

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JONES PHARMA, INC. and :
KING PHARMACEUTICALS, INC., :
 :
Plaintiffs, :
 :
v. : Civil Action No. 03-786 JJF
 :
KV PHARMACEUTICAL CO., :
 :
Defendant. :

Paul E. Crawford, Esquire, and Patricia S. Rogowski, Esquire of
CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware.
Of Counsel: F. Dominic Cerrito, Esquire, Daniel L. Malone,
Esquire, and John C. Martin, Esquire of PENNIE & EDMONDS LLP, New
York, New York.
Attorneys for Plaintiffs Jones Pharma, Inc., and King
Pharmaceuticals, Inc.

Josy W. Ingersoll, Esquire, and Christian Douglas Wright, Esquire
of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware.
Attorneys for Defendant KV Pharmaceutical Co.

MEMORANDUM OPINION

February 17, 2004

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is Defendant KV Pharmaceutical Co.'s ("KV") Motion To Transfer To Eastern District Of Missouri Pursuant To 28 U.S.C. § 1404(a). (D.I. 8.) For the reasons set forth below, the Court will deny KV's Motion.

BACKGROUND

This case is a Hatch-Waxman patent infringement action under 35 U.S.C. § 271(e)(2) arising from an Abbreviated New Drug Application KV submitted for approval in order to sell a generic version of Jones Pharma, Inc.'s ("Jones") drug Levoxyl. By its Motion, KV seeks a transfer of the instant action to the Eastern District of Missouri.

I. Parties' Contentions

KV contends that the instant action could have been brought in Missouri. Further, KV contends that Jones did not file the instant action on its "home turf," and therefore, Jones's decision to file in Delaware is not entitled to the deference ordinarily accorded to a plaintiff's choice of forum. KV also contends that the private and public interests favor transfer to Missouri.

In response, Jones contends that although its principal place of business is not in Delaware, both KV and it are Delaware corporations. Therefore, Jones contends that the Court should give strong deference to its decision to file the instant action

in Delaware. Further, Jones contends that the private and public interests do not strongly favor transfer to Missouri.

DISCUSSION

28 U.S.C. § 1404(a) provides the standard for a convenience transfer to another jurisdiction. Section 1404(a) states, "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." The Third Circuit has not limited itself to the factors listed in Section 1404(a), instead requiring courts to consider the private and public interests protected by Section 1404. The private interests include:

plaintiff's forum preference as manifested in the original choice, the defendant's preference, whether the claim arose elsewhere, the convenience of the parties . . . , the convenience of the witnesses - but only to the extent that the witnesses may actually be unavailable for trial in one of the fora, and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum).

Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir.

1995) (citations omitted).

The public interests include "the enforceability of the judgment, practical considerations that could make the trial easy, expeditious, or inexpensive, the relative administrative difficulty in the two fora resulting from court congestion, the local interest . . . , [and] the public policies of the fora."

Id. (citations omitted). "The burden of establishing the need

for transfer . . . rests with the movant." Id. Unless the movant demonstrates that the balance of conveniences strongly favors transfer, plaintiff's forum choice should prevail. Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970).

I. Whether Plaintiffs' Choice Of Forum Is Entitled To "Paramount Consideration"

Ordinarily, a court will give "paramount consideration" to a plaintiff's choice of forum. See Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970). However, absent a legitimate, rational reason, if the plaintiff chooses to litigate away from his or her "home turf," the defendant's burden is lessened. Waste Distillation Tech., Inc. v. Pan Am. Res., Inc., 775 F. Supp. 759, 764 (D. Del. 1991). Under Section 1404(a), "home turf" refers to a corporation's principal place of business. Id. A corporation's decision to incorporate in a particular state is a rational and legitimate reason to choose to litigate in that state. Stratos Lightwave, Inc. v. E20 Communications, Inc., C.A. No. 01-309 JJF, 2002 WL 500920 at *2 (D. Del. March 26, 2002). Applying these principles to the circumstances in this case, the Court will give "paramount consideration" to Jones's decision to file the instant action in Delaware.

