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

THE HISPANIC LEADERSHIP FUND, INC.,	Civ. No. 4:12-339-JAJ-TJS
Plaintiff,	
v.	
FEDERAL ELECTION COMMISSION,	MOTION TO TRANSFER VENUE
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO TRANSFER VENUE

Defendant Federal Election Commission respectfully moves the Court to transfer this case to either the Eastern District of Virginia or the District of Columbia. Venue cannot properly be laid in the Southern District of Iowa under 28 U.S.C. § 1391(e)(1)(A) or (C) because no party to this case resides in this District, and venue is improper here under 28 U.S.C. § 1391(e)(1)(B) because no substantial part of the events or omissions giving rise to plaintiffs' claims occurred in this District. Therefore, pursuant to 28 U.S.C § 1406(a), the Court may either dismiss this action or transfer it in the interest of justice to a district in which it could have been brought. The Commission requests that the Court transfer the action to the Eastern District of Virginia, in which plaintiff resides, or to the District of Columbia, in which the Commission resides.

In the alternative, the Commission moves the Court to exercise its discretion to transfer the venue of this action to either of the above-named districts for the convenience of the parties pursuant to 28 U.S.C. § 1404(a).

Pursuant to Local Rules 5.2.g.4 and 7.d, a memorandum in support of this motion is appended hereto. Pursuant to Local Rule 7.*l*, the Commission consulted regarding this motion with counsel for plaintiff, who indicated that plaintiff does not consent to this motion.

Respectfully submitted,

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August 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2012, the foregoing Motion to Transfer Venue was filed electronically with the Clerk of Court through the Court's ECF system, which will send notification of this filing to the following recipients:

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UNITED STATES DISTRICT COURT
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THE HISPANIC LEADERSHIP FUND, INC.,	Civ. No. 4:12-339-JAJ-TJS
Plaintiff,	
v.	
FEDERAL ELECTION COMMISSION,	BRIEF IN SUPPORT OF MOTION TO TRANSFER VENUE
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S BRIEF IN SUPPORT OF ITS MOTION TO TRANSFER VENUE

Plaintiff is a Virginia corporation, the Federal Election Commission is a federal agency located in Washington, D.C., and plaintiff claims that the FEC misconstrued a federal statute while conducting official agency business in the District of Columbia. Not one event giving rise to this suit occurred in the Southern District of Iowa. Thus, venue is not properly laid here, and this action must be dismissed or transferred to a district in which venue would be proper. Even if venue were proper here, and it is not, the interests of justice and convenience of the parties would warrant transferring this case to either Virginia or the District of Columbia.

I. FACTUAL BACKGROUND

Plaintiff The Hispanic Leadership Fund ("HLF") is a Virginia corporation located in Alexandria, Virginia. (Compl. at 1 (caption), ¶ 24.) Defendant Federal Election Commission ("FEC" or "Commission") is the independent agency of the United States government vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), and other federal campaign

finance statutes. *See generally* 2 U.S.C. § 437d(a). The Commission's only office is in Washington, D.C.

On April 18, 2012, an organization named American Future Fund ("AFF") requested that the Commission issue an advisory opinion finding that eight television advertisements AFF planned to run would not constitute "electioneering communications" under a provision of FECA, 2 U.S.C. § 434(f)(3)(A). (*See* Compl. Exh. 2.) Specifically, AFF asked the Commission to opine that the advertisements did not refer to a "clearly identified" candidate for federal office within the meaning of 2 U.S.C. § 431(18) and 11 C.F.R. §§ 100.17, 100.29(b)(2). AFF sought this opinion because any person who broadcasts an "electioneering communication" must disclose to the Commission and the public certain information about the financing of the communication, 2 U.S.C. § 434(f)(1), and AFF did not wish to disclose such information. (Compl. Exh. 2 at 1.)

In response to AFF's request, the Commission issued an advisory opinion on June 13, 2012, finding that two of AFF's advertisements referred to clearly identified candidates and one did not. (Compl. Exh. 7.) The Commission did not issue an opinion as to the remaining ads (Compl. ¶¶ 35, 38), because the FEC's six Commissioners were evenly divided on the application of the statute to those ads and the Commission cannot issue an advisory opinion without the affirmative vote of four or more of its Commissioners. 2 U.S.C. § 437c(c).

Six weeks later, on July 30, HLF filed the instant complaint and moved for a preliminary injunction. HLF alleges that it plans to run the same five advertisements as to which AFF did not receive an advisory opinion. (Compl. Exh. 1 (scripts); Compl. ¶ 48 (noting that HLF's ads are "materially indistinguishable" from AFF's).) HLF alleges that it plans to run these ads "in Iowa and other states." (Compl. ¶ 46.) HLF argues that the ads do not refer to a clearly

identified candidate, and therefore that the Commission erred as a matter of law by not granting AFF's advisory opinion request as to these ads. (*Id.* ¶ 20; Pl.'s Br. in Supp't of Mot. for Prelim. Inj. at 5, 11-13 (Docket No. 3-1) ("Pl's Inj. Br.").) HLF has not alleged any facts about the relative number of ads it plans to run in Iowa versus other states or made any allegations about specific advertising time it intends to purchase in any location.

