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

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

BRIEF SUPPORTING DEFENDANT THREE ANGELS' MOTION TO DISMISS

Defendant Three Angels Broadcasting Network, Inc. ("3ABN") moves 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, 3ABN seeks a transfer of venue under 28 U.S.C. § 1404 to the U.S. District Court for the Southern District of Illinois.

INTRODUCTION

Federal subject matter jurisdiction for this case is founded solely on Count IV of the Complaint, directed only at defendant Tommy Shelton, which alleges he crossed state lines to engage in illicit sexual conduct in violation of the Mann Act, 18 U.S.C. § 2423. As to the remaining claims, plaintiff alleges supplemental jurisdiction under 28 U.S.C. § 1367(a). A § 2423 claim, however, covers only defined "sexual acts." 18 U.S.C. § 2423(f). Plaintiff does not accuse Shelton of performing any act that is within the scope of § 2423. 3ABN contends both that subject matter jurisdiction is *facially* absent, based on the allegations of the Complaint if assumed to be true, and that subject matter is *in fact* absent, based on declarations submitted herewith describing in more detail the sexual abuse plaintiff claims to have suffered. See United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2002).

Further, the Mann Act claim is time-barred. Count IV is thus deficient on its face and in fact, does not state a cognizable claim, and cannot serve as the basis for this Court's exercise of subject matter jurisdiction. As there is no other claim that would support the exercise of federal jurisdiction, the entire case must be dismissed under Fed. R. Civ. P. 12(b)(1). Improper venue is an independent basis for dismissal. The Northern District of Illinois is not a proper venue under 28 U.S.C. § 1391(b)(1)-(3). Dismissal is mandated. Finally, if the case is not dismissed for the reasons argued above, a transfer to the U.S. District Court for the Southern District of Illinois under 28 U.S.C. § 1404 is appropriate for the convenience of parties and witnesses.

FACTS

Plaintiff alleges that he was the victim of two separate episodes of sexual abuse by defendant Tommy Shelton, which occurred four years apart. The first alleged episode occurred in 1997 in Virginia, when Walker was eleven years old. (Compl. ¶¶ 12-13). The claimed 1997 abuse consisted of "numerous" incidents of "mutual masturbation." (Compl. ¶ 13).

The second episode of claimed abuse occurred in 2001, when Shelton, though living in Kentucky, was employed by 3ABN in Illinois. (Compl. ¶¶ 14-19). In 2001, plaintiff—then fifteen years old—took a part-time job at 3ABN. (Compl. ¶ 17). He alleges that Shelton "traveled between Kentucky and Illinois using means of interstate commerce, with the purpose and intent of sexually abusing [plaintiff], for approximately one year." (Compl. ¶ 19). Plaintiff says the abuse consisted of "mutual fondling, masturbation, and Tommy Shelton grinding his naked body against Alex Walker until he ejaculated." (Id.).

The civil Mann Act claim, Count IV of the Complaint, arises only from the alleged 2001 abuse. (Compl. ¶ 48). Plaintiff alleges that although the conduct occurred in 2001, he "did not become aware that he had suffered psychological and emotional injuries arising from the acts

and conduct of Tommy Shelton until 2009." (Compl. ¶ 48). He says that 2009 is when he sought psychological help. (Id.). He attributes the delay in making "a causal connection between his injuries and the sexual acts and other misconduct" of Shelton to "various coping mechanisms." (Compl. ¶ 49).

Because federal courts are duty-bound to police their jurisdictional limits, this Court has authority to examine facts outside the Complaint in order to satisfy itself that subject matter jurisdiction exists. 3ABN submits for the Court's consideration an account of Walker's report of abuse to authorities on December 5, 2008, and a summary of his allegations prepared by Virginia authorities. (Decl. of Police Chief Chad E. Pusey & Ex. A attached thereto; Ex. A to Decl. of M. Gregory Simpson at ¶¶ 5(d)-(e)). With these documents, the Plaintiff's vague allegations regarding the nature of the claimed abuse are clarified (or contradicted) as follows: (1) plaintiff in fact alleges that he was the victim of four to five incidents of abuse occurring in Virginia in 1994, when he was eight years old; (2) plaintiff does not allege any subsequent abuse; (3) plaintiff does not allege any abuse in Illinois or at 3ABN; and (4) the alleged abuse consisted entirely of touching over clothing and did not involve penetration or unclothed contact with plaintiff's genitals. These materials negate any suggestion that the missing facts for a *facially* valid Mann Act claim should be implied or inferred from the allegations in the Complaint, and they demonstrate that subject matter jurisdiction is *in fact* absent.

