

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

CIVIL ACTION NO. 08-CV-00138-REB-CBS

SONY BMG MUSIC ENTERTAINMENT ET AL

V.

CATHERINE M. FILLO

**MEMORANDUM OF LAW OF DEFENDANT CATHERINE FILLO IN
SUPPORT OF HER MOTION TO TRANSFER VENUE FROM THE DISTRICT
OF COLORADO TO THE DISTRICT OF NEW HAMPSHIRE**

PRELIMINARY STATEMENT

Defendant, Catherine Fillo, by her attorney, Melanie Bell, respectfully submits this memorandum of law in support of her motion to transfer venue, pursuant to 28 U.S.C. §1404(a) as the Plaintiff has no legitimate purpose for pursuing this action in the District of Colorado as it should have been brought in the District of New Hampshire where Defendant and many non-party witnesses are located, the alleged infringement giving rise to this cause of action occurred in New Hampshire and none of the Plaintiffs are located in Colorado.

ARGUMENT

A. THE INSTANT CASE SHOULD HAVE BEEN BROUGHT IN THE DISTRICT COURT OF NEW HAMPSHIRE INITIALLY AND THEREFORE SHOULD BE TRANSFERRED TO THE DISTRICT OF NEW HAMPSHIRE FOR THE CONVENIENCE OF THE PARTIES AND WITNESSES, AS WELL AS IN THE INTERESTS OF JUSTICE.

28 U.S.C. §1404(a) provides in pertinent part: “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.” Jurisdiction and venue are proper in New Hampshire as the suit should have been brought in the District of New Hampshire under 17 U.S.C. §101 *et seq.*; 28 U.S.C. §1331 (federal question); and 28 U.S.C. §1338(a) (copyright). Similarly defendants objects to personal jurisdiction in the District of Colorado as she is a full-time student at the University of New Hampshire and Defendant lacks the requisite minimal contacts with Colorado for purposes of 28 U.S.C. §1391(b) and (c) and 28 U.S.C. §1400.

Either party may move for a transfer under 28 U.S.C. §1404(a). *I-T-E-Circuit Breaker Co. v. Regan*, 348 F. 2d 403 (8th Cir. 1965).

The purpose of the statute is to permit change of venue for convenience of parties (plaintiff or defendant), and witnesses in order to prevent the waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense. 28 U.S.C.A. § 1404(a); *Amini Innovation Corp. v. Bank & Estate Liquidators, Inc.*, 512 F. Supp. 2d 1039 (S.D. Tex. 2007); *Spiegelberg v. Collegiate Licensing Co.*, 402 F.Supp.2d 786, 789 (S.D.Tex.2005); *DataTreasury Corp. v. First Data Corp.*, 243 F.Supp.2d 591, 593 (N.D.Tex.2003).

It is in the interest of justice to transfer this case as the Defendant has already been harmed by Plaintiffs' choice of venue. This litigation began after records were subpoenaed from the University of New Hampshire where Defendant was and continues to be a fulltime student. Plaintiffs determined to sue her in Colorado instead of New Hampshire and delivered service of the complaint to her parents' home in Colorado. Despite being made aware of the fact that she did not live in Colorado, Plaintiffs continued their aggressive pursuit of Defendant and obtained a default judgment against her all while she innocently went about her studies and without her knowledge. Defendant missed another court date due to the fact that she was in school in New Hampshire and several deadlines have passed as she unsuccessfully attempted to obtain Colorado counsel. It would appear that the only interest being served by the Colorado choice of forum is that of plaintiffs' attorneys.

