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8 **IN THE UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF ARIZONA

9
10 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
VELEZ; and Steve WARGOCKI,

11
12 Plaintiffs,

13 vs.

14 US AIRLINE PILOTS ASSOCIATION,
US AIRWAYS, INC.,
15 Defendants,

Case No. 2:08-cv-1633-PHX-NVW
(Consolidated)

SUPPLEMENTAL
MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION TO
CHANGE VENUE AND
TRANSFER TO ANOTHER
DISTRICT,
PURSUANT TO 28 U.S.C. § 1404

16
17 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
VELEZ; and Steve WARGOCKI,

18
19 Plaintiffs,

20 vs.

21 Steven H. BRADFORD, Paul J. DIORIO,
Robert, A. FREAR, Mark. W. KING,
Douglas L. MOWERY, and John A.
STEPHAN,

22
23 Defendants.

Case No. 2:08-cv-1728-PHX-NVW

1 **I. BACKGROUND.**

2 Following Defendant's Motion To Change Venue And Transfer To Another
3 District filed November 2nd (Doc. # 622), on November 4th this Court ordered (Doc. #
4 623) that:

5 Defendant file a supplement memorandum by November 17, 2009,
6 addressing the considerations and case authority concerning transfer of a
7 case after a trial on liability has already been concluded and substantial
8 judicial resources have been expended in one district that would have to be
9 duplicated if post-liability proceedings were transferred to another district.

Defendant submits this memorandum in response.

10 **II. SUPPLEMENTAL ARGUMENT.**

11 **A) Case Authority Allows Transfer After Trial.**

12 In sum, under 28 U.S.C. § 1404 and the doctrine of *forum non conveniens*, case
13 authority presents no bar, but rather supports transfer of venue after a trial on liability
14 notwithstanding the expenditure of judicial resources. Transfer is allowed at any time,
15 even after judgment. Convenience of the court is generally not considered a factor and
16 when it has been considered, it is not a controlling factor. Similarly, a court's familiarity
17 with applicable law can be a relevant consideration, but in diversity cases where state law
18 must be applied, not in federal-question cases such as the instant matter. *To wit*:

19 First, a transfer of venue is allowed "at any time during the pendency of a case,
20 even after judgment has been entered." *Chrysler Credit Corp. v. Country Chrysler, Inc.*,
21 928 F.2d 1509, 1516 (10th Cir. 1991); *Galvin v. McCarthy*, 545 F. Supp. 2d 1176 (D.
22 Colo. 2008) (a court may transfer an action under the statute at any time during the
23 pendency of the case, even after judgment has been entered); *Farmer Bros. Co. v. Coca-*

1 *Cola Co.*, 366 F. Supp. 725, 727 (S.D. Tex. 1973) (“At times, it is far more preferable to
2 change the forum at a stage later in the case when it may be ascertained with certainty
3 that the interests of justice so dictate.”).

4 Second, other courts have transferred venue *after* a liability trial or determination.
5 In *Sypert v. Miner*, 266 F.2d 196 (7th Cir. 1959), the case had been tried and submitted to
6 the jury, but the jury was unable to agree on a verdict. *Id.* at 198. The *same* case had to
7 be re-tried. Notwithstanding the judicial resources expended on the first trial, the
8 Seventh Circuit, relying heavily on the convenience of witnesses, upheld the district
9 court’s transfer of venue *after* completion of the first trial but *prior* to commencement of
10 the second trial. In similar circumstances, the district of D.C. transferred venue after a
11 jury trial failed to produce a verdict. *See Martin-Trigona v. Meister*, 668 F. Supp. 1
12 (D.D.C. 1987) (transfer under § 1404(a) ordered *after* jury trial prior to re-trial). Again,
13 notwithstanding the judicial resources expended on the first trial, venue was transferred
14 to re-try the *same* case in a different district.
15

16 In addition, case law from complex air disaster litigation provides support for the
17 transfer of venue *after* a liability trial but *prior* to the damage phase. *See e.g., In Re Air*
18 *Crash Disaster at John F. Kennedy International Airport On June 24, 1975*, 479 F. Supp.
19 1118, 1123 (E.D.N.Y. 1978) (damages trial ordered in Eastern District of Louisiana *after*
20 liability trial in complex air crash litigation was held in Eastern District of New York); *In*
21 *re Multidistrict Civil Actions Involving the Air Crash Disaster, New Hanover, New*
22 *Hampshire, on October 25, 1968*, 342 F. Supp. 907 (D.N.H. 1971) (liability trial in one
23

1 district, damages in districts of origin), noted in A. Wright & A. Miller, *Manual For*
2 *Complex Litigation Part 1*, § 522(2) at 159 n. 351 (1977).

