IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

ALEX WALKER, Plaintiff, v. THREE ANGELS BROADCASTING NETWORK, INC., and TOMMMY SHELTON, Defendants.	)	No. 11 CV 4177 Judge Robert M. Dow, Jr. Magistrate Susan E. Cox

3ABN'S REPLY TO PLAINTIFF'S RESPONSE TO ITS MOTION TO DISMISS

Defendant Three Angels Broadcasting Network, Inc. ("3ABN") submits this reply in support of its motion to dismiss plaintiff Alex Walker's Complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3), and 12(b)(6). In the alternative, and only if the Court concludes federal subject matter jurisdiction exists, 3ABN asks for a transfer of venue under 28 U.S.C. § 1404 to the U.S. District Court for the Southern District of Illinois.

In addition to his brief in response to 3ABN's motion, Plaintiff filed a "Motion to Exclude Defendant [3ABN's] Declarations and Incorporated Memorandum of Law." (Docs. 16, 17.) 3ABN addresses Plaintiff's motion to exclude in a separate brief, and only replies here to Plaintiff's opposition to the motion to dismiss. In his opposition, Plaintiff argues that the motion should be analyzed solely under Rule 12(b)(6). But Seventh Circuit precedent draws a distinction between an argument asserting lack of subject matter jurisdiction based on the complaint's face, on the one hand, and based in fact, on the other. 3ABN argues both, invoking Rule 12(b)(1) and 12(b)(6) standards.

Next, Plaintiff argues that the complaint is sufficient under Rule 12(b)(6) standards. But the complaint falls short under Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), because

the allegations do not constitute an offense under the relevant statute. Allegations of "fondling" and "masturbation," without more, even accepting them as true, do not nudge the claims "across the line from conceivable to plausible" in stating the requisite skin-to-skin contact. See id. at 570. Also, Plaintiff misapplies precedent in arguing that the complaint sufficiently alleges that Defendant Tommy Shelton had the requisite intent under 18 U.S.C. § 2423. Plaintiff also argues that his § 2423 claim is not time-barred because of the "discovery rule." But the statute's plain language and Supreme Court precedent do not support applying such a rule.

Regarding venue, Plaintiff inappropriately relies on the catchall venue provision in 28 U.S.C. § 1391(b)(3). Section 1391(b)(3) does not apply, because there is another judicial district in which the action may be brought under § 1391(b)(2): the Southern District of Illinois. Thus, federal subject matter jurisdiction is lacking both in fact and on the face of the Complaint, venue is improper in the Northern District, and if subject matter jurisdiction is nevertheless found to exist, the case should be dismissed or transferred to the Southern District of Illinois for the convenience of the parties and witnesses.

I. Legal Argument Regarding Count IV.

A. Applicable Standards Regarding Count IV.

Plaintiff argues that 3ABN's motion must only be analyzed under Rule 12(b)(6) for failure to state a claim, and not under Rule 12(b)(1) because the motion is an indirect attack on the merits of his claims. (Pl.'s Opp'n 3-4.) But the Court should analyze the motion under both rules. 3ABN agrees, as stated in its motion, that the Court should utilize the equivalent of a Rule 12(b)(6) analysis when considering its argument that subject matter jurisdiction is *facially* absent. (Def.'s Br. 4.) But a Rule 12(b)(1) analysis applies to 3ABN's argument that subject matter jurisdiction is *in fact* absent, based on the materials filed with the motion. It is

appropriate to consider evidence outside the pleadings when conducting analysis under Rule 12(b)(1). Sapperstein v. Hager, 188 F.3d 852, 855-56 (7th Cir. 1999); Commodity Trend Serv. V. Commodity Futures Trading Comm'n, 149 F.3d 679, 685 (7th Cir. 1998). Plaintiff has the burden of establishing subject matter jurisdiction by competent proof, and he has failed to meet this burden. The documents indicate that there is in fact no subject matter jurisdiction over Plaintiff's claims because there is no federal claim.