ARGUMENT

I. Plaintiff's Lawsuit Must Be Dismissed for Lack of Subject Matter Jurisdiction.

Plaintiff's sole basis for bringing this case in federal court is Count IV of the Complaint, which alleges a theory of recovery under the Mann Act. Count IV is facially invalid for at least three reasons, precluding subject matter jurisdiction from being evident on the face of the

Complaint. First, it doesn't allege the *kind* of sexual acts proscribed by the Mann Act—acts involving penetration or *unclothed* touching of the minor victim's genitals. Moreover, because plaintiff doesn't in fact contend that these kinds of acts occurred, and the attached materials show they didn't occur, subject matter jurisdiction based on Count IV is absent *in fact*. Second, the Complaint pleads facts from which the Court can determine as a matter of law that the Mann Act claim is time-barred. And third, the Complaint pleads facts from which the Court can conclude that Tommy Shelton did not travel across state lines for the purpose of abusing the plaintiff.

Thus, 3ABN asks this Court to dismiss Count IV for failure to state a claim under the authority of Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and to dismiss the whole case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

A. Standard of Review.

When deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), "the court is not bound to accept the truth of the allegations in the complaint. Rather, the plaintiff has the obligation to establish jurisdiction by competent proof, and the court may properly look to evidence beyond the pleadings in this inquiry." Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 685 (7th Cir. 1998). If "the contention is that there is in fact no subject matter jurisdiction, the movant may use affidavits and other material to support the motion. The burden of proof on a 12(b)(1) issue is on the party asserting jurisdiction." United Phosphorus, 322 F.3d at 946.

To the extent this motion asks the Court to evaluate the facial sufficiency of Count IV of the Complaint, it amounts to a motion to dismiss under Fed. R. Civ. P. 12(b)(6). In ruling on a motion to dismiss pursuant to Rule 12(b)(6) or a 12(b)(1) motion challenging subject matter jurisdiction on the face of the complaint, courts "must accept as true all the plaintiff's well-

pleaded factual allegations and the inferences reasonably drawn from them." Gibson v. City of Chicago, 910 F.2d 1510, 1521 (7th Cir. 1990) (quoting Yeksigian v. Nappi, 900 F.2d 101, 102 (7th Cir. 1990)); United Phosphorus, 322 F.3d at 946.

To survive a motion to dismiss, the complaint first must comply with Rule 8(a) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief" (Fed. R. Civ. P. 8(a)(2)), such that the defendant is given "fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Second, the factual allegations in the complaint must be sufficient to raise the possibility of relief above the "speculative level," assuming that all of the allegations in the complaint are true. E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773, 776 (7th Cir. 2007) (quoting Twombly, 550 U.S. at 569 n.14). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations, quotation marks, and brackets omitted). The complaint must state a claim for relief that is facially plausible. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Plausibility is not probability, but it requires "more than a sheer possibility that a defendant has acted unlawfully." Id. 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).

B. The Mann Act Claim (Count IV) Is Deficient Because It Fails to Allege Either Penetration or Unclothed Contact with Walker's Genitals.

1. A Civil Mann Act Claim Requires Either Penetration, Oral-to-Genital Contact, or Unclothed Contact with the Minor Victim's Genitals.

Plaintiff's civil claim under Mann Act § 2423, Count IV of his Complaint, alleges that defendant Tommy Shelton "travel[ed] with intent to engage in illicit sexual conduct in violation of 18 U.S.C. § 2423." (Compl. p. 8) (capitalization omitted). Subparagraph (b) of that section, which appears to be the part of § 2423 that plaintiff is trying to invoke, provides: "A person who travels in interstate commerce . . . for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both." 18 U.S.C. § 2423(b). There is a civil remedy to minor victims of violations of § 2423(b).[1]

The scope of Mann Act § 2423, however, is limited by its terms to "illicit sexual conduct," which is defined as follows:

> As used in this section, the term "illicit sexual conduct" means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

18 U.S.C. § 2423(f). Plaintiff is not alleging commercial sex acts, so his claim must be premised on a "sexual act" as defined by 18 U.S.C. § 2246, with a person under age 18. According to section 2246, "sexual act" means:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
> (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,

[1] "Any person who, while a minor, was a victim of a violation of section . . . 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value." 18 U.S.C. § 2255(a).

degrade, or arouse or gratify the sexual desire of any person.

18 U.S.C. § 2246(2). The definition of "sexual act" for purposes of the Mann Act thus requires penetration with the penis under subparagraph A, oral-to-genital contact for subparagraph B, or penetration with something other than the penis for subparagraph C. The final subparagraph, D, requires touching "not through clothing" of the minor victim's genitals.