3 Third, duplicative effort, or the judicial inconvenience of a proposed transfer, are
4 not normally factors to be considered, but if considered these factors are not controlling.
5 *In re Alan Neal Scott*, 709 F.2d 717, 721 (D.C. Cir. 1983) (“Inconvenience to the court is
6 a relevant factor but, standing alone, it should not carry the day.”). “The elements to be
7 considered in exercising discretion to transfer to another district are defined in a manner
8 which generally precludes considering the convenience of Court and counsel.” *Johnson*
9 *v. Burlington-Northern, Inc.*, 480 F. Supp. 259, 260 (W.D. Mo. 1979) (citing 28 U.S.C. §
10 1404(a) and *Solomon v. Continental American Life Ins. Co.*, 472 F.2d 1043, 1047 (3d Cir.
11 1973)); *Pfizer, Inc. v. Lord*, 47 F.2d 122, 125 (2d Cir. 1971) (“convenience of the judge
12 is, of course, not normally a factor to be weighed in considering a section 1404(a) motion
13 ...”); *In re Scott*, 709 F.2d 717, 721 (D.C. Cir. 1983) (transfer not appropriate merely to
14 serve court’s personal convenience); *Savoia Film S. A. I. v. Vanguard Films*, 10 F.R.D.
15 64, 67 (S.D.N.Y. 1950) (“Section 1404(a) provides for the transfer of an action for the
16 convenience of parties and witnesses, not for the convenience of the Court.”); *Brown v.*
17 *Insurograph, Inc.*, 85 F. Supp. 328, 329-30 (D. Del. 1949) (“The convenience of the court
18 considering transfer or of the court to which transfer is sought is not an allowable
19 standard or criterion except as it may be embraced in the term ‘in the interest of
20 justice.’”).
21
22

23 Fourth, a court’s familiarity with the law is considered on a transfer motion when
jurisdiction rests on diversity and there is a need for state law to be applied, but it is not

1 appropriate where jurisdiction rests, as here, on federal question. *See e.g., Medtronic,*
2 *Inc. v. Boston Scientific Corp.*, 587 F. Supp. 2d 648 (D. Del. 2008) (on motion to transfer
3 venue, public interests include appropriateness of having trial of diversity case in forum
4 that is at home with state law that must govern action); *Connors v. R & S Parts &*
5 *Services, Inc.*, 248 F. Supp. 2d 394 (E.D. Pa. 2003) (same); *O'Brien v. Goldstar*
6 *Technology, Inc.*, 812 F. Supp. 383 (W.D.N.Y. 1993) (same); *Van Gelder v. Taylor*, 621
7 F. Supp. 613 (N.D. Ill. 1985) (same).

8
9 Fifth, “public interest” as a component of the “interest of justice” does not include
10 the prior expenditure of judicial resources, which may have to be duplicated to some
11 extent, but rather such factors as: (1) the degree to which the courts in both venues are
12 familiar with the governing laws; (2) the relative congestion of the calendars of the
13 transferee and transferor courts; and (3) the local interest in deciding local controversies
14 at home. *Wada v. United States Secret Service*, 525 F. Supp. 2d 1 (D.D.C. 2007); *Walker*
15 *v. Jon Renau Collection, Inc.*, 423 F. Supp. 2d 115 (S.D.N.Y. 2005); *Brannen v. National*
16 *R.R. Passenger Corp.*, 403 F. Supp. 2d 89 (D.D.C. 2005).

