The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al., Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al., Defendants.	No. 2:17-cv-00094-JCC DEFENDANTS' REPLY IN SUPPORT OF MOTION TO TRANSFER VENUE HON. JOHN C. COUGHENOUR NOTED ON MOTION CALENDAR: Friday, March 24, 2017

Plaintiffs' Opposition to Defendants' Motion to Transfer Venue, ECF No. 40, relies on multiple misstatements of the law and two fundamentally incorrect assumptions. As a result, Plaintiffs have reached the rather startling conclusion that Seattle would be the best place to litigate a case where the only named plaintiff with a live case or controversy in his individual capacity lives 1,500 miles away in North Dakota. The Court should grant Defendants' Motion to Transfer, ECF No. 39.

1. Plaintiffs' Opposition Is Riddled with Legal Error

Plaintiffs' Opposition is shot through with legally dubious propositions. To begin, Plaintiffs observe that "[s]even out of the fourteen of Plaintiffs' lawyers reside in Seattle, and an additional two reside in Los Angeles" and "[t]ransfer of this case to North Dakota

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would require all of Plaintiffs' lawyers to travel and result in no local counsel."[1] ECF No. 40 at 10. But as Defendants previously noted, courts have been clear that "'[t]he convenience of counsel is not a factor to be considered' in weighing a transfer of venue."[2] *See* ECF No. 39 at 7 n.4 (quoting *Bunker v. Union Pac. R.R. Co.*, No. 05-cv-045059, 2006 WL 193856, at *2 n.1 (N.D. Cal. Jan. 23, 2006)); *see also Encore D.E.C., LLC v. APRES1 I, LLC*, No. 14-cv-01238, 2014 WL 12576650 (D. Or. Dec. 22, 2014) ("this is not a valid consideration on a motion to transfer venue"); *Smith v. Aetna Life Ins. Co.*, No. 11-cv-02559, 2011 WL 3904131, *6 (N.D. Cal. Dec. 22, 2011) ("the convenience of counsel is not considered for purposes of deciding whether a venue is convenient for the purposes of § 1404(a)"). Plaintiffs' argument appears to suggest they are more concerned with maintaining this action in Seattle for the convenience of counsel than with the convenience of the parties and witnesses.

Next, Plaintiffs suggest that "courts afford less weight to the government's forum preferences." ECF No. 40 at 8 (quoting *EEOC v. United Airlines, Inc.*, 2009 WL 7323651, *3 (N.D. Cal. Dec. 3, 2009)). That is simply wrong. What the case Plaintiffs cite actually says is: "[B]ecause the EEOC is both a government agency *and the plaintiff in a class action*, the weight accorded to the EEOC's choice of forum is diminished." *Id.* (emphasis added). Because the government is not the plaintiff in this case, the rule has no applicability here. Indeed, it is an application of the general rule that plaintiffs' choice of forum in class actions is generally accorded little weight. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) ("Although great weight is generally accorded plaintiff's choice of forum . . . when an individual . . . represents a class, the named plaintiff's choice of forum is given less weight."); *cf. Foster v. Nationwide Mut. Ins. Co.*, No. 07-cv-04928, 2007 WL 4410408, at *3 (N.D. Cal. Dec. 14, 2007) (according "no deference"

[1] One could reasonably question whether it is really necessary for all fourteen lawyers to travel for every hearing.

[2] Nor would a transfer "merely shift the inconvenience from one party to another." ECF No. 40 at 11. Neither side has counsel of record resident in Grand Forks, but as Mr. Ostadhassan lives there, it would still be more convenient for Plaintiffs than for Defendants.

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to the plaintiffs' choice of forum because, among other reasons, the lawsuit was a class action and the "operative facts [had] not occurred within the forum"). As such, it is Plaintiff's choice of forum in this District that is entitled to little weight, not Defendants' requested transferee forum, which, in any event, is limited to those jurisdictions where the action could have been originally filed. *See* 28 U.S.C. § 1404(a).

With respect to access to evidence, Plaintiffs contend that the government has not "suggested that discovery will occur through on-site inspection of government records rather than a standard production of electronically copied files." ECF No. 40 at 12-13. But again, Defendants have already explained, through a sworn statement, that "USCIS still maintains A-files in paper," Mr. Ostadhassan's A-file is in Minnesota, and as a legal matter "the issue is the 'ease of access' to the source of proof, not whether the evidence would be unavailable absent the transfer." ECF No. 39 at 7 (quoting Tritten Decl. and *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1165-66 (S.D. Cal. 2005)).

Plaintiffs then go on to suggest that "it is likely that the most important witnesses are not *any* of the immigration officers handling individual files, but rather the government officials who designed and implemented CARRP." ECF No. 40 at 10. This is problematic on two grounds. First, at present, there is no certified class. Instead, the only live claims are Mr. Ostadhassan's individual claims. As such, his eligibility for the benefits he is seeking and the immigration officers handling his applications are of crucial importance. Beyond this, assuming *arguendo* the Court certified one or more classes, it is unlikely that those who designed and implemented CARRP would be proper witnesses. As the Seventh Circuit has explained:

> Hammer wants discovery during which former Attorney General Ashcroft, former Director Hawk-Sawyer, and former Warden Lappin must explain under oath why they adopted the policy in question . . . . [We do not] see how a demand that a Cabinet officer give testimony about his thinking could be squared with *United States v. Morgan*, 313 U.S. 409 (1941), and *PBGC v. LTV Corp*, 496 U.S. 633 (1990). These decisions hold that courts evaluating the validity of an administrative action may not enlarge the administrative record by demanding that the people who proposed or approved the rule testify about their thinking.

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Hammer v. Ashfcroft, 570 F.3d 798, 802-03 (7th Cir. 2009). Thus, the only witnesses whose convenience is implicated by the motion to transfer are those associated with Mr. Ostadhassan's pending applications.

