UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-61760-CIV-DIMITROULEAS/SNOW

NESTOR ERMOGENES ARROYO QUINTEROS, et al.,

Plaintiff,

v.

DYNCORP AEROSPACE OPERATIONS LLC, a Delaware corporation, DYNCORP TECHSERVE LLC, a Delaware corporation, DYNCORP INTERNATIONAL LLC, a Delaware corporation and DYNCORP, a Delaware corporation,

Defendants.
_____/

Magistrate Judge Snow

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS OR TRANSFER PURSUANT TO THE FIRST-FILED RULE, OR, IN THE ALTERNATIVE, TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a)

THIS CAUSE is before the Court upon Defendants, Dyncorp Aerospace Operations LLC, Dyncorp Techserv LLC, Dyncorp International LLC, and Dyncorp's (Collectively "DynCorp") Motion to Dismiss or Transfer Pursuant to the First-Filed Rule or, in the Alternative, to Transfer Pursuant to 28 U.S.C. § 1404(a) [DE 27]. The Court has carefully considered the Motion [DE 27], Plaintiffs' Response in Opposition [DE 36], Defendants' Reply [DE 38], the parties' arguments before the undersigned at the hearing on April 20, 2007, and is otherwise fully advised in the premises.

I. BACKGROUND

The central issue before the Court in the instant motion is whether the merits of the above-

styled action should be resolved here, in the Southern District of Florida, or alternatively in the District of Columbia. This case arises from Defendants' conduct in connection with the implementation of "Plan Columbia," and its alleged negative effects on the citizens of Ecuador. Under "Plan Columbia" Defendants have a contract with agencies of the United States and the Columbian government to eliminate, by fumigants sprayed from airplanes, plantations of cocaine and/or heroine poppies in large tracts of the Colombian rainforest owned by private citizens of Columbia. The substantive decisions concerning the aerial eradication program are made either on-site in Columbia or out of Washington D.C. under the direct supervision of the Contracting Officer, based in D.C., and by high ranking government officials up to and including Secretary of State Condoleeza Rice, President George W. Bush, and members of Congress. The Defendants' assert that their contract is highly sensitive and provides that DynCorp is prohibited from disclosing documentation, data, or information concerning "Plan Columbia" without permission from Washington D.C.. DynCorp's International's headquarters are located within 30 minutes of the District of Columbia courthouse, where Defendants argue this case should be litigated.

Plaintiffs in this action are 1,632 individuals, as well as the three Ecuadorian Provinces, Esmereldas, Carchi and Sucumbios. Plaintiffs allege that on or about December 1, 2000 and continuing to the present, the Defendants, pursuant to "Plan Columbia," sprayed toxic chemicals at or near the border between Colombia and Ecuador and that the chemicals ended up in the provinces of Sucumbios, Esmereldas and Carchi, where the Plaintiffs in this action reside. Plaintiffs allege that "Plan Columbia" and the Defendants' contract does not authorize spraying outside Columbian borders and seek to hold Defendants liable for this unauthorized spraying.

Plaintiffs allege that the fumigant used by the Defendants contains water, glyphosate (the

pesticide otherwise known as "Roundup"), and the adjuvants COSMO FLUX-411 and COSMO-iN-D. The label for Roundup warns against contact with the eyes and skin, and warns against application to bodies of water, and contact with food sources. According to the Plaintiffs this unauthorized spraying has caused severe mental, physical and economic damage. Plaintiffs' medical conditions include, but are not limited to, chromosome damage, respiratory illness, visual problems, gastrointestinal problems and skin conditions.

Plaintiffs brought the instant action in the Southern District of Florida alleging violations of the Alien Tort Claims Act, various international conventions and treaties as well as the state common law doctrines of negligence, negligent hiring, negligent supervision, nuisance, trespass, battery, assault, intentional infliction of emotional distress, strict liability and medical monitoring. Plaintiffs seek only damages and specifically assert that they "do not seek to enjoin Defendants from continuing their aerial eradication operations in 'Plan Columbia,' but instead seek to remedy the damages Defendants cause them in Ecuador."

Venue has become an issue because this case is not the only case brought by Ecuadorian citizens allegedly injured by the Defendants' "Plan Columbia" spraying. On September 11, 2001, eleven named plaintiffs brought suit in the United States District Court for the District of Columbia. Arias v. DynCorp. et al., Case No. 1:01-cv-01908 (D.D.C. filed Sept 11, 2001). The Arias case brings largely the same laundry list of claims as the instant action[1] and also seeks damages for the injuries suffered by individual plaintiffs. However, the Arias plaintiffs further

[1] In fact, as Defendants point out, large portions of the Complaint in the instant action appear to be directly cut and pasted from the Arias complaint.

seek to enjoin the unauthorized spraying across the border into Ecuador.[2] The Arias case is a putative class action brought on behalf of some 10,000 Ecuadorians located in the Sucumbios province of Ecuador, and would, if certified, include many of the Plaintiffs in the instant case.