B. Plaintiff Fails to Allege a Mann Act Claim Under 18 U.S.C. § 2423.

Plaintiff contends that he has sufficiently alleged a Mann Act claim under § 2423(b).[1] He first argues that he has stated a claim under § 2423(b) because he has alleged "sexual abuse" that consisted of "mutual fondling, masturbation, and Tommy Shelton grinding his naked body against [Plaintiff] until he ejaculated," and 3ABN is attempting to "split hairs" by arguing that the allegations "may not refer to conduct of a sexual nature or with Plaintiff's sexual organs at all." (Pl.'s Opp'n 6 (quoting Compl. ¶ 19).) Plaintiff's allegations do not state a claim.

Plaintiff mistakenly sets forth the pre-*Twombly* standard that "[a] complaint may not be dismissed unless it is impossible for the Plaintiff to prevail under any set of facts that could be proved consistent with the allegations." (Pl.'s Opp'n 4-5 (quoting Valle v. City of Chicago, 982 F. Supp. 560, 563 (N.D. Ill. 1997).) The Supreme Court has stated that "this famous observation [from Conley v. Gibson, 355 U.S. 41 (1957)] has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007). Rather, a complaint must allege sufficient "facts to state a

[1] Plaintiff takes issue with 3ABN's description of Count IV as a "Mann Act" claim. (Pl.'s Opp'n 2 n.1.) 3ABN refers to Count IV as a Mann Act claim for ease of reference, similar to other courts. See, e.g., United States v. Cole, 262 F.3d 704, 706 (8th Cir. 2001). Such reference merely acknowledges that § 2423 expands on the protections to minors originally contained in the Mann Act, and is not meant to convey that it was part of the original Mann Act. United States v. Garcia-Lopez, 234 F.3d 217, 220 n.3 (5th Cir. 2000) ("Section 2423 evolved from the same legislative initiative as the Mann Act, and both are components of the same general legislative framework.").

claim to relief that is plausible on its face." Id. at 570. The complaint's allegations must "plausibly suggest[] (not merely [be] consistent with)" entitlement to relief because of Fed. R. Civ. P. 8's "threshold requirement" that a plaintiff's "'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" Twombly, 550 U.S. at 557. Facial plausibility requires a plaintiff to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). If the alleged facts "do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'" the plaintiff is entitled to relief. Id. at 1950. A complaint that contains allegations that are "merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility." Id. (quoting Twombly, 550 U.S. at 557). Determining plausibility is a "context-specific task." Id. A court may take into consideration whether there are "obvious alternative explanation[s]." Twombly, 550 U.S. at 567. An allegation of conduct not statutorily prohibited "without some further factual enhancement . . . stops short of the line between possibility and plausibility." Id. at 557. Plaintiff's complaint falls shy of crossing the plausibility line because it doesn't expressly allege skin-to-skin contact with Plaintiff's genitals.

A civil claim under § 2423(b) must be based on "illicit sexual conduct." Plaintiff concedes that the applicable definition of "illicit sexual conduct" (by way of § 2423(f)) comes from 18 U.S.C. § 2246(2)(D): "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." (Pl.'s Opp'n 5-6.) To state a claim, therefore, it must be plausible, not merely possible, that Defendant Shelton touched Plaintiff's genitals "not through the clothing." But possibility is all the Plaintiff alleges.

