UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE, ACTING BY AND THROUGH THE NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICE Plaintiff, v. NICOLE R. NASON in her official capacity as Administrator of the FEDERAL HIGHWAY ADMINISTRATION, Defendant	C.A. No. 19-cv-158-WES-PAS

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO TRANSFER VENUE

Defendant Nicole R. Nason[1], in her official capacity as Deputy Administrator of the Federal Highway Administration ("FHWA" or "the Agency"), hereby opposes Plaintiff's Motion to Transfer Venue. Plaintiff, the Narragansett Indian Tribe ("Plaintiff" or "the Tribe") filed this action in this Court against the FHWA on March 29, 2019. On July 9, 2019, Defendant filed a motion to dismiss, because, among other reasons, this Court and the First Circuit have already concluded that there is no jurisdiction to review the Tribe's challenges to the FHWA's termination of the Programmatic Agreement related to the Providence Viaduct. Now, in an act of procedural gamesmanship, while the Defendant's motion to dismiss remains pending, Plaintiff seeks to transfer the matter away from this Court – which is both its home forum and the forum in which it chose to bring this case – to the District of Columbia. Because all of the facts that

[1] Since the time Plaintiff filed the complaint in this matter, Nicole R. Nason has replaced Deputy Administrator Brandye L. Hendrickson as Administrator of the Federal Highway Administration. In accordance with Federal Rule of Civil Procedure 25(d), Administrator Nason is automatically substituted as Defendant in place of former Deputy Administrator Hendrickson.

Plaintiff cites in support of its motion were present and known when it filed its complaint five months ago, and because Plaintiff has not alleged, much less demonstrated, any inconvenience or any circumstances that have changed since it filed the complaint, Plaintiff's motion should be denied and Plaintiff should be required to litigate in the forum it selected.

STANDARD OF REVIEW

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." 28 U.S.C. § 1404(a). "The ultimate inquiry" for a court "is a determination of where the case should proceed to achieve convenience of the parties and witnesses as well as to fulfill the ends of justice." Main Street NA Parkade, LLC v. Sleepy's LLC, No. CA 13-593, 2014 WL 652313, at *1 (D.R.I. Feb. 19, 2014) (citing Jackson Nat'l Life Ins. Co. v. Economou, 557 F.Supp.2d 216, 220 (D.N.H. 2008)). The moving party bears the burden of proving that a transfer is warranted. Tristar Products, Inc. v. Novel Brands, LLC, 267 F.Supp.3d 380, 382 (D.R.I. 2017); Brian Jackson & Co. v. Eximias Pharmaceutical Corp., 248 F.Supp.2d 31, 38 (D.R.I. 2003) ("movant must make a strong showing that transfer of venue is appropriate under the circumstances").

Relevant here, "[a]lthough § 1404 does not limit transfer motions to a defendant, a leading treatise has noted that '[i]t seems quite logical that the burden should be at least as heavy on a plaintiff who seeks to change the forum that he or she had selected as it is when the defendant is the moving party.'" Xtreme Industries, LLC v. Gulf Copper & Mfg. Corp., No. H-10-248, 2010 WL 4962967, at *5 (S.D. Tex. Dec. 1, 2010) (quoting 15 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3848, at 163 (3d ed. 2007)). Accordingly, in cases where a plaintiff moves to transfer under 28 U.S.C. § 1404(a) and "where the original venue is proper and unobjectionable to the defendant, it seems fair to require the

plaintiff to show some change in circumstances warranting overturning that plaintiff's own forum choice." Jennings v. Entre Computer Centers, Inc., 660 F.Supp. 712, 715 (D. Me. 1987); see also, Rappaport v. Steven Spielberg, Inc., 16 F.Supp.2d 481, 501 (D.N.J. 1998) (holding that plaintiff seeking to transfer must demonstrate a change in circumstance that has occurred since the filing of the action which warrants a change of venue); Cremin v. Canadian National Railway Corp., No. 84-8770, 1986 WL 4065, at *3 (S.D.N.Y. Apr. 3, 1986) ("a plaintiff moving for transfer under § 1404(a) has the burden of showing some change in circumstances since the action was filed in the transferor forum"); James v. Daley & Lewis, 406 F.Supp. 645, 648 (D. Del. 1976) ("before a court will grant a plaintiff's motion for a change of venue, he must first show a change in circumstances since the filing of his suit").

ARGUMENT

This motion presents the unusual case in which Plaintiff seeks a transfer from its own chosen home venue, made still more unusual by the Plaintiff's failure to articulate any satisfactory reason why this case should not proceed in the forum that it originally selected. The Plaintiff has failed to allege, much less demonstrate, that its chosen forum of the District of Rhode Island is inconvenient for any party or witness or presents any substantial hardship or unfairness. See McGlynn v. Credit Store, Inc., 234 B.R. 576, 582 (D.R.I. 1999); Braintree Laboratories, Inc. v. Bedrock Logistics, LLC, No. 16-11936, 2016 WL 7173755 at *3 (D. Mass. Dec. 8, 2016) (convenience of witnesses is probably the most important factor in considering a motion to transfer).[2] Furthermore, Plaintiff makes no attempt to explain why it initially chose the District of Rhode Island but now favors the District of Columbia. Having originally averred that

[2] As Plaintiff itself recognizes, "due to the fact that this is [as Plaintiff frames it] an APA case, 'neither the convenience of the parties and witnesses nor the ease of access to sources of proof weighs heavily in the analysis.'" Pl. Mot to Transfer (ECF No. 14), at 3, n. 2 (citing Pueblo v. Nat'l Indian Gaming Comm'n, 731 F.Supp.2d 36, 42 (D.D.C. 2010)).