The requirement in subparagraph D that the touching be "not through clothing" limits the Mann Act's scope. The Mann Act requires intentional, skin-to-skin contact. United States v. Hayward, 359 F.3d 631, 641 (3d Cir. 2004). This is part of the distinction between a "sexual act" (prohibited by § 2423) and "sexual contact" (not prohibited by § 2423) under § 2246(3).

2. Plaintiff Does Not Allege Sexual Activity Proscribed by the Mann Act.

Plaintiff's Complaint does not allege any form of sexual activity that falls within the scope of the Mann Act's definition of "sexual act." Under plaintiff's theory of the case, only the 2001 episode of claimed abuse is relevant to the Mann Act claim because that is the episode involving alleged interstate travel. (See Compl. ¶ 46).

The 2001 episode of alleged abuse occurred when Walker was fifteen, and had taken a part-time job at 3ABN's production department. (Compl. ¶ 17). According to the Complaint, the abuse consisted of "mutual fondling, masturbation, and Tommy Shelton grinding his naked body against Alex Walker until he ejaculated." (Comp. ¶ 19). No more detail regarding the specific alleged conduct is provided, except a conclusory allegation in Count IV itself that Shelton's acts "are in violation of 18 U.S.C. § 2423." Conclusory allegations are disregarded under a motion-to-dismiss analysis. Twombly, 550 U.S. at 555.

The precise question for the Court is whether "mutual fondling, masturbation, and Tommy Shelton grinding his naked body against Alex Walker until he ejaculated" meets the

Mann Act's definition of a "sexual act." They do not. First, there is no allegation of penetration or oral-to-genital contact, which rules out subsections A-C of the definition of "sexual act." What remains is subsection D, which defines "sexual act" to include "intentional touching, not through clothing," of the minor's genitals. The Complaint makes no such express allegation.

The Complaint's allegation of "mutual fondling" does not support an inference of skin-to-skin contact. First, fondling need not involve genital contact at all. See Webster's II New College Dictionary 435 (1999) (defining "fondle" to mean, inter alia, "to handle, stroke, or caress lovingly"); see also Anderson v. Cornejo, 199 F.R.D. 228, 258-59 (N.D. Ill. 2000) (noting that fondling extends to various areas of the body). The allegation of fondling does not plausibly imply genital contact, and therefore cannot satisfy the Mann Act's requirement of genital contact. Plead facts must be more than merely consistent with a defendant's liability. Iqbal, 129 S. Ct. at 1949.

Second, even if plaintiff had meant to allege genital fondling (which is not something that can be inferred or implied from the language of the Complaint), genital fondling can occur over or under clothing. See § 2246(2), (3) (distinguishing between touching directly and over clothing). Cf. 740 Ill. Comp. Stat. Ann. 22/103 (West 2011) (stating that fondling can be "directly or through clothing"). The Mann Act is concerned with genital fondling only where it is "not through clothing." The Complaint does not allege this sort of fondling.

Further, the Complaint implies that plaintiff was clothed during the alleged sexual activity, which further negates any inference that the alleged fondling involved skin contact. Plaintiff alleges that Shelton was "naked," but fails to mention his own state of dress. Since it would support his claim to allege that he too was naked, the only reasonable inference that can be drawn is that he was clothed. Because plaintiff was not naked, an allegation of "mutual

fondling," even if of his genitals, would not imply the skin-to-skin contact that is necessary for a Mann Act claim. Plaintiff's allegation of "mutual fondling" falls short of stating a Mann Act claim.

The Complaint's allegation of "masturbation" fares no better. "Masturbation" can mean either stimulation of one's own genitals or those of another. Webster's New World Dictionary 873-84 (2d College ed. 1974) (defining "masturbate" as "to manipulate one's own genitals, or the genitals of (another) for sexual gratification). The Complaint does not indicate which form of masturbation is alleged, which is fatal to a Mann Act claim because self-stimulation is not within the definition of "sexual act." Further, masturbation, like fondling, can occur over or under clothing. Plaintiff has not alleged, and there is nothing to support an inference, that the masturbation involved his unclothed genitals. The mere allegation of masturbation fails to state a civil claim under the Mann Act.

Finally, the allegation of "grinding" by Shelton against plaintiff to the point of ejaculation clearly does not involve conduct within the scope of the Mann Act. The definition of "sexual act" does not include "grinding" or any synonym. Grinding by Shelton against the plaintiff does not imply penetration or skin-to-skin contact with plaintiff's genitals. The "grinding" allegation does not support a Mann Act claim.