He argues that it suffices for the complaint to allege that there was "'sexual abuse [that] included mutual fondling, masturbation, and Tommy Shelton grinding his naked body against [Plaintiff] until he ejaculated.'" (Pl.'s Opp'n 6 (quoting Compl. ¶ 19).) But these actions, without more, are not prohibited by the Mann Act. See United States v. Hayward, 359 F.3d 631, 641 (3d Cir. 2004) (Mann Act requires intentional, skin-to-skin contact); United States v. Starr, 486 F. Supp. 2d 940, 947 (N.D. Iowa 2007) (holding that § 2246(2) "does not include masturbation in its definition of a 'sexual act'"), aff'd, 533 F.3d 985 (8th Cir. 2008); Anderson v. Cornejo, 199 F.R.D. 228, 258-59 (N.D. Ill. 2000) (referring to fondling as touching over clothing of various areas of the body). Plaintiff asks the Court to help along its allegations and nudge them across the line from mere possibility to plausibility by inferring that Shelton touched Plaintiff's genitals "not through the clothing." But such an inference is not reasonable given Congress's specific distinction between a "sexual act" (skin-to-skin contact with genitals prohibited by § 2423 by way of § 2246(2)(D)) and "sexual contact" (defined by § 2246(3) as not requiring skin-to-skin contact, and which is not prohibited by § 2423). "[O]nce a claim has been stated adequately, [then] it may be supported by showing any set of facts consistent with the allegations in the complaint," but not before. Twombly, 550 U.S. at 563. Plead facts must be more than merely consistent with a defendant's liability. Iqbal, 129 S. Ct. at 1949. But here, the plead facts suggest that Plaintiff was clothed during the alleged sexual activity, and that there was no skin-to-skin contact with Plaintiff's genitals. Plaintiff alleges that Shelton was "naked" (during "grinding") but fails to mention his own state of dress. By alleging activities ("fondling" and "masturbation") that do not necessarily imply skin-to-skin contact with Plaintiff's genitals, coupled with the allegation that Shelton was "naked," the only reasonable inference that can be drawn is that Plaintiff was clothed. There is simply nothing to support an inference that

Shelton's acts involved him touching Plaintiff's unclothed genitals. Plaintiff has failed to allege an act that could be found to violate the Mann Act. Subject matter jurisdiction is not evident from the face of the complaint.[2]

C. The Complaint Fails to Adequately Allege Purpose.

Plaintiff also argues that he sufficiently alleged that Shelton crossed state lines for the purpose of illicit sexual conduct prohibited by § 2423 because, according to him, he need only plead "one illicit motive" under Seventh Circuit precedent. (Pl.'s Opp'n 7.) Plaintiff states that United States v. McGuire, 627 F.3d 622 (7th Cir. 2010), is dispositive, but Plaintiff misreads the case. McGuire *is* significant, but the case supports dismissal here, not plaintiff's argument. McGuire went beyond the "dominant purpose" test in United States v. Vang, 128 F.3d 1065 (7th Cir. 1997). The McGuire court noted that "dominant" is not a statutory requirement, and concluded that when construing the "for the purpose of" language in § 2423 where a dual purpose for travel may be present, a court's analysis should focus on "whether, had a sex motive not been present, the trip would not have taken place or would have differed substantially." McGuire, 627 F.3d at 625. The defendant in McGuire chose specifically to travel across state lines to give retreats, but he chose to bring male assistants as part of his manner of travel. Id. at 623. The court's point was that the defendant tailored his travel to include young males for illicit sexual purposes; they were not necessary, and the defendant would have travelled without them but for the purpose of illicit sexual purposes. See id. at 625-26. That is not what we have here.

The complaint alleges that Shelton was working at 3ABN in Illinois in 2001, and plaintiff later began working there as well. (Compl. ¶¶ 15-18). Plaintiff alleges that Shelton "discovered" plaintiff and "resumed" abusing him. (Compl. ¶ 17). The allegations have nothing

[2] Plaintiff asks leave to amend the complaint. (Pl.'s Opp'n 5 n.3.) The Court should deny the request because it would not cure the other issues, i.e., that Count IV is time-barred, venue is improper and the documents attached to 3ABN's motion to dismiss show that there is no subject matter jurisdiction in fact.

