowa to distribute its advertisements and breached that contract, venue would certainly lie in the Southern District of Iowa for an action based on that contract. Instead, Plaintiff cannot enter into a contract to distribute its advertisements in Iowa because, due to Defendant FEC's failure to reach a decision on similar advertisements, it does not know what its legal obligations under the Federal Election Campaign Act would be. This is not a situation where Plaintiff has arbitrarily chosen the Southern District of Iowa or the only connection to Iowa will be a later statutory enforcement action. *C.f. Rogers v. Civil Air Patrol*, 129 F. Supp. 2d 1334, 1338-39 (M.D. Ala. 2001) (holding venue did not lie under 28 U.S.C. § 1391(e)(1)(B) where the only connection of a federal defendant to the district was the defendant's performance of the requirements of the challenged statute sometime in the future). Plaintiff's claims are inextricably geographically linked to Iowa as Plaintiff cannot reach the citizens of Iowa with its messages about important public policy issues without airing its advertisements in Iowa. In this case, Plaintiff's damages—the infringement of its constitutional rights—are identical to the basis of its claim. As the injury to Plaintiff's constitutional rights is occurring in Iowa, a substantial part of

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[1] As Defendant FEC notes in its motion, this decision is based on identical language to 28 U.S.C. § 1391(e)(1)(B) in 28 U.S.C. § 1391(b)(2).

the events giving rise to Plaintiff's claim occurred in Iowa. Therefore, venue is proper in this court.

Where venue is proper in the original forum, transfer "must . . . be justified by particular circumstances that render the transferor forum inappropriate by reference to the considerations specified in that statute." *Starnes v. McGuire*, 512 F. 2d 918, 925 (D.C. Cir. 1974). There are three statutory categories of factors that determine whether transfer is proper: the convenience of the parties, the convenience of the witnesses, and the interests of justice. 28 U.S.C. § 1404(a); *Terra Int'l*, 119 F. 3d at 691. It is proper for a court deciding a motion for transfer to consider additional factors to make an "individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 62 (1964)).

In the categories of convenience of the parties and witnesses, the Eighth Circuit has considered factors such as the convenience of the parties, the convenience of the witnesses, the willingness of witnesses to appear, the ability to subpoena witnesses, the adequacy of deposition testimony, the accessibility to records and documents, the location where the conduct complained of occurred, and the applicability of each forum state's substantive law. *Terra Int'l*, 119 F. 3d at 696; *see also Gulf Oil*, 330 U.S. at 508. In the interest of justice category, the Eighth Circuit has considered factors such as judicial economy, the plaintiff's choice of forum, the defendant's preference of forum, the costs to the parties of litigating in each forum, ability to enforce a judgment, congestion of the two courts, conflict of law issues, and the advantages of having a local court determine questions of local law. *See Terra Int'l*, 119 F. 3d at 696; *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 922 F. Supp. 1334, 1364 (N.D. Iowa 1996) (citing *Jumara v. State Farm Ins. Co.*, 55 F. 3d 873, 878-80 (3rd Cir. 1995)).

A number of factors are equal in this case. The issues in this case are matters of federal law: Plaintiff's First Amendment rights and the Federal Election Campaign Act. No non-party witnesses are anticipated. An injunction and declaratory judgment issued by a federal court would be enforceable in any federal court. All records and documents at issue are matters of public record, are available electronically, or have been submitted to the court by Plaintiff as exhibits. Thus, the choice of law, witness, enforceability, and accessibility of documents considerations are irrelevant.

The convenience of the parties and comparative costs are the only factors that weigh in favor of transfer, and the difference in convenience and costs is not substantial enough to meet Defendant's high burden of proof to overcome the preference given to Plaintiff's choice of forum. *See Terra Int'l*, 119 F. 3d at 695. The fact that another forum is more convenient for the moving party is, by itself, an insufficient reason to require transfer. *See SEC v. Savoy Indus., Inc.*, 587 F. 2d 1149, 1156 (D.C. Cir. 1978). The District Courts of the District of Columbia and Eastern District of Virginia are closer to both Plaintiff's and Defendant's place of business, and transfer to either would save counsel the costs of traveling to Iowa. The Plaintiff chose the Southern District of Iowa, however, because that is where the harm to its rights is occurring.

Defendant FEC is currently defending cases in Wyoming, Kentucky, North Carolina, Ohio, and the Seventh Circuit. *Free Speech v. FEC*, No. 12-127 (D. Wyo. filed June 14, 2012); *Conway for Senate v. FEC*, No. 12-244 (W. D. Ky. filed May 10, 2012); *Koerber v. FEC*, No. 08-39 (E.D. N.C. filed Oct. 3, 2008); *Miller v. FEC*, No. 12-242 (S.D. Ohio filed Mar. 26, 2012); *Beam v. Hunter, FEC Chairman*, No. 11-3386 (7th Cir. filed Oct. 21, 2011). Defendant FEC has not filed a motion to transfer venue in any of those cases. *Id.* In addition, Defendant FEC actively defended three cases in the Eighth Circuit in recent years without filing a motion to transfer in any of them. *Minn. Citizens Concerned for Life v. FEC*, 113 F. 3d 129 (8th Cir. 1997) (originating in

D. Minn.); *Liffrig v. FEC*, No. 05-123 (D. N.D. Apr. 16, 2007); *Miles for Senate v. FEC*, No. 01-83 (D. Minn. Jan. 10, 2002).