II. THIS CASE MUST BE TRANSFERRED OR DISMISSED BECAUSE VENUE IS NOT PROPER IN THIS DISTRICT

HLF's complaint invokes the venue provisions of 28 U.S.C. § 1391(e)(1). (Compl. ¶ 23.) Under that statute, venue in a civil action against the federal government is proper in any district in which:

> "(A) a defendant in the action resides,
>
> (B) a substantial part of the events or omissions giving rise to the claim occurred . . ., or
>
> (C) the plaintiff resides . . . ."

28 U.S.C. § 1391(e)(1).

It is undisputed that neither HLF nor the Commission resides in the Southern District of Iowa. Thus, venue can be proper here only if "a substantial part of the events or omissions giving rise to the claim occurred" in this District. 28 U.S.C. § 1391(e)(1). They did not.

The Eighth Circuit has explained that, "by referring to 'events and omissions giving rise to the claim,' Congress meant to require Courts to focus on the relevant activities *of the defendant*, not of the plaintiff." *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995) (emphasis added).[1] "Thus, under *Woodke*, . . . the Court must determine whether a substantial part of the

[1] *Woodke* and several of the other cases cited herein analyze the general venue provision in paragraph (b)(2) of section 1391. That provision is identical to paragraph (e)(1)(B), including the same "events or omissions" language; the only difference is that paragraph (e)(1)(B) applies in suits against the government, and paragraph (b)(2) applies in other suits.

defendants' allegedly wrongful acts or omissions occurred in this district." *Quality Improvement Consultants, Inc. v. Williams*, Civ. No. 02-3994, 2003 WL 543393, at *8-*9 (D. Minn. Feb. 24, 2003) (emphasis added) (finding venue improper because plaintiffs failed to identify "any allegedly wrongful act or omission by [defendants] that occurred" in district). The fact that a plaintiff may suffer some harm in a particular district does not render venue proper in that district. "The Eighth Circuit . . . has clarified that the district in which 'a substantial part of the events or omissions giving rise to the claim occurred,' . . . means where the events giving rise to the *action* occurred, not where the events giving rise to the plaintiff's *damages* occurred." *Catipovic v. Turley*, Civ. No. 11-3074, 2012 WL 2089552, at *15 (N.D. Iowa June 8, 2012) (emphases in original, citing *Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 736 (8th Cir. 1997)).

In this case, venue is not proper in this district because not a single "event or omission" giving rise to this suit occurred in the Southern District of Iowa. The only "allegedly wrongful act" at issue in this case, *Quality Improvement*, 2003 WL 543393, at *8, was the Commission's statutory interpretation of the term "clearly identified candidate" in the context of AFF's request for an advisory opinion. (*See, e.g.*, Compl. ¶ 16 (alleging that plaintiff is being harmed by "the FEC's failure to correctly apply the FECA and controlling precedent to AFF's advisory opinion request"); Pl.'s Inj. Br. at 39 ("There is a causal connection between the FEC's failure to apply the law and issue and advisory opinion, and the harm now faced by HLF.").) The FEC's interpretation of the relevant FECA provisions took place in Washington, D.C., not in this District.

HLF's complaint states that venue is proper here because "the injury to plaintiff's constitutional rights is occurring in the state of Iowa." (Compl. ¶ 23.) The relevant inquiry,

however, is not where the damage allegedly occurred, but where the events or omissions "giving rise to the claim occurred." *See Catipovic,* 2012 WL 2089552, at *15. This principle applies fully in constitutional challenges: "Allegations that [plaintiff] is complying with an unconstitutional law for fear of prosecution in this judicial district cannot support venue under § 1391(e)(2)." *Dearth v. Gonzales*, Civ. No. 06-1012, 2007 WL 1100426, at *4 (S.D. Ohio, Apr. 10, 2007) (finding venue improper in suit against federal government where only connection to district was plaintiff's allegation that federal law would unconstitutionally prohibit his desired conduct there).

And, in any event, HLF merely alleges that Iowa is one of several states in which it would like to run advertisements. (Compl. ¶ 46.)[2] Thus, even if the site of the alleged injury were relevant (which it is not), plaintiff makes no factual allegation that a "*substantial* part" of those injuries would occur here. For example, plaintiff does not identify any specific media outlet where it plans to run its ads, let alone allege that a substantial percentage of its purchases would be made in this District.

Allowing venue to rest on bare allegations such as those made by HLF here would undercut the primary purpose of the venue statutes, to prevent forum shopping. *Wisland*, 119 F.3d at 735-36. Under plaintiff's theory, any pre-enforcement challenge to a federal statute could be venued in essentially any district; the plaintiff would merely have to allege that the challenged statute would prevent him from doing something in that district. There is no basis in law for enabling such forum shopping. *Cf. Richards v. Aramark Servs., Inc.*, 108 F.3d 925, 928 (8th Cir. 1997) ("Venue requirements exist for the benefit of defendants. One of the central

[2] Plaintiff's assertion that venue is proper because of plaintiff's planned activity in "the state of Iowa" (Compl. ¶ 23) is deficient on its face, as neither that allegation nor anything else in the complaint states any connection to *this District*, as required by section 1391(e)(1).

purposes of statutory venue is to ensure that a defendant is not haled into a remote district, having no real relationship to the dispute.") (internal citations and quotation marks omitted); *Dearth*, 2007 WL 1100426, at *4.