in common with the defendant in McGuire. There are no allegations that Shelton modified his travel in any way, or that he made special arrangements to meet Plaintiff. In short, the complaint alleges that Shelton travelled across state lines to go to work. Again, the test set forth in McGuire is "whether, had a sex motive not been present, the trip would not have taken place or would have differed substantially." 627 F.3d at 625. The only reasonable inference that can be drawn is that Shelton crossed state lines to get to work, and the alleged victim happened to be at Shelton's place of employment too. That does not plausibly state a claim under § 2423(b). See McGuire, 627 F.3d at 625 (analogizing that where a businessman has only one assistant, young and beautiful, and for business reasons needs her to come on a business trip, and he "hopes that he might have sex with her on the trip, yet he would have made the same trip, taking her with him, even if he had had no such designs" then "sex would not have been the purpose of the trip with her, but a possible bonus that could however have played no part in his decision to take the trip"); see also Hansen v. Huff, 291 U.S. 559, 563 (1934) ("if the purpose of the journey was not sexual intercourse, though that be contemplated, the statute is not violated"). Count IV fails to state a facially plausible claim and must be dismissed.

D. Count IV Is Time-Barred as a Matter of Law.

Next, Plaintiff argues that his Mann Act claim is timely. (Pl.'s Opp'n 8.) But he does so by invoking the "discovery rule," and concedes that but for the application of the discovery rule, his Mann Act claim is untimely. The statute of limitations for a civil Mann Act claim is provided by 18 U.S.C. § 2255(b): "Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability." The discovery rule is that accrual occurs when a plaintiff discovers "he has been *injured* and who *caused* the

injury." Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004) (internal quotation marks omitted). The question here is whether the discovery rule applies to § 2255(b) involving a federal claim based on alleged sexual abuse of a minor. It does not. Given the plain language of the statute, the Supreme Court's extremely limited application of the discovery rule, and wording of analogous federal statutes that expressly incorporate the discovery rule, the discovery rule should not be read into § 2255(b).

The Supreme Court has made clear that it is not true that federal statutes of limitations incorporate a general discovery rule unless Congress expressly states otherwise. TRW Inc. v. Andrews, 534 U.S. 19, 27-28 (2001). So there is no presumption that the discovery rule applies. The general rule, not the discovery rule, is that "the limitations period commences when the plaintiff has a 'complete and present cause of action.'" Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997) (quoting Rawlings v. Ray, 312 U.S. 96, 98 (1941)). A cause of action becomes "complete and present" when "the plaintiff can file suit and obtain relief." Id.

Here the statute uses the words "within six years after the right of action first accrues." 18 U.S.C. § 2255(b). In Rawlings, the Supreme Court construed a state statute with the words "after the cause of action shall accrue." Rawlings, 312 U.S. at 98. The Court stated that the words "after the cause of action shall accrue" referred to "a complete and present cause of action," which was the phrase's "usual meaning." Id. Under this rule, "'[t]he cause of action accrues even though the full extent of the injury is not then known or predictable.'" Wallace v. Kato, 549 U.S. 384, 391 (2007) (quoting 1 C. Corman, Limitations of Actions, § 7.4.1, at 526-27 (1991)). This is because, otherwise, the limitations period would begin only when a plaintiff concluded he had been harmed enough. Id. Moreover, "'[t]hat a person entitled to an

action has no knowledge of his right to sue, or of the facts out of which his right arises, does not postpone the period of limitation.'" TRW, 534 U.S. at 37 (Scalia, J., concurring) (quoting 2 H. Wood, Limitation of Actions § 276c(1), p. 1411 (4th ed. 1916)).