Plaintiff has failed to allege an act which could be found to violate the Mann Act. Subject matter jurisdiction is not evident from the face of the Complaint.

C. The Mann Act Claim Is Also Deficient Because It Fails to Adequately Allege That Tommy Shelton Crossed State Lines for the Purpose of Illegal Sex.

The Complaint also fails to state a claim under § 2423 because it does not coherently allege that Shelton traveled "for the purpose of engaging in any illicit sexual conduct." Plaintiff alleges in conclusory manner that Shelton "traveled between Kentucky and Illinois using means

of interstate commerce, with the purpose and intent of sexually abusing Alex Walker." (Compl. ¶ 19; accord ¶ 46).

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." United States v. McGuire, 627 F.3d 622, 625 (7th Cir. 2010). Stated differently, if the purpose of travel is business or employment and the alleged abuser hopes to engage in sexual activity on the trip but would have made the same trip even without such hope, and does not tailor his manner, frequency, or time of travel to accommodate sexual activity, the travel was not "for the purpose of" illicit sexual conduct. See id. at 626; see also Hansen v. Haff, 291 U.S. 559, 563 (1934) (stating that "if the purpose of the journey was not sexual intercourse, though that be contemplated, the statute is not violated" and concluding no violation of relevant statute because woman was traveling to resume employment).

The Complaint does not adequately allege that Shelton crossed state lines for the purpose of engaging in illicit sex. The Complaint alleges that the abuse happened "during Tommy Shelton's employ with 3ABN...at the 3ABN facility in Illinois." (Compl. ¶ 18). It alleges that Tommy Shelton had begun working in the production department in 2001 (Compl. ¶ 15), and that plaintiff came along later, when Shelton was already there (Compl. ¶ 17). It alleges that Shelton "discovered" Walker and resumed abusing him. (Compl. ¶ 17).

Thus, it is clear from the Complaint itself that Shelton traveled to the locus of the claimed abuse because he worked there, and not because he sought out the plaintiff in order to abuse him. Nothing in the Complaint alleges or could reasonably permit an inference that Shelton modified his trips in order to engage in sexual conduct, or that but for the alleged sexual motive, Shelton

would not have made the trips to Illinois. The alleged facts make clear that Shelton crossed state lines to get to work, and the alleged victim happened to be there too. For this additional reason, plaintiff's Count IV fails to state a facially plausible claim and must be dismissed.

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

Plaintiff's civil Mann Act claim must be dismissed for the independent reason that the claim is barred by the applicable statute of limitations. Dismissal on statute of limitations grounds is appropriate where a plaintiff pleads himself out of court by making allegations that reveal an action is untimely. See United States v. Lewis, 411 F.3d 838, 842 (7th Cir. 2004).

The applicable statute of limitations for a civil claim under the Mann Act § 2423 is set forth at 18 U.S.C. § 2255(b), which states: "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."[2] Under either prong, plaintiff's Mann Act claim is time-barred.

Generally, "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." Bay Area, 522 U.S. at 201; accord Wallace v. Kato, 549 U.S. 384, 388 (2007).

The last acts of alleged abuse occurred in 2001. (See Compl. ¶¶ 17-19). Plaintiff could have brought this action then as all the elements for recovery existed at that time. Thus, under

[2] Stated differently, a claim "expires after six (6) years, if at the end of that six (6) year period a plaintiff is over eighteen (18). However, if a plaintiff is still a minor after the six (6) years have passed, the cause of action expires when plaintiff turns twenty-one (21)." Doe v. Schneider, 667 F. Supp. 2d 524, 530 (E.D. Pa. 2009).

the six-year prong of § 2255(b), the action had to be brought sometime in 2007. It was not filed until June 20, 2011, some four years too late.

Under the three-year prong, plaintiff fares no better. Assuming his age was a disability under federal law, the disability ended when he turned eighteen because that is the age of majority under federal law. 18 U.S.C. § 2256(1). Plaintiff's Complaint alleges that he was born in 1986. (See Compl. § 13). His "disability" would thus have ended sometime in 2004. Upon reaching the age of majority, plaintiff had to bring suit within three years of turning eighteen, no later than 2007. Under the clear and unequivocal terms of the statute, and based on facts admitted in the Complaint itself, plaintiff's cause of action against Tommy Shelton for the alleged violation of 18 U.S.C. § 2423 was required to have been brought no later than 2007. That claim is therefore time-barred, and must be dismissed.