In sum, because all of the events and omissions that gave rise to HLF's claims occurred in the District of Columbia and not in this District, venue is not proper here. And upon a finding of improper venue, the district court "shall dismiss, or if it be in the interest of justice, transfer such case to any district . . . in which it could have been brought." 28 U.S.C. § 1406(a); *see also Dearth*, 2007 WL 1100426, at *5 (dismissing suit against federal government for improper venue pursuant to § 1406(a) without prejudice to refiling in District of Columbia). "In the interest of justice," the Commission respectfully requests that the Court transfer this case to either of the districts in which it could have been brought: in the Eastern District of Virginia (plaintiff's residence), where venue would be proper under section 1391(e)(1)(C), or in the District of Columbia (FEC's residence and where "substantial part of events . . . giving rise to the claim occurred"), where venue would be proper under section 1391(e)(1)(A)-(B).

III. IN THE ALTERNATIVE, THIS CASE SHOULD BE TRANSFERRED FOR THE CONVENIENCE OF THE PARTIES

Even if the Court were to determine that a substantial part of the events or omissions giving rise to the claim occurred in this District, the Court should exercise its discretion to transfer this case under 28 U.S.C. § 1404(a). That section provides that 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 court where it might have been brought." As the Supreme Court has explained, the

> purpose of the section is to prevent the waste "of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense . . . ." To this end it empowers a district court

> to transfer "any civil action" to another district court if the transfer is warranted by the convenience of the parties and witnesses and promotes the interest of justice.

Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (quoting *Cont'l Grain Co. v. Barge F.B.L.-585*, 364 U.S. 19, 26-27 (1960)) (footnote omitted). The reasons to transfer a case under section 1404(a) include ease of access to evidence, the availability of compulsory process, the cost of securing the attendance of witnesses, and "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). While the Eighth Circuit has declined to offer an "exhaustive list of specific factors to consider in making the transfer decision," it has explained that "district courts should weigh any case-specific factors relevant to convenience and fairness to determine whether transfer is warranted." *In re Apple Inc.*, 602 F.3d 909, 912 (8th Cir. 2010) (internal quotation marks omitted).

The Eastern District of Virginia or the District of Columbia would be a far more convenient venue for this case. HLF is located in the Eastern District of Virginia, as is HLF's counsel. The Commission and its counsel are located in the District of Columbia, which is adjacent to the Eastern District of Virginia and less than ten miles from plaintiff's location. And any witnesses who might be called to provide testimony are presumably located in these two districts. HLF has not alleged that it has *any* connection to this District, and so its choice of this forum is entitled to little weight. *Holt v. Wyeth*, Civ. No. 05-263, 2012 WL 1901290, at *2 (D. Minn. May 25, 2012) ("Plaintiff's choice of forum is given less protection since Plaintiff does not reside in Minnesota, does not have any connection to Minnesota, and because the events underlying this action did not occur in Minnesota.").

Indeed, HLF does not appear to dispute that the Eastern District of Virginia would be a more convenient venue. (*See* Pl.'s Resp. & Opp. to Def.'s Mot. to Continue Hearing on Pl.'s

Mot. for Prelim. Inj. at 4 (Docket No. 15).) Instead, HLF argues that the Court should nonetheless decline to transfer this case because the Commission is currently defending cases in various districts across the country. (*See id*.) That argument, however, is beside the point.

HLF's also asserts that the Court should retain this case because, in cases filed against the Commission in the District of Columbia and the Eastern District of Virginia, those courts have scheduled arguments on preliminary injunction motions for approximately six to ten weeks after the cases were filed. (*See* Pl.'s Opp. to Mot. to Continue at 4-5.) HLF implies that the plaintiffs in those cases sought more expedited injunctive relief and were denied it due to "docket congestion." (*See id*.) Not true. The court in the Eastern District of Virginia is well known for its "rocket docket" approach to scheduling.[3] And in any event, HLF's argument rings exceedingly hollow given that HLF waited almost *seven weeks* from when the Commission issued its response to AFF's advisory opinion request before filing this suit. Such self-created exigency should not outweigh the benefits that would accrue from trying this matter in a more convenient venue.

IV. CONCLUSION

The events giving rise to plaintiff's claims occurred and both parties and their counsel are located in two adjoining districts some 1,000 miles away from this Court. The Commission respectfully requests that the Court transfer this action to the Eastern District of Virginia or the District of Columbia.

Respectfully submitted,

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[3] *See, e.g.*, Jackie Judd, *Moussaoui, Lindh on 'Rocket Docket'*, ABC News, http://abcnews.go.com/WNT/story?id=130520#.UB8dJqOwVDU.

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