Section 2255(b) uses the words "within six years after the right of action first accrues." Thus, the general rule applies and the six-year limitations period commences for § 2255(b) when plaintiff had "a complete and present cause of action," i.e., when he could have filed suit and obtained relief. To have a complete and present cause of action, a plaintiff must have standing, which requires that the plaintiff have suffered an "injury in fact." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). An injury in fact requires "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." O'Sullivan v. City of Chicago, 396 F.3d 843, 854 (7th Cir. 2005). Ordinarily the statute of limitations begins to run when a defendant has invaded a legally protected interest of the plaintiff. Steele v. United States, 599 F.2d 823, 826 (7th Cir. 1979). Although Plaintiff alleges that only in 2009 did he become aware of emotional and psychological injuries as a result of Shelton's alleged actions (Compl. ¶ 48), that does not mean there was not an injury in fact prior to that time.

The focus of § 2255 is that a person may bring a civil claim for damages due to an alleged violation of § 2423. Section 2423(b) prohibits crossing state lines for the purpose of engaging in certain illicit sexual conduct. There was injury to Plaintiff when Shelton allegedly engaged in illicit sexual conduct. There is a presumption of resulting injury from sexual abuse. See Clay v. Kuhl, 727 N.E.2d 217, 222 (Ill. 2000); Doe v. Montessori Sch. of Lake Forest, 678 N.E.2d 1082, 1089 (Ill. App. Ct. 1997) ("when an adult engages in unwanted touching . . . an injury occurs"); see also Hollander v. Brown, 457 F.3d 688, 693 (7th Cir. 2006) (Illinois law

presumes there is an injury from "unwanted touching"). Accordingly, Plaintiff is deemed to have suffered an injury in fact when the abuse allegedly occurred in 2001, causing the claim to accrue at that time, and not beginning in 2009 when he "discovered" certain alleged emotional and psychological injuries.

Presumed resulting injury aside, Plaintiff expressly alleges that Shelton "inflicted harmful and offensive sexual contact" and "sexual assault and battery . . . [that was] offensive and harmful" in 2001. (Compl. ¶¶ 35-36.) And he alleges that Shelton created "a reasonable fear of imminent peril and sexual assault." (Compl. ¶ 34.) There is no requirement that Plaintiff know the full extent of his injuries, or know of a right to sue before the limitations period begins. See Wallace, 549 U.S. at 391; TRW, 534 U.S. at 37 (Scalia, J., concurring). Plaintiff's allegations of harmful and offensive touching that created fear of "imminent peril and sexual assault" constitute an invasion of a legally protected interest of which Plaintiff was aware. Plaintiff had a complete and present cause of action in 2001 because he could have filed suit when the alleged abuse occurred.

As stated above, the Supreme Court has expressly stated that the discovery rule is not automatically read into federal statutes unless Congress states otherwise. TRW, 534 U.S. at 27-28. Where Congress has codified the discovery rule, it has done so by writing the word "discovery" in the statute itself. See 15 U.S.C. § 77m (claim timely if "brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . ."); 18 U.S.C. § 1030(g) (must bring action "within 2 years of the date of the act complained of or the date of the discovery of the damage"); 28 U.S.C. § 1658(b) (timely if filed no more than "2 years after the discovery of the facts constituting the violation"); 29 U.S.C. § 1451(f) (ERISA action timely filed only if

not brought later of "(1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge . . . of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action"); 42 U.S.C. § 9612(d)(2) (claim timely if "claim is presented within 3 years after . . . [t]he date of the discovery of the loss"); Merck & Co., Inc. v. Reynolds, 130 S. Ct. 1784, 1794-96 (2010) (applying discovery rule to 28 U.S.C. § 1658(b) in large part because of Congress's use of the word "discovery" in statutory wording). "Discovery" is not in § 2255(b).

When Congress enacts a statute, it is presumed to be generally aware of relevant precedent. Merck, 130 S. Ct. at 1788. Historically, § 2255(b) was enacted in 1986, well after federal courts began recognizing a discovery rule in limited circumstances.[3] But Congress did not incorporate a discovery rule into the statute's wording. Under the clear terms of the statute, and based on allegations in the Complaint itself, Plaintiff's claim for an alleged violation of § 2423 was untimely after 2007. The claim is therefore time-barred, and must be dismissed.

