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6 AMANDA LOLLAR and BAT WORLD SANCTUARY

7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10
11 MARY CUMMINS

12 Plaintiff,

13 vs.

14 AMANDA LOLLAR aka BAT WORLD
15 SANCTUARY an individual person,
16 BAT WORLD SANCTUARY an
unknown business entity, JOHN DOES 1-
10

17 Defendants.

CASE NO. CV11 08081 DMG (MANx)

**REPLY OF DEFENDANTS AMANDA
LOLLAR AND BAT WORLD
SANCTUARY, INC. IN SUPPORT OF
MOTIONS TO DISMISS/TRANSFER
VENUE**

Date: December 12, 2011
Time: 9:30 a.m.
Ctrm.: 7

1 **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTIONS TO**
2 **DISMISS**

3 **I. INTRODUCTION**

4 Defendants filed two motions to dismiss. The first requested dismissal of this
5 action for improper venue, or in the alternative, transfer of this action to the Northern
6 District of Texas. The second sought to have this action dismissed based on the
7 doctrine of comity. Plaintiff’s belated single Opposition to Defendants’ two motions
8 fails to show why Defendants’ motions should be denied.

9 Unable to counter the showing in Defendants’ moving papers that venue in this
10 action is proper only in the Northern District of Texas, Plaintiff focuses on case law
11 discussing personal jurisdiction. Personal jurisdiction and venue, however, are two
12 separate animals. Even though one forum may have personal jurisdiction over a
13 defendant, that forum will not be proper venue unless the requirements of 28 U.S.C. §
14 1391 are met. As shown in Defendants’ moving papers, venue is not proper in the
15 Central District of California. Where, as here, Defendants have timely objected to
16 Plaintiff’s choice to file in the wrong venue, dismissal or an order transferring the case
17 to the proper venue, is mandatory.

18 Similarly, Plaintiff’s Opposition makes only a half-hearted attempt to oppose
19 Defendants’ motion to dismiss Plaintiff’s action based on the doctrine of comity.
20 Plaintiff does not dispute that the parties in this case are the same as the parties in a
21 case already pending in district court in the Northern District of Texas when Plaintiff
22 initiated this action. Plaintiff’s argument that the parties are not the same because they
23 are on different sides of the “v.” in the caption is nonsensical. Additionally, Plaintiff’s
24 argument that the parties are not the same because she has improperly named “doe”
25 defendants is also unavailing as discussed below. This action must be dismissed or
26 transferred to the United States District Court for the Northern District of Texas.

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1 **II. LEGAL ARGUMENT**

2 **A. The Central District Of California Is The Wrong Venue For This Action**

3 **1. Because All Defendants Reside In Texas, This Action Must Be**
4 **Litigated There**

5 The venue issue in this case is straightforward and simple. All named Defendants
6 reside in the same State: Texas. As such, pursuant to 28 U.S.C. § 1391(a)(1), the *only*
7 proper venue for this action is in a judicial district in Texas. Because both Defendants
8 reside in the Northern District of Texas, that specific judicial district is the only proper
9 venue for this action. 28 U.S.C. § 1391(a)(1).

10 Plaintiffs’ attempt to avoid this clear result by arguing that she has named Doe
11 defendants that she knows reside in states other than California or Texas is misguided
12 and unavailing. First, the Federal Rules of Civil Procedure do not recognize “doe”
13 defendants. “Doe” defendants are authorized in California state courts. See Code of
14 Civil Procedure §474. Plaintiff has not filed this action in California state court.

15 Second, even if “doe” defendants were recognized in Federal Court, Plaintiff’s
16 knowledge of the identity of these defendants – sufficient to state where they reside –
17 would mean that the defendants could not be considered “doe” defendants. The statute
18 authorizing the naming of “doe” defendants is clear that “doe” defendants can only
19 apply to persons or entities unknown to the Plaintiff. See C.C.P. Section 474. Thus,
20 Plaintiff’s claim that she believes that the “doe” defendants sued reside in states other
21 than California or Texas is based on pure speculation, and cannot be relied upon to
22 defeat Defendants’ Motion.

23 **2. Internet Postings On Passive Websites Are Insufficient For**
24 **Establishing Venue**

25 As anticipated in Defendants’ moving papers, Plaintiff argued in her Opposition
26 that venue is proper in the Central District of California, pursuant to Section
27 1391(a)(2), because Defendants posted their purportedly defamatory statements on
28 websites located in California, including Indymedia.org, YouTube.com, Yahoo.com,

1 Google.com, Blogger.com and Facebook.com. As pointed out in Defendants' moving
2 papers, postings on internet sites cannot constitute an act or transaction for the
3 purposes of establishing venue pursuant to Section 1391(a)(2), where as here, the
4 internet sites are passive sites. *Equidyne Corp. v. Does*, 279 F.Supp.2d 481, 489 (D.DE
5 2003). See also *Miller v. Asensio*, 101 F.Supp.2d 395, 406 (D.S.C. 2000) ("if posting
6 information on a website in New York was sufficient to permit venue in any district in
7 which a plaintiff accessed the website and read the posting, then logically venue could
8 lie in every state where a plaintiff resides or has access to a personal computer" and
9 finding that such a rule would eviscerate the protections afforded by the venue
10 statutes.")