With modern electronic filing, the only additional cost to the litigants of venue in Iowa is the cost of traveling to Iowa for hearings, particularly since the anticipated number of hearings in this matter is minimal. Such costs are insubstantial in comparison to the overall total cost of litigation. Therefore, while it would be more convenient to Defendant to litigate this case in the District of Columbia or Virginia, the difference in convenience is not sufficiently substantial to outweigh Plaintiff's choice of forum.

The location of the conduct weighs in favor of denying transfer. Defendant FEC's failure to reach a decision on the American Future Fund advisory opinion request occurred in the District of Columbia, and any enforcement action under the Federal Election Campaign Act would originate in the District of Columbia. However, the injury to Plaintiff's constitutional rights is occurring in Iowa and the FEC (as shown in the previous paragraph) routinely litigates cases in federal courts across the country. Plaintiff desires to air its proposed advertisements in Iowa but is prevented from doing so by the uncertain application of the Federal Election Campaign Act's disclosure requirements. The location of the conduct suggests that Iowa is the proper forum to hear Plaintiff's case.

Judicial economy also weighs in favor of denying transfer. "Relative docket congestion and potential speed of resolution is an appropriate factor to be considered." *Starnes*, 512 F. 2d at 932; *see also Gulf Oil*, 330 U.S. at 508. The most recent case brought against the Federal Election Commission seeking a preliminary injunction in the United States District Court for the District of Columbia was filed on June 22, 2012, and a hearing on the preliminary injunction is scheduled for September 6, 2012. *McCutcheon v. FEC*, No. 12-1034 (D. D.C. filed June 22, 2012). The most recent case brought against the Federal Election Commission seeking a preliminary injunction in

the United States District Court for the Eastern District of Virginia was filed on July 30, 2008. A preliminary injunction hearing was held on September 10, 2008. *Real Truth About Obama, Inc. v. FEC*, No. 08-483 (E.D. Va. Filed July 30, 2008). Based on the most recent treatment of motions for preliminary injunctions against the Federal Election Commission, Plaintiff fears that the ninety-day electioneering communications period at issue here will be essentially over by the time either of the FEC's proposed federal districts is able to schedule a hearing to address the motion for preliminary injunction. Plaintiff has elected to air advertisements in this district, and its rights are being harmed here.

Plaintiff has requested expedited review of its motion for a preliminary injunction to minimize the infringement on its constitutional rights. This court has already scheduled a hearing and is moving expeditiously to consider Plaintiff's case. Transfer to another forum would necessarily delay the hearing and delay the adjudication of Plaintiff's important constitutional rights. These constitutional rights will start being violated as early as August 4 or 7, 2012, which is the date the electioneering communications period for President Obama begins. Considerations of judicial economy suggest strongly that the motion to transfer should be denied.

Most significantly, Plaintiff chose Iowa as the forum for its case. Plaintiff's choice of forum should not be disturbed, unless the balance of other factors in favor of Defendant's choice of forum weigh strongly in favor of transfer. *Gulf Oil*, 330 U.S. at 508; *Terra Int'l*, 119 F. 3d at 695; *Golconda*, 365 F. 2d at 857; *Milliken*, 565 F. Supp. at 515. Defendant has failed to prove that the other factors weigh strongly in favor of transfer. At best, the factors are equal, and a "tie is awarded to the plaintiff." *In re National Presto Industries*, 347 F. 3d 662, 665 (7th Cir. 2003); *see also Van Dusen*, 376 U.S. at 645-46 ("Section 1404 (a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient."); *Setco Enter.*, 19 F. 3d at 1281. As movant, Defendant has a high burden of proving that the transferee district is

sufficiently more convenient or more just to overcome Plaintiff's choice of forum. Defendant has failed to meet its burden.

For the foregoing reasons, the Court should deny Defendants' Motion to Transfer Venue to the U.S. District Court for the District of Columbia or the Eastern District of Virginia. Defendant has not met its high burden of proof and Plaintiff respectfully requests this court defer to its choice of venue.

Dated: August 6, 2012 By: /S/Matt Dummermuth

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2012, copies of the foregoing Response and Opposition to Defendant's Motion to Transfer Venue by electronic service and U.S. first class mail on the following parties:

VIA ELECTRONIC SERVICE
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And

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