II. The Case Must Be Dismissed For Improper Venue.

Plaintiff also fails to show why the case should not be dismissed for improper venue. See Dong v. Garcia, 553 F. Supp. 2d 962, 964 (N.D. Ill. 2008) (burden on plaintiff to establish venue is proper). Plaintiff concedes that venue in the Northern District of Illinois is not proper under 28 U.S.C. § 1391(b)(1), because not all the defendants reside in the same state. (Pl.'s Opp'n 11.) But in order to invoke the catchall venue provision of § 1391(b)(3) to argue that venue is proper in the Northern District, Plaintiff brushes past § 1391(b)(2).

[3] See, e.g., United States v. Kubrick, 444 U.S. 111, 120 & n.7 (1979) (medical malpractice cases); Urie v. Thompson, 337 U.S. 163, 169-72 (1949) (latent disease).

Section 1391(b)(3) is a catchall provision that applies only if §§ 1391(b)(1)-(2) do not apply. See Weiss v. Credit Suisse First Boston, No. 03-C085, 2003 WL 115252, at *1 (N.D. Ill. Jan. 10, 2003); McDowell v. Ham, No. 4:11-cv-220, 2011 WL 2560342, at *2 (N.D. Fla. May 23, 2011) (concluding that § 1391(b)(3) was inapplicable "because that provision is only applicable when there is no district in which the action may otherwise be brought," and the lawsuit could have been brought in district where the events occurred); 14D Charles Alan Wright et al., Federal Practice and Procedure § 3806.2 (3d ed. 2011) (stating that § 1391(b)(3) is a "safeguard or fallback" provision that can only be used "when, and only when . . . any other applicable venue statutes, fail to make any judicial district an acceptable venue"). So we turn back to § 1391(b)(2), and doing so reveals the flaws of Plaintiff's argument.

Plaintiff argues that § 1391(b)(2) is not applicable, because it requires a "single judicial district" in which a substantial part of the acts and omissions gave rise to the claims, and here, alleged acts occurred in more than one district. (Pl.'s Opp'n 11.) He provides no authority or explanation for arguing that § 1391(b)(2) requires that there can only be one judicial district where the acts "may be isolated" before venue is proper under (b)(2). (Pl.'s Opp'n 11.) Nor could he. The plain language of § 1391(b)(2) has no such requirement. Section 1391(b)(2) states that a party may bring an action in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." "The test is not whether a majority of the activities pertaining to the case were performed in a particular district, but whether a substantial portion of the activities giving rise to the claim occurred in the particular district." Truserv Corp. v. Neff, 6 F. Supp. 2d 790, 792 (N.D. Ill. 1998) (noting that a "substantial part" of the events can occur in more than one district). None of the alleged events occurred in the Northern District, and Plaintiff does not allege or argue so. But a substantial part of the alleged events *did*

allegedly occur in the Southern District of Illinois. Because there is a district where the action may be brought—the Southern District by way of § 1391(b)(2)—then the catchall venue provision of § 1391(b)(3) is inapplicable, and Plaintiff's arguments regarding whether 3ABN is subject to personal jurisdiction in the Northern District are irrelevant. The case must be dismissed for improper venue.[4]

III. If No Dismissal on Other Grounds, Venue Should Be Transferred.

If the Court determines that venue is proper in the Northern District, the case should be transferred to the Southern District of Illinois for the convenience of the parties and witnesses and in the interest of justice. The Chicago area has absolutely no connection to this lawsuit: Not one single alleged act giving rise to the claims occurred there, and not one single witness or party can be found there; not even the *Plaintiff* resides there. Although Plaintiff failed to list his address, the Pusey Declaration (Doc. 12) indicates he lives in Oblong, IL. Thus, Plaintiff's travel time to Chicago (5 hours) would be more than 2.5 times greater than his travel time to Benton, IL (2 hours, 20 min.). 3ABN supplied a list of witnesses, all of whom are found in the Southern District, as is 3ABN itself. Finally, according to his Answer (Doc. 13), Tommy Shelton lives in Meridian, MS; thus the Southern District is clearly more convenient for him than the Northern District. Clearly, Plaintiff's selection of the Northern District was nothing more than an exercise of forum shopping.

