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April 27, 2022

Via ECF

Hon. Naomi Reice Buchwald, U.S.D.J.
United States District Court, S.D.N.Y.
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Courtroom 21A
New York, NY 10007-1312

Re: Request to Move for Summary Judgment on Replevin Claim / Change of Venue
Case No.: 1:21-cv-01791(NRB)—*Rachel Filsoof v. Andrew J. Cole*
Client No: 1272-1001

Dear Judge Buchwald:

Plaintiff seems to continually misapprehend the Court's rules, the local rules and the Federal Rules of Civil Procedure, notably, as they relate to the length of submissions. Nothing could be more flagrant than Plaintiff's discovery motion that, if formatted as required by this Court covered pages more than 100 pages in excess of the page limit. Plaintiff continued her pattern of flouting the Court's rules in submitting a response that exceeded the page limit by 25%. See Rule 2(B) of Your Honor's individual rules of practices.

Plaintiff also seems to have missed the purpose of Defendant's submission which was for a pre-motion conference as required by these rules. This issue will be fully briefed when a full motion is submitted, and a proper record is made. We do not intend to litigate these important issues by letter motion that may or may not provide a full record to the Circuit if it is needed. The last time that occurred, Plaintiff impermissibly moved by letter motion for substantive relief, and conceded that certain discovery was relevant. This partial briefing required full briefing in a proper motion via motion for reconsideration.

With respect to replevin, the authority pointed to by Plaintiff is distinguishable even from her quote. The copyright was intertwined with the rest of the issues. Plaintiff admits that the only commonality between the issues is the same parties. With regard to the context-free exhibits provided by Plaintiff, if that is all she has (which it is, unless Plaintiff has withheld yet more discovery than has already been uncovered), then there is going to be no need for a jury on this issue. The Court will note that "donating things to one's children" (ECF 213-2)—not Plaintiff, if even arguably a gift to someone does not fulfill the primary element of Plaintiff's defense—intent on the part of the donor to make a present transfer to the donee. See Gruen v. Gruen, 68 N.Y.2d 48, 53 (1986). There can be no gift to Plaintiff if the intent was to give the items to someone else (especially because Plaintiff has no children). Id.

Furthermore, Plaintiff's only other example attempts to ignore context (ECF 213-1). Not only does she not notice that that very email was submitted with Defendant's papers, but she willfully curates out the portion where she promises to return the replevin items. Comparing Exhibit "A" to ECF 211 (exhibit Defendant's letter motion, emailed to chambers and not posted to the docket) with ECF 213-1 (Plaintiff's response), will confirm the self-serving omission. Indeed, Plaintiff's reliance on Defendant's

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plea for Plaintiff to not break up with him as intent to part with his things reflects the thinness of her defense. Further eroding it is the fact that she actually returned the jewelry box and admits that fact at her deposition. See Exhibit "A" to ECF 211. The actual return of one of the enumerated items confirms there was no intent to provide a gift of any of the items and there was no acceptance.

Finally, the passage of time between Plaintiff's examples that they are still discussing the return of the replevin items reflects an absence of an intent to make a gift of the replevin items and the absence of the final element of an inter vivos gift, acceptance by the donee. See Gruen, 68 N.Y.2d at 53. Not anywhere in any of these correspondences does Plaintiff accept anything. In contrast, she avers an intent to return them. See Exhibits "A" through "C" to ECF 211 (emailed to chambers), *e.g.*, Exhibit A at 1, an April 1, 2020 email from Plaintiff to Defendant stating, "Whenever I get to NY I'll contact you about your guitars and jewelry box and we can figure out how to get them back to you.").

Accordingly, severing this claim will pare down the issues and be an efficient use of resources. Plaintiff has now shown her cards with respect to her gift defense, and as a matter of law, it fails. Accordingly, the Court could, and should, order return of those items on this pre-motion record alone, since summary judgment on the heightened gift standard is already warranted in favor of Defendant.

With regard to venue, Plaintiff appears to hope to try this case by deposition transcript. When this motion is fully briefed, it will become apparent how few of the witnesses are in New York and how the vast majority are in California. Even more are outside of New York including Plaintiff who considers herself a citizen, as certified under penalty of perjury, not of New York, but, according to her impermissibly redacted tax returns, of Georgia. Not a single party is a citizen of New York.

The bottom line is that this case should have never been in New York. Venue has always been in dispute. See ECF 34 at ¶¶ 6-20; 116. The only forum shopping that has been done has been by Plaintiff in filing here. This is not a complicated case and there is not a whole lot that a California judge would have to do to get up to speed. Moreover, the vast majority of the facts, witnesses and evidence are in California. Defendant has not asked that the Court not resolve its current motions. This motion must be briefed and decided which will take time. Moreover, the Court just decided many of them. ECF 215.

Plaintiff's authority with regard to change of venue is moribund. In those cases, the change was sought when both Districts were proper. See e.g. Am. Eagle Outfitters, Inc. v. Tala Bros. Corp., 457 F. Supp. 2d 474 (S.D.N.Y. 2006). Here, the Southern District of New York is and always has been improper and the contact that Defendant once had with New York, a meritless criminal charge, is now gone. Still, even using the standard enumerated in Tala Bros., venue should still be permissively transferred. It should be noted that "exceptional circumstances" is not the standard. As discussed by the Tala Bros. Court:

> Courts in the Second Circuit consider numerous factors in determining the balance of convenience and fairness on a motion to transfer including: (1) the **locus of the operative facts**; (2) convenience of the parties; (3) the **convenience of the witnesses**; (4) the location of relevant documents and relative ease of proof; (5) **the relative means of the parties**; (6) **the availability of process to compel attendance of unwilling witnesses**; (7) a forum's familiarity with the governing law; (8) the weight accorded to plaintiff's choice of forum; and (9) trial efficiency **and the interests of justice based on the totality of the circumstances**.

Id. at 477 (emphasis added).

Under this construct, as Plaintiff concedes, "the balance is strongly in favor of Defendant." While we are not going to spend the time going through the witness list until full briefing, Plaintiff cannot deny that most are in California, and very few are in New York. The convenience of the witnesses necessitate a move. Moreover, as discussed, the means of the parties necessitates a movement to California. Plaintiff is being financed by her mother and owns a third interest multi-million-dollar property; Defendant is being financed by someone with no stake in the outcome who could withdraw support at any time (which is what Plaintiff hopes, leaving Defendant defenseless). The locus of facts are in California as discussed previously. Compulsion of unwilling witnesses also necessitates a move. Finally, in light of the lack of contacts with New York on the part of the Defendant, the fact that Plaintiff is a citizen of Georgia, etc., the totality of the circumstances necessitates transfer.

Plaintiff cannot now cry waste of resources after submitting such an irresponsible discovery motion that far exceeds any permissible page limit. Given the change of circumstances, *e.g.*, that there is no pending criminal charge against Defendant and the District Attorney's office has opted to neither reargue nor appeal, this application reflects confirmation of what was muddy previously, that this case has no business in the Southern District of New York and should either be dismissed or moved to where it belongs, California.

Respectfully submitted,

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By: _____
Daniel J. Schneider