Both Jones and KV are Delaware corporations. And, as the Court observed in Stratos, a corporation's decision to incorporate in a state is a rational and legitimate reason to file an action in that forum. 2002 WL 500920 at *2. Therefore,

to prevail on its Motion, KV must demonstrate that the Jumara factors strongly favor a transfer to Missouri.

II. Whether The Private Interests Strongly Favor Transfer

Although the claim arose and the parties have their principal places of business in Missouri, the Court concludes that these factors, along with the remaining Jumara private interest considerations, do not strongly favor a transfer to Missouri. First, the Court concludes that the convenience of the parties does not favor venue in one jurisdiction over the other. Neither party would be unduly burdened by litigating this action in Delaware or Missouri. See Pennwalt Corp. v. Purex Inds., Inc., 659 F. Supp. 287, 290 (D. Del. 1986) (taking into account the burden a small company would encounter in litigating an action in a jurisdiction where it did not reside). KV's annual sales approximate \$240 million (D.I. 12; Ex. 1) and Jones's annual sales approximate \$245 million. (D.I. 14; Ex. D.) Therefore, the Court concludes that litigating this action in Delaware will not "place a significant and onerous burden" on either party. Pennwalt, 659 F. Supp. at 290. Further, although both parties have their principal places of business in Missouri, both parties are incorporated in Delaware. And, as KV chose to avail itself of the laws of Delaware, it may not now complain because Jones decided to sue it in this state. SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 833 F. Supp. 450, 453 (D.

Del. 1993).

Next, although KV contends that the books and records necessary to litigate this action are in Missouri, KV does not contend that they could not be produced or would be unavailable in Delaware. Therefore, the Court does not consider the location of the books and records as weighing in favor of a transfer to Missouri. See Jumara, 55 F.3d at 879 (indicating that a court should consider the location of books and records only to the extent that the files "could not be produced in the alternative forum."). Further, all of the witnesses relating to the formulation and development of its generic drug that KV intends to call at trial, save Mr. Franz, are current KV employees. (D.I. 10.) These employee witnesses are party witnesses and are presumed willing to testify at trial. Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp. 2d 192, 203 (D. Del. 1998) ("Party witnesses or witnesses who are employed by a party carry no weight in the 'balance of convenience' analysis since each party is able, indeed, obligated to procure the attendance of its own employees for trial."). With respect to Mr. Franz, the Court is not persuaded by KV's contention that Mr. Franz's retirement from KV and residence in Missouri strongly favors a transfer of the instant action. As noted above, the movant bears the burden in motions to transfer, Jumara, 55 F.3d at 879, and KV has provided the Court with no evidence that Mr. Franz, KV's former CEO, would

be unwilling to testify on its behalf. Accordingly, the Court gives little weight to Mr. Franz's status as a non-party witness and residence in Missouri.

III. Whether The Public Interests Strongly Favor Transfer

The Court also concludes that the public interests do not weigh strongly in favor of a transfer to Missouri. First, the Court is unpersuaded by KV's contention that the congestion of the Delaware courts strongly favors a transfer. See Affymetrix, 28 F. Supp. 2d at 206 (noting that the congestion of a court's docket is a legitimate factor to be considered in a motion to transfer). The median time for completion of non-jury trials in the District of Delaware is twenty-seven months, compared to twenty-three months in the Eastern District of Missouri. (D.I. 9; Ex. B.) The Court considers this four-month difference as, at most, only minimally favoring a transfer.

Further, there is no strong local interest in litigating this action in Missouri. The instant action is a patent infringement case, and, as the Court held in Stratos, rights relating to patents are not local or state matters. 2002 WL 500920 at *2. Therefore, patent rights cannot give rise to a local controversy or implicate local interests. Id. Accordingly, the Court concludes that the fact that the alleged infringement occurred in Missouri does not weigh strongly in favor of transferring the instant action.

CONCLUSION

Based upon Jones's decision to file the instant lawsuit in Delaware and the absence of strong private or public interests favoring transfer to Missouri, the Court concludes that the Jumara factors do not strongly favor a transfer of the instant action under 28 U.S.C. § 1404(a). Accordingly, the Court will deny KV's Motion.

An appropriate Order will be entered.