Plaintiff argues that his choice of forum must be given substantial weight. (Pl.'s Opp'n 12 (citing Morton Grove Pharmaceuticals, Inc. v. National Pediculosis Association, 525 F. Supp. 2d 1039 (N.D. Ill. 2007).) But he omits to mention the next proposition in Morton Grove: "A

[4] Plaintiff's request to conduct discovery on venue should be denied. (See Pl.'s Opp'n 12 n.6.) The venue analysis would be altered by additional discovery only if facts were uncovered showing that "a substantial part of the events or omissions giving rise to the claim" occurred in the Northern District. 28 U.S.C. § 1391(b)(2); (See Pl.'s Opp'n 12 n.6.). Plaintiff has already alleged precisely where the events or omissions giving rise to the claim occurred: 3ABN's headquarters in the Southern District of Illinois.

plaintiff's choice of forum is afforded less deference, however, when another forum has a stronger relationship to the dispute or when the forum of plaintiff's choice has no significant connection to the situs of the material events." 525 F. Supp. 2d at 1044. Plaintiff's choice here carries little weight given that the Northern District has no connection to any of the material events, and the Southern District is where the alleged 2001 abuse occurred and where 3ABN was allegedly negligent. Robinson v. Madison, 752 F. Supp. 842, 847 (N.D. Ill. 1990) (plaintiff's choice has "minimal value" when alleged conduct and events did not occur in selected forum).

Also, Plaintiff argues that "[v]ague generalizations about the nature of [witnesses'] testimony will not suffice." (Pl.'s Opp'n 13 (citing Moore v. AT&T Latin Am. Corp., 177 F. Supp. 2d 785, 790).) But Moore, in referencing "vague generalizations," was referencing Kafka v. Bellevue Corp., No. 90C6709, 1991 WL 49619, *3 (N.D. Ill. Apr. 1, 1991), where the defendant didn't identify material witnesses or refer to the subject matter of their testimony. That is not what we have here. 3ABN provided a list of material witnesses, stated their counties of residence, and gave a basic description of the subject matter of what they can testify to. (Gilley Decl. ¶¶ 3-4); Moore, 177 F. Supp. 2d at 791 (granting transfer of case, concluding that defendant met burden where it provided a list of witnesses, gave place of residence, and "basic description" of testimony).

Plaintiff also argues that 3ABN "fails to demonstrate how venue in the Southern District is any more convenient for the non-party witnesses Plaintiff expects will be identified in discovery who reside in Virginia." (Pl.'s Opp'n 13.) Hypothetical witnesses should not be considered in connection with this motion. See Moore, 177 F. Supp. 2d at 790.

The power to compel and the ease and expense of obtaining participation of witnesses favors the Southern District. See Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd., 776 F. Supp.

1271, 1277 (N.D. Ill. 1991) (concluding that "the presence of third party witnesses outside the subpoena power of [the] court . . . weighs heavily in favor of transferring"). All known and identified witnesses reside in the Southern District. (See Gilley Decl. ¶¶ 3-4.) Plaintiff's final argument, that the public interest does not favor transfer, is hollow. (Pl.'s Opp'n 13.) 3ABN's programming is available in Chicago to the same extent as in Nome, Alaska—premium satellite channels and Internet only. The only community in Illinois with an interest in the lawsuit is in the Southern District, where 3ABN resides.

CONCLUSION

For the reasons stated herein, 3ABN asks for dismissal of this case. Only if the Court concludes it has subject matter jurisdiction, 3ABN asks for transfer to the U.S. District Court for the Southern District of Illinois.

Respectfully submitted,

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