17 **A) Practical Considerations Do Not Hamper Transfer.**

18 In sum, even if judicial economy is considered, no practical considerations restrict
19 transfer because post-liability proceedings will not require duplicating judicial resources
20 expended in the liability phase. Here, the issues in the post-liability phase will not be
21 dependent on, or readdress, the issues in the liability phase.¹ That phase is complete (but
22

23 _____
¹ This must be contrasted with the *Sypert* and *Martin-Trigona* cases, where venue was transferred prior to re-trials on the same matter, which unquestionably required the

1 for appeal). Even if a transferee court did find it necessary to gain familiarity with the
2 liability phase that would not require duplicative effort because plaintiffs have advanced
3 a post-liability theory that is entirely new to their trial-liability theory. Finally, the timing
4 of this motion is appropriate because the damages phase has yet to start. *To wit:*

5 First, the damages phase is a new case altogether, not a continuation of the trial-
6 liability or trial-injunction phases, which are now complete and resolved but for appeal (a
7 ‘phase’ over which no district court has jurisdiction). This Court has itself recognized
8 that the damages phase is a new and distinct affair:
9

10 And when we finished the liability trial I was of the mind to just finish this
11 up. So that's why we set the schedule. But now that these things are
12 coming out I am beginning to realize that this case is now different. *This is*
13 *now a damage case. It's not an injunction case anymore.* And the need and
14 the justification for moving expeditiously in an injunction case really is
diminished in a way that I didn't focus on as much as I should have. And it's
leading me to think that I have got to step back and not put you, both sides,
in the position of trying to litigate a damage case on somewhat similar track
to a time-urgent injunction case. (7 July 09 Tr. at 34:11).

15 and

16 [I]t seems like there simply – this is getting a lot closer to a normal case
17 track. (20 Aug 09 Tr. at 18:13).

18 The damages phase is predictably concerned with whether an injury was caused by
19 any acts for which Defendant was found liable and, if so, what amounts. Litigation and
20 trial of those issues are both new and distinct from the liability phase. (Pre-Trial Order at
21 Doc. # 417, p. 33-34 listing trial issues for liability). They should not require any
22

23 expenditure of duplicative judicial resources in the transferee district. (*supra* at 3).
Nevertheless, the transferor district properly focused its Section 1404 analysis to the
convenience of parties and witnesses.

1 substantive duplication. Also, any injunction-enforcement issues would, if at all,
2 constitute new matters not previously litigated or tried.

3 Second, plaintiffs are pursuing an entirely new theory of causation in the liability
4 phase from that which they originally pled, so much so that this Court *required* them to
5 re-plead it. (Doc. # 606). This Court has also observed that it is likely that a new
6 examination will be required upon additional discovery, and specifically held open
7 Defendant's option to renew its summary judgment motion after discovery (Doc. # 566):

8
9 It's telling me that more discovery is needed, that at -- that there is certainly
10 evidence and circumstances from which the factual scenario that plaintiff is
11 now presenting could well play out. (7 July 09 Tr. at 35:4).

11 and

12 So I'm thinking that's another reason to put this on a more normal track as a
13 damage case. The discovery issues are -- I have got to deal with those.
14 There's yet another reason. (7 July 09 Tr. at 35:10).

14 The new theory, and the apparent need to review or consider discovery not yet
15 accomplished, gives no practical advantage to the transferor court over the transferee
16 court.

17 Third, the timing of this motion is appropriate because it would allow a transferee
18 court to oversee nearly all of the damages litigation, all of the discovery, and all of the
19 trial and post-trial proceedings. This Court delayed scheduling of the damages phase and
20 suspended discovery. (Doc. # 606). No new schedule has been set, nor will be until
21 December or January. (Tr. July 1 at 28:17-23).² Nor has this Court ruled on the pending
22

23

² In addition, USAPA's motion requesting a stay of the damage litigation is currently pending in the Ninth Circuit.

1 motions to dismiss or on attorneys' fees. Even if it did, all litigation, discovery and trial
2 necessary to proceed could be accomplished, and accomplished with far more
3 convenience to witness including third-party witnesses and the parties, in the transferee
4 district.

5
6 **III. RELIEF REQUESTED.**

7 For the convenience of the witnesses and parties, it is requested that the Court
8 transfer this action to the Unites States District Court for the District of Columbia.

9 Respectfully Submitted,

10 Dated: November 13, 2009

11 By: /s/ Nicholas P. Granath, Esq.

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CERTIFICATE OF SERVICE

(Case No. 2:08-cv-1633-PHX-NVW)

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and any attachments, were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

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Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On November 13, 2009, by:

/s/ Nicholas P. Granath, Esq.

Nicholas P. Granath