B. DEFENDANT MAKES A PRIMA FACIE CASE THAT TRANSFER IS WARRANTED AND THEREFORE HER REQUEST SHOULD BE GRANTED

“The moving party has the burden of proof and must make a convincing showing of the right to transfer.” *American Standard, Inc. v. Bendix Corp.*, 487 F. Supp. 254, 261. If a defendant produces evidence showing that a great majority of the material witnesses, the parties to the action, and the place where the action arose from are all in another distant district, he or she makes out a prima facie case that a transfer is warranted and the burden is then shifted to the plaintiff to show that at least one of the requirements of 28 USC 1404 has not been satisfied. *White v. Employers' Liability Assur. Corp.*, 86 F. Supp. 910 (D.C. S.C. 1949). The Defendant was and remains a full-time undergraduate student at the University of New Hampshire, all of the nonparty witnesses sought to be examined

by Plaintiffs are also students of the University of New Hampshire with no ties to Colorado, and the infringement allegedly occurred at the University of New Hampshire. In fact, prior to bringing this suit, Plaintiffs invoked the jurisdiction of the District of New Hampshire in order to enforce the subpoena to secure the underlying computer information on which they rely to make their case.

In this case, the Defendant resides in New Hampshire, many potential nonparty witnesses are also students in New Hampshire with no connection to Colorado, the alleged infringement occurred in New Hampshire, and plaintiffs' counsel has already availed itself of the New Hampshire judicial system to enforce the subpoena which lead to the filing of this suit. In addition, Defendant may call witnesses on behalf of the University of New Hampshire who similarly have no connection to Colorado.

C. THE COURT SHOULD GIVE PLAINTIFF'S CHOICE OF FORUM LITTLE TO NO CONSIDERATION BECAUSE PLAINTIFF HAS NO CONNECTION TO THE DISTRICT OF COLORADO, AND PLAINTIFF HAS ALREADY DEMONSTRATED WILLINGNESS TO UTILIZE NEW HAMPSHIRE COURT SYSTEM AND RESOURCES

When adjudicating a transfer of venue motion, the court closely scrutinizes plaintiff's choice of forum when the plaintiff does not live in the judicial district in which it has filed suit, and most of the operative facts occurred outside of the district, then plaintiff's choice of forum receives less deference. 28 U.S.C.A. §1404(a); *McCaskey v. Cont'l Airlines, Inc.*, 133 F. Supp.2d 514, 529 (S.D.Tex.2001). The Plaintiffs in this case are legal entities registered in either in California, New York or Delaware. The Plaintiffs' expert witness is a professor at the University of Iowa. In fact, Plaintiffs have not mentioned a single defendant they intend to call who has a connection to Colorado other than the defendant's father and her brother, who is now a student at the University

of Alabama. And since the alleged infringement allegedly occurred at the University of New Hampshire, it is evident that the only reason Plaintiffs seek their depositions is harassment.

In *McCaskey* the court granted a motion to transfer venue in a patent infringement suit where nonresident plaintiff sued defendant in a district where limited sales activity took place. In the present case, the Plaintiffs have sued Defendant in a district where none of the alleged infringement occurred. The court in *McCaskey* stated that the plaintiff's choice of forum in that case was entitled to "diminished importance due to this district's lack of ties to the dispute and to the parties." Similarly, the District of Colorado has no ties to the allegations giving rise to this dispute.

**D. THE COURT SHOULD GRANT DEFENDANT'S MOTION TO
TRANSFER VENUE TO THE DISTRICT OF NEW HAMPSHIRE
BECAUSE ALL RELEVANT CONSIDERATIONS WEIGH IN FAVOR OF
DEFENDANT**

Factors that this Court should take into consideration include: the convenience of the parties and witnesses; the cost of obtaining attendance of witnesses and other trial expenses; the availability of compulsory process; the relative ease of access to sources of proof; the place of the alleged wrong; the plaintiff's choice of forum; the possibility of delay and prejudice; the local interest in having local interests decided at home; and the interests of justice in general. *Amini Innovation Corp. v. Bank & Estate Liquidators, Inc.*, 512 F. Supp. 2d 1039 (S.D. Tex. 2007).

