

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WEST COAST FRANCHISING COMPANY : CIVIL ACTION  
vs. :  
DAVID H. STEVENSON : NO. 97-0288

MEMORANDUM AND ORDER

AND NOW, to wit, this 2nd day of February, 1998, upon consideration of defendant's Motion to Dismiss for Improper Venue and, in the Alternative, Motion to Transfer (Document No. 3, filed March 23, 1997), Defendant's Brief in Support of the Motion (Document No. 4, filed March 23, 1998), Plaintiff's Answer to Defendant's Motion to Dismiss for Improper Venue or, Alternatively to Transfer (Document No. 5, filed April 21, 1997), Plaintiff's Brief in Opposition to Defendant's Motion (Document No. 6, filed April 21, 1998), Affidavit of Don R. Thomas, Chief Operating Officer of West Coast Franchising Company in Opposition to Defendant's Motion (Document No. 7, filed April 21, 1998), and Reply Brief in Support of Defendant's Motion (Document No. 11, filed June 25, 1997), **IT IS ORDERED** that defendant's Motion to Dismiss for Improper Venue and, in the Alternative, Motion to Transfer is **DENIED**.

The denial of defendant's Motion to Dismiss for Improper Venue and, in the Alternative, Motion to Transfer is based on the following:

1. Plaintiff brought suit against defendant for non-payment of certain fees and/or royalties allegedly required under a Franchise Agreement between the parties. The Complaint recites that venue is based on 28 U.S.C. § 1391(a) and a forum selection clause contained in the Franchise Agreement;

2. Article XIII of the Franchise Agreement provides, inter alia, as follows:

This Agreement shall be construed according to the law of the Commonwealth of Pennsylvania and the parties consent to the exclusive jurisdiction of the state and/or federal courts located in the Commonwealth of Pennsylvania.

3. Defendant's franchise is located in the Northern District of California. Plaintiff is headquartered in Philadelphia, Pennsylvania, and the Agreement was executed on behalf of plaintiff at that location;

4. Generally, a forum selection clause is controlling on the parties absent a strong showing that it should be set aside as unreasonable. M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). A forum selection clause is unreasonable where the resisting party makes a strong showing that the forum thus selected is "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court or that the clause was procured through fraud or

overreaching." M/S Bremen, 407 U.S. at 18; Foster v. Chesapeake Ins. Ltd., 933 F.2d 1207, 1219 (3d Cir. 1991). In the absence of fraud, undue influence, or overweening bargaining power, forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances." M/S Bremen, 407 U.S. at 10, 15. See also Jumara v. State Farm Insurance Company, 55 F.3d 873 (1995);

5. Defendant has produced no evidence that the forum selection clause was procured through fraud or overreaching. Moreover, although the Eastern District of Pennsylvania is a less convenient forum for defendant who resides in the Northern District of California, defendant has failed to present evidence that the selected forum, Philadelphia, is so gravely difficult and inconvenient that he will, for all practical purposes, be deprived of his day in court; and,

6. The Court has analyzed the factors to be considered in transferring a case to another venue under 28 U.S.C. § 1404(a) "for the convenience of parties and witnesses, and the interest of justice . . . ." The facts presented lead the Court to conclude that plaintiff's witnesses and records are based in the Eastern District of Pennsylvania and defendant's witnesses and records are based in the Northern District of California. With the exception of plaintiff's choice of forum, the Eastern District of Pennsylvania, and the forum selection clause, the location of witnesses and records and the other factors normally considered in connection with a transfer request - public interest factors - do

not strongly favor either forum.

**IT IS FURTHER ORDERED** that defendant shall file and serve its Answer to the Complaint within twenty (20) days. A scheduling conference will be conducted in due course.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**