11 Plaintiff's reliance on *3DO Co. v. Poptop Software, Inc.*, 1998 LEXIS 21281 is
12 unavailing because *3DO* does not discuss venue, it discusses personal jurisdiction only.
13 Additionally, the facts of the *3DO* case are completely different from the facts of this
14 case. In *3DO*, the plaintiff alleged that the defendant unlawfully appropriated code
15 from their copyrighted computer game for the purpose of creating another game.
16 Defendant were then alleged to have created a website that enabled residents of
17 California to download their pirated computer game. Here, by contrast Defendants are
18 alleged to have posted information on a blog. As the courts in *Equidyne Corp. v.*
19 *Does*, 279 F.Supp.2d 481, 489 (D.DE 2003) and *Miller v. Asensio*, 101 F.Supp.2d 395,
20 406 (D.S.C. 2000) have held, this type of passive activity is insufficient to establish
21 venue. Plaintiff's opposition, therefore, fails to show that venue is proper in the
22 Central District of California.

23 **3. Where, As Here, A Defendant Has Objected To Improper Venue,** 24 **Dismissal Or Transfer Is Mandatory**

25 Plaintiff does not challenge the showing in Defendants' Motion that where, as
26 here, a defendant challenges the wrong venue, the federal court ***must*** dismiss or
27 transfer the case to the federal court in the proper district upon a defendant's timely
28 objection. 28 U.S.C. § 1406 (a). *Johnson v. Payless Drug Stores Northwest, Inc.*, 950

1 F.2d 586, 588 (9th Cir. 1991) (Where venue is improper, an order of dismissal or
2 transfer is **mandatory**) (emphasis added). This Court must dismiss this action, or
3 alternatively, transfer it to the Northern District of Texas.

4 **B. This Action Should Be Dismissed Based On The Doctrine Of Comity**

5 Defendants' second motion to dismiss was based on the doctrine of comity. In
6 that motion, Defendants pointed out that they had previously initiated an action against
7 Plaintiff in district court in the Northern District of Texas based on the same issues
8 raised in Plaintiff's complaint. That lawsuit is still pending. Plaintiff does not deny
9 the existence of this lawsuit. Rather Plaintiff's Opposition simply argues that the
10 doctrine should not apply because the parties are on opposite sides of the "v." in the
11 caption. In other words, Plaintiff points out that she is a defendant in that action, and
12 that Defendants are plaintiffs in that action. This argument makes no sense.
13 Regardless of which parties are defendants or plaintiff, the fact remains, they are the
14 same persons and entities. Plaintiff does not argue otherwise.

15 Recognizing her inability to show that the Texas case is between different
16 parties than the instant case, Plaintiff claims that the "doe" defendants she named in
17 this action should defeat the doctrine of comity. This argument also fails. As noted
18 above, federal court does not recognize "doe" defendants. Even if it did, the existence
19 of these unidentified *potential* defendants cannot defeat Defendants' motion. It is too
20 speculative to be given credence.

21 Plaintiff argument that the doctrine of comity should not be applied because the
22 Texas action includes a cause of action for breach of contract is also wrong. Plaintiff
23 does not dispute that both the Texas action and the current action are allege claims for
24 defamation based on blog entries. The fact that one party may have an additional
25 claim does not alter the underlying nature of the action. Plaintiff was already litigating
26 against Defendants in a case pending in Texas. Plaintiff should have brought her
27 claims for relief in that case. As shown in Defendants' moving papers, Texas
28 recognizes each of the causes of action Plaintiff alleges in this case. Plaintiff's

1 decision to file a new suit in California was made for no other reason than to frustrate
2 Defendants and increase their attorneys' fees and costs. Plaintiff's action should be
3 dismissed.

4 **III. CONCLUSION**

5 Accordingly, and based on the foregoing, Defendants respectfully request that
6 the Court grant their motion to dismiss this action for improper venue and based upon
7 the doctrine of comity, or transfer this case to the United States District Court,
8 Northern District of Texas.

9
10 Respectfully submitted,

11 DATED: December 1, 2011

BRAGG & KULUVA

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13 By: /s/ Stephen M. MacPhail
STEPHEN M. MACPHAIL
14 Attorneys for Defendants
AMANDA LOLLAR and BAT WORLD
15 SANCTUARY
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PROOF OF SERVICE BY MAIL
(FRCivP 5(b)) or
(CCP 1013a, 2015.5) or
(FRAP 25(d))

I am employed with the law firm of BRAGG & KULUVA, whose address is 555 S. Flower Street, Suite 600, Los Angeles, California 90071. I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with BRAGG & KULUVA's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of BRAGG & KULUVA's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at BRAGG & KULUVA with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

**REPLY OF DEFENDANTS AMANDA LOLLAR AND BAT WORLD
SANCTUARY, INC. IN SUPPORT OF MOTIONS TO DISMISS/TRANSFER
VENUE**

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at BRAGG & KULUVA, 555 S. Flower Street, Suite 600, Los Angeles, California 90071, in accordance with BRAGG & KULUVA's ordinary business practices:

Mary Cummins
645 W. 9th Street #110-140
Los Angeles, CA 90015

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed this day, December 1, 2011, at Los Angeles, California.

/s/ Maria M. Cerros
Maria M. Cerros