For these reasons, Count IV, alleging travel with intent to engage in illicit sexual conduct in violation 18 U.S.C. § 2423, is time-barred and must be dismissed. There are no other claims that invoke federal subject matter jurisdiction. Accordingly, the Court must dismiss Count IV of plaintiff's complaint and then dismiss the entire action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

II. The Case Must Be Dismissed For Improper Venue.

An independent basis for this motion to dismiss is that venue is improper. "A civil action wherein jurisdiction is not founded solely on diversity of citizenship, except as otherwise provided by law, may be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred...or (3) a judicial district in which any defendant

may be found, if there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391(b).

A plain reading of plaintiff's Complaint in conjunction with § 1391(b) establishes that the appropriate federal district, if any, is the Southern District of Illinois, in which a substantial part of the events or omissions giving rise to the claim occurred. Any argument to the contrary is subterfuge. The case must therefore be dismissed for improper venue.

III. If the Case Is Not Dismissed on Other Grounds, Venue Should Be Transferred to the Southern District of Illinois for the Convenience of the Parties and Witnesses.

When venue is proper, but inconvenient, a defendant may move to transfer a case to a more convenient forum, pursuant to 28 U.S.C. § 1404(a): "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." Transfer is appropriate under § 1404(a) where the moving party demonstrates (1) venue is proper in the transferor district, (2) venue and jurisdiction are proper in the transferee district, and (3) the transfer is for the convenience of parties and witnesses and in the interest of justice. Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 (7th Cir. 1986).

Should this Court determine that venue is proper in the Northern District, it is unquestionably more convenient to the parties and witnesses and in the interest of justice to transfer the matter to the Southern District of Illinois, where jurisdiction and venue are clearly proper. 3ABN's principal place of business is in West Frankfort, Illinois, in Franklin County, which is in the Southern District, and a substantial part of the alleged events occurred there.

Transfer is appropriate for the convenience of the parties and witnesses and in the interest of justice. Both the private and public interests to be considered dictate in favor of transfer. Private interests include the plaintiff's choice of forum; the situs of material events; the relative

ease of access to sources of proof in each forum, including the court's power to compel the appearance of unwilling witnesses at trial and the costs of obtaining the attendance of witnesses; and the convenience of the parties, specifically their residences and ability to bear the expense of trial in a particular forum. Heller Fin., Inc. v. Riverdale Auto Parts, Inc., 713 F. Supp. 1125, 1129 (N.D. Ill. 1989). The public interest factors include the court's familiarity with applicable law and the desirability of resolving controversies in their locale. Id.

The private interest factors clearly favor transfer to this matter to the Southern District. Only the plaintiff's choice of forum argues against transfer. The situs of the material events for which plaintiff seeks redress is 3ABN's facility located in West Frankfort, Illinois, in Franklin County. 3ABN's principal place of business is located in West Frankfort. Thus, the relative ease of access to sources of proof weighs in favor of transfer, as employment records, and other business documents may still be in existence in West Frankfort. The power to compel and the ease and expense of obtaining participation of witnesses favors the Southern District. Simply put, it is less expensive for all to have a resident of Franklin County appear for trial in Franklin County than it is to have that same witness travel to and appear in Chicago. The county of residence for likely witnesses residing in Illinois is Franklin County or neighboring Williamson County. (Decl. of James W. Gilley ¶¶ 3-4). It is undoubtedly more convenient and less expensive for plaintiff, 3ABN, and Tommy Shelton to attend trial in Franklin County.

Public interest factors to be considered are (1) the court's familiarity with applicable law; and (2) the desirability of resolving controversies in their locale. Heller Fin., 713 F. Supp. at 1129. The first factor is irrelevant. But the desirability of resolving controversies in their locale weighs heavily in favor of transfer to the Southern District for the reasons previously stated. Moreover, the communities of Franklin County have a significantly greater interest in hearing

and resolving this dispute than does Cook County. If the case is not dismissed on the grounds stated elsewhere in this motion, it should be transferred to the district court for the Southern District of Illinois, as a matter of convenience in keeping with § 1404(a).

CONCLUSION

For the reasons stated herein, Defendant Three Angels Broadcasting Network, Inc. respectfully moves the Court to dismiss plaintiff's Complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction), 12(b)(3) (improper venue) and 12(b)(6) (failure to state a claim). If the Court determines that dismissal is not appropriate, 3ABN seeks a transfer of venue under 28 U.S.C. § 1404(a), for the convenience of parties and witnesses, to the United States District Court for the Southern District of Illinois.

Respectfully submitted,

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