In *Checuti v. Conrail*, venue was transferred in spite of the fact that it would impose added costs to plaintiff injured worker due to the location of some of his treating physicians. 291 F. Supp. 2d 664 (N.D. Ohio 2003). In *Checuti*, the court also took into

consideration the fact that the plaintiff resided in Michigan, the second district, the defendant operated in Michigan and had no offices or employees in Ohio; the plaintiff's coworkers at the time of injury resided in Michigan, as did the yard master to whom injury was reported, the union representative, supervisor, other treating physicians, and the parent corporation's claims agent whose involvement employee had relied on to add parent as party defendant, and the alleged incident occurred in Michigan. Here, not only does Defendant reside in New Hampshire, at least eight witnesses in the present case are also University of New Hampshire students. More still, the actions arising from the allegations in the complaint filed against Fillo manifest in New Hampshire and Plaintiffs have availed themselves of New Hampshire for subpoena enforcement and have traveled to New Hampshire to conduct depositions. The Court in this instance should weigh all of these factors, when making its decision to transfer venue to New Hampshire.

In *Amini* the defendant's motion to transfer from Texas to New Jersey was similar to the present case as both cases involve an allegation of copyright infringement. The majority of witnesses, including key-nonparty witnesses, in *Amini*, resided in New Jersey, and the defendant's sales and other infringing acts largely occurred in the state of New Jersey. In considering these facts, the court in *Amini* granted the motion to transfer venue from Texas to New Jersey. Similarly, in the present case, the majority of witnesses and the Defendant attend school in New Hampshire. Defendant's father, the sole Colorado witness in this case, is willing to travel to New Hampshire to testify. Likewise, Defendant's brother, located in Alabama, is no more inconvenienced by travel to New Hampshire as he would be traveling to Colorado. More importantly, the operative facts

took place in New Hampshire and there is a strong likelihood Defendant will be calling witnesses from the University of New Hampshire.

One of the most important considerations in transferring a case is the convenience of the witnesses. In this regard, the inquiry is directed not at the number of witnesses, but rather at the nature and quality of the witnesses' testimony and the question of whether they can be compelled to testify. *Hotel Constructors, Inc. v. Seagrave Corp.*, 543 F. Supp. 1048, 1051 (N.D. Ill. 1982); *Schmidt v. Leader Dogs for the Blind, Inc.*, 544 F. Supp. 42, 48 (E.D. Pa. 1982); *Capitol Cabinet Corp. v. Interior Dynamics, Ltd.*, 541 F. Supp. 588, 591 (S.D.N.Y. 1982). The convenience of the witnesses must also be measured in terms of the interest of justice. *American Standard*, 487 F. Supp. at 264.

The court in *Sackett v. Denver and Rio Grande Western R. Co.* held that the case would be transferred from the Federal District Court of Colorado to the Federal District Court in Utah, since Utah was site of plaintiff's residence, of accident, of residence of five railroad employees who gave statements, and of hospital at which plaintiff was examined and treated after accident. 603 F. Supp. 260 (D. Colo. 1985). Similarly, the Defendant in the present case who is seeking transfer of venue to New Hampshire, the Defendant is New Hampshire student with no intention of returning to Colorado, her key witnesses are students in New Hampshire with no connections to Colorado, and New Hampshire is the site of the alleged injury underlying this claim.

The convenience of non-party witnesses, rather than that of party witnesses, is the more important factor and is accorded greater weight in a transfer of venue analysis; convenience of one key witness may outweigh the convenience of numerous less important witnesses. 28 U.S.C.A. §1404(a). *State Street Capital Corp. v. Dente*, 855

F.Supp. 192, 198 (S.D.Tex.1994) *Amini Innovation Corp. v. Bank & Estate Liquidators, Inc.*, 512 F. Supp. 2d 1039 (S.D. Tex. 2007).