Despite the foregoing patent errors, Plaintiffs' most glaring legal error is conflating the convenience of maintaining this action in the Western District of Washington where Mr. Wagafe's individual claims are now moot with his legal authority to remain a class representative.

2. Plaintiffs Conflate Mr. Wagafe's Individual-Capacity Claims With His Ability to Remain a Class Representative

It appears that Plaintiffs anticipated Defendants might adjudicate both named Plaintiffs' claims (as they requested in their Prayer for Relief), thereby rendering moot the named Plaintiffs' individual claims. *See* ECF No. 40 at 7. That has not occurred, and Mr. Ostadhassan's application remains pending. Nonetheless, Plaintiffs go to great pains to argue that the adjudication of Mr. Wagafe's individual claims does not affect his ability to act as a class representative, and does not moot the claims of the class he sought to represent, ECF No. 40 at 1 & 5-7, despite the fact that Defendants have not challenged his standing to do so. Defendants did not raise either point in their motion to transfer. It was a motion *to transfer*, not to dismiss the action or the class claims. In this posture, Plaintiffs' claim that Defendants are attempting to "evade the jurisdiction of this Court," *id.* at 2 – as though the U.S. District Court for the District of North Dakota is not an Article III tribunal – defies belief.[3]

Defendants agree that "this motion is not the proper vehicle to litigate Plaintiff Wagafe's standing as a named Plaintiff." *Id.* at 5. But it is worth noting that Plaintiffs have clearly conflated Mr. Wagafe's eligibility to serve as a class representative and the class claims, on the one hand, with his own individual claims (which are now clearly

[3] Contrary to Plaintiff's argument, *see* ECF No. 40 at 2, Defendants have not suggested that the Western District of Washington is not a proper forum. *See* Defendants' Motion to Transfer Venue, ECF No. 39 at 3 ("Defendants agree that at the time this action was filed, venue was proper under 8 U.S.C. § 1391 in the Western District of Washington."). Defendants contend that because Mr. Wagafe's naturalization application has been approved, while Mr. Ostadhassan's application for adjustment of status remains pending, it is now an inconvenient forum.

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moot) on the other. Unlike Mr. Wagafe, Mr. Ostadhassan still has live individual-capacity claims that could reach trial. And if they do, compulsory process would not be available to compel Mr. Ostadhassan's wife to attend a trial in Seattle.[4] *See* Fed. R. Civ. P. 45(c)(1)(A). Mr. Ostadhassan's wife filed the pending Form I-130, *Petition for Alien Relative*, on behalf of Mr. Ostadhassan, and approval of which is necessary for Mr. Ostadhassan to adjust his status.

District courts in this Circuit routinely transfer cases to preserve the availability of compulsory process. *See*, *e.g.*, *Encore D.E.C., LLC*, No. 14-cv-01238, 2014 WL 12576650 at *6; *Herrera v. Sotelo*, No. 14-cv-01133, 2014 WL 3101448, *4 (C.D. Cal. July 7, 2014); *Kaswit, Inc. v. Dogfather K9 Connections, LLC*, No. 14-cv-00718, 2014 WL 3362355, *6 (C.D. Cal. July 7, 2014); *Kinney v. Chomsky*, No. 14-cv-02187, 2014 WL 3725932, *4 (N.D. Cal. July 25, 2014); *Koval v. United States*, No. 13-cv-1630, 2013 WL 6385595, *4 (D. Ariz. Dec. 6, 2013). Indeed, Rule 45(d)(3)(A)(ii) requires a court to quash or modify a subpoena that requires a person to comply beyond the geographical limits of Rule 45(c). *See Garlough v. Trader Joe's Co.*, No. 15-cv-01278, 2015 WL 4638340, *5 (N.D. Cal. Aug. 4 2015). The Court need not look beyond the adjudication of Mr. Wagafe's individual claims to conclude that the class claims should be litigated in North Dakota because of the obvious advantages of litigating Mr. Ostadhassan's individual claims there.

Plaintiffs contend that having provided Mr. Wagafe with the relief he sought, *see* Amended Complaint, Prayer for Relief ¶ 4, and seeking to transfer the litigation to the residence of the only other named plaintiff, Defendants are engaging in a "transparent attempt" to "forum shop." ECF No. 40 at 2. It hardly needs to be said, but Defendants do not choose their Plaintiffs. Indeed, with respect to "forum shopping," Plaintiffs

[4] Plaintiffs suggest that Mr. Ostadhassan's wife might be willing to attend a trial in Seattle, and note that her testimony could potentially be presented by means of a recorded deposition. *See* ECF No. 40 at 11. But the question is the *availability* of compulsory process, not whether it would be necessary to actually issue a subpoena. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29–30 (1988). In the event she declines, the authority to compel attendance is essential to a fair trial. So Plaintiffs' observations that her testimony *could* be presented by deposition, and that she *might* voluntarily attend a trial in this District, miss the mark.

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explain that if the Court grants them leave to amend their complaint, there will soon be an additional "four Plaintiffs who reside in King County, Washington." *Id.* at 5.

3. Plaintiffs' Opposition Depends upon Contingent Future Events

From there, Plaintiffs take the addition of their new plaintiffs as given, and suggest – without so much as an affidavit – that "three other named Plaintiffs in the proposed Second Amended Complaint live and work in this District, and key operative facts" occurred here as well. *Id.* at 8. But as it currently stands, there is no Second Amended Complaint, and there are no new plaintiffs.

There is one named plaintiff with a live individual-capacity claim, and he lives in Grand Forks, North Dakota.

Conclusion

The Court should grant Defendants' Motion to Transfer Venue. ECF No. 39.

Dated: March 23, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 23, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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