"a substantial part of the events giving rise to the claim occurred in the District of Rhode Island," Compl. at ¶ 5, no doubt based on the fact that this case is brought by a Rhode Island Plaintiff concerning FHWA construction in Rhode Island, and complaining (albeit without legal basis) about the failure of the Tribe to obtain ownership of three parcels of property located within Rhode Island as mitigation for that construction, (see Compl. at ¶¶ 20-27), the Tribe now attempts to argue that "[t]he nexus to Rhode Island is attenuated at best." Pl. Mot. (ECF No. 14), at 4, n. 2.

Plaintiff has not alleged, however, and Defendant is unaware of, any circumstances that have changed since the filing of this action five months ago. See Jennings, 660 F. Supp. at 715; Moto Photo, Inc. v. K.J. Broadhurst Enters., Inc., No. 301-cv-2282-L, 2003 WL 298799, at *3 (N.D. Tex. Feb. 10, 2003) (citing Washington Public Utility Group v. U.S. District Court, 843 F.2d 319, 327 (9th Cir. 1987)); Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 (7th Cir. 1986); Haren-Christensen Corp. v. M.S. Frigo Harmony, 477 F. Supp. 694, 698 (S.D.N.Y. 1979); but cf. American Home Assurance Co. v. Glovegold, Ltd., 153 F.R.D. 695 (M.D. Fla. 1994) (rejecting "change of circumstances" requirement); Central Hudson Gas & Electric Corp. v. Empresa Naviera Santa, S.A., 769 F. Supp. 208, 209 (E.D. La. 1991) (same)). The only development that has occurred since Plaintiff filed this complaint is the Defendant's filing of a motion to dismiss, in which Defendant argues, among other grounds for dismissal, that this Court and the First Circuit have already determined that there is no jurisdiction to review the Tribe's challenges to the termination of the Programmatic Agreement. Def. Mot. To Dismiss (ECF No. 12), pp. 11-12; Narr. Indian Tribe v. RI Dep't. of Transp., C.A. No. 17-125 (D.R.I. Sept. 11, 2017) (a'ffd. Narr. Indian Tribe v. RI Dep't of Trans., 903 F.3d 26, 30 (1st Cir. 2018)). Plaintiff has therefore failed to make any showing, let alone one sufficient to meet its burden, as to why transfer at this stage of the litigation is warranted.

The U.S. Supreme Court has made clear that 28 U.S.C. § 1404 "should not create or multiply opportunities for forum shopping." Ferens v. John Deere Co., 494 U.S. 516, 523 (1990). "[W]here plaintiffs, rather than defendants, seek transfer, the prejudicial concerns necessarily differ. Indeed, forum shopping looks as the principal concern where plaintiffs seek transfer." Al Shimari v. CACI Int'l, Inc., 933 F.Supp.2d 793, 799 (E.D. Va. 2013) (citing Ferens, 494 U.S. 516). To that end, courts regularly deny transfer requests motivated by an effort to secure what is perceived to be a more favorable forum, and do not turn a blind eye to the movant's true motivations. See, e.g., Williams Advanced Materials, Inc. v. Target Tech. Co., 03-CV-276-A, 2007 WL 2245886, at *6 (W.D.N.Y. Aug. 1, 2007) ("While the motion is being made under the pretense that it is more convenient for the moving parties, the true motivation behind it is 'judge-shopping.'"). In this case, the only development since Plaintiff's original filing of this suit is the Defendant's motion to dismiss, and thus Plaintiff's request to transfer venue is likely motivated, at least in part, by a concern that the prior decision of this Court and the Court of Appeals may have preclusive effect on its efforts to renew a challenge to termination of the Programmatic Agreement. See Cohen v. Waxman, 421 F.App'x 801, 803-308 (10th Cir. 2010) ("Only now that [plaintiff] knows that he will lose in that forum does he seek another . . . Only a neutral reason – one not designed to favor one party over another – can justify a transfer.").

Plaintiff could have filed this action in the District of Columbia, but chose not to. A ruling allowing Plaintiff to transfer this case to a forum it now views as favorable, without any evidence of a change in circumstances, would serve to sanction the very behavior that § 1404 seeks to curtail. Plaintiff ignores the fact that it has twice previously chosen this Court as the proper venue to challenge the FHWA's actions, and it offers only vague and conclusory allegations supporting its contention that the District of Columbia is now somehow better suited to adjudicate its claims. Plaintiff thus has failed to meet its burden that a transfer of venue is

warranted or appropriate, and the Court should decline its request to transfer the case.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that the Court deny Plaintiff's Motion to Transfer Venue.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 26th day of August, 2019, I electronically filed the within Notice of Appearance with the Clerk of the United States District Court for the District of Rhode Island using the CM/ECF System. The following participants have received notice electronically:

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