In the case of *State Street*, there was an action against New Jersey franchisees to recover on promissory note. The court would not transfer to Southern District of New Jersey because the vast majority of nonparty witnesses, who had most information concerning performance of contract, resided in Texas, documents on which creditor relied were located in Texas while franchisees had failed to identify any documents on which they relied, contract stipulated that Texas law would govern, and transfer would likely delay trial. Unlike the situation in *State Street*, Defendant's present case presents a situation in which nearly all witnesses are located in the state of New Hampshire. The single witness located in Colorado is the Defendant's father who is willing to travel to New Hampshire to testify in this matter. Defendant's brother, located in Alabama, is likewise willing and able to travel to New Hampshire to testify in this matter. In addition, the Defendant has been unable to engage counsel in Colorado and so has retained counsel in New Hampshire, for whom she will have to pay the travel costs and additional unnecessary legal fees. Even if Defendant had been able to retain Colorado counsel, her attorney-client relationship would have suffered because of the sheer geographical distance between the two, and she would have to expend additional resources in order to effectively communicate and benefit from counsel.

The degree of inconvenience on the defendant and the witnesses in accessing plaintiff's choice of forum is an important factor to take into consideration. Unlike the situation in the case of *Brayton Purcell LLP v. Recordon & Recordon* where the defendant sought to transfer venue in a copyright infringement case from the northern to

the southern district of California, Defendant seeks to transfer venue from Colorado -- two-thirds of the way across the country -- to New Hampshire. *Brayton Purcell LLP v. Recordon & Recordon*, 361 F. Supp. 2d 1135 (N.D. Cal. 2005). The court in *Brayton* denied the defendant's motion to transfer venue because it found the burden of litigating in the plaintiff's choice of forum was a minimal burden on the defendant. *Id.* Here, the burden on both Defendant and many relevant witnesses is extraordinary in terms of time and expense. New Hampshire witnesses would have to pay for round trip airfare at approximately \$500-800.00 per person; hotel accommodations for the duration of the trial; transportation and rental car fees while in Colorado as well as the cost of meals, which they would not have to bear if the Court grants this motion to transfer to New Hampshire. In the instances where these students are employed, they are working modest part-time jobs to pay their living expenses while in school and, in instances where the students are unemployed, they are relying completely on the tuition paid to the school for their housing and meals. It is unlikely these witnesses would assent to the inconvenience and cost of travel and are beyond the reach of process of the District Court of Colorado to the detriment of her defense.

There would be no added burden to Plaintiff if the change of venue is granted as the witnesses for the Plaintiff are located in Iowa, New York and Maryland and the Plaintiffs are incorporated and/or located in California, New York and Delaware. For some of these witnesses, it would appear to be less burdensome for them to travel to New Hampshire.

The University of New Hampshire ("UNH") became a potential party and/or witness to this dispute when Plaintiff subpoenaed private information about its students

as part of this suit. Moreover, its testimony may be needed in connection with the technical issues concerning it's network. UNH and the people of New Hampshire have an interest in seeing justice served in state of New Hampshire because the school and its students will be affected by the outcome of this type of litigation and the use of personal information about its students. In addition, UNH is a public state university, and the people of New Hampshire have an interest in adjudicating this dispute and protecting the interests of its public institution and its students.

CONCLUSION

In conclusion, because the purpose of 28 U.S.C. 1404(a) is to permit change of venue for convenience of parties and witnesses in order to prevent the waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense, the Court should permit the Defendant in the case to transfer venue from the District of Colorado to the District of New Hampshire. Eight of the witnesses reside in New Hampshire and two other witnesses are willing to travel to New Hampshire to testify for the sake of convenience of other witnesses. The Defendant, a college student with extremely limited financial resources, resides in New Hampshire and the alleged infringing acts took place in the State of New Hampshire. Not only would this change of venue support the convenience of the parties and witnesses, it is also in the interest of the people of New Hampshire to adjudicate disputes arising out of acts that allegedly took place within its jurisdiction.

Respectfully submitted,

CATHERINE FILLO

By and through her attorney

s/Melanie Bell

Melanie Bell NH Bar ID 15573

PO Box 653

Newbury, NH 03255

(603) 863-2622