In their Motion to Dismiss or Transfer, the Defendants argue that the instant case should be dismissed or transferred to the District of Columbia to be consolidated with the Arias action either pursuant to the federal first filed rule, or pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties and in the interests of justice. The Court will discuss each of the Defendants' contentions in turn.

II. DISCUSSION

a. The First Field Rule

The federal first filed rule permits a district court to decline jurisdiction over an action when a complaint involving overlapping parties and issues has already been filed in another district. Manuel v. Convergys Corp., 430 F.3d 1132, 1135 (11th Cir. 2005); Carl v. Republic Security Bank, 2002 WL 32167730 *3 (S.D. Fla. Jan. 22, 2002); Supreme Int'l Corp. v. Anheuser-Busch, Inc., 972 F. Supp. 604, 606 (S.D. Fla. 1997). This rule requires the latter case to be dismissed in favor of the jurisdiction of district with the first-filed case. Manuel, 430 F.3d at 1135; Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982) ("In absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case."). "The 'first to file' rule is grounded in principles of comity and sound judicial administration. 'The federal courts have long recognized that the principle of

[2] The Court notes that the Arias complaint does not appear to directly attack "Plan Columbia," but only seeks to enjoin that spraying which is not authorized under the Plan.

comity requires federal district courts - - courts of coordinate jurisdiction and equal rank - - to exercise care to avoid interference with each other's affairs'" Save Power Ltd. v. Syntek Fin. Corp., 121 F.3d 947, 950 (5th Cir. 1997) (quoting West Gulf Mar. Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 728 (5th Cir. 1985)). This rule prevents the duplication or waste of judicial resources and prevents conflicting rulings. See e.g. Id.; Supreme Int'l, 972 F. Supp. at 606. The first filed rule does not require that the parties and issues involved be identical. Only sufficient similarity or substantial overlap is required. Manuel, 430 F.3d at 1135; Save Power, 121 F.3d at 950; see also Fuller v. Abercrombie & Fitch Stores, Inc., 370 F. Supp. 2d 686, 688 (E.D. Tenn. 2005).

In this case Defendants argue that the federal first filed rule compels the dismissal or transfer of the present case to the District of Columbia to be consolidated with the earlier-filed Arias case. Defendants contend that the claims in the two cases are nearly indistinguishable, that all claims in this case are also currently pending before the D.C. District Court and that large portions of the instant complaint are simply cut and pasted from the complaint in Arias. Defendants also argue that there is substantial overlap between the parties because many of the individual plaintiffs in the instant action would fall within the putative class, yet to be certified, in Arias.

Plaintiffs counter by trying to distinguish their case from Arias. Plaintiffs argue that the issues in this case are different because the Arias case has political overtones and poses a direct challenge to "Plan Columbia" whereas this case is a simple tort/personal injury case. The Plaintiffs also argue that there is no overlap of plaintiffs in this case since none of the 1,632

Plaintiffs in the instant action are parties to the Arias case.[3] Plaintiffs assert that although many of the individuals would be covered by "putative Arias class," that this class will never be certified. Not only is this type of action inappropriate for the class action mechanism, but also the time period for filing a motion for class certification has passed with no motion from the Arias Plaintiffs. Accordingly, Plaintiffs conclude, the federal first filed rule should not apply.

Ultimately, the Court agrees with the Plaintiffs that the first filed rule does not compel transfer to the District of Columbia. While the Court doubts that the issues in the Arias case and the case at hand are materially different for purposes of the first filed rule,[4] it is unnecessary to decide that issue because the Court finds that there is no overlap between the plaintiffs in the two cases, making transfer pursuant to the first filed rule inappropriate.

Since Plaintiffs have dropped the four plaintiffs in this case that overlapped with the plaintiffs in the Arias case, no overlapping plaintiffs remain. Only the Defendants are the same. While complete identity of the parties is not required, Save Power, 121 F.3d at 951, the Eleventh Circuit requires some overlap. Id.; Manuel, 430 F.3d at 1135. Defendants cite to Fuller v.

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[3] On April 13, 2007 the Court granted the Plaintiffs' Motion to drop four of the Plaintiffs in this case who were also named plaintiffs in the Arias case. Those four Plaintiffs were the only overlapping plaintiffs between the two cases [DE 48].

[4] While the Plaintiffs take great pains to distinguish between the two cases, characterizing this case as merely a personal injury case and the Arias action as a direct challenge to "Plan Columbia," the differences between the two cases are not as glaring as Plaintiffs would have the Court believe. While the Arias complaint does seek injunctive and declaratory relief, and the instant complaint only seeks damages, the Arias complaint does not seek to enjoin "Plan Columbia" but merely seeks relief from the alleged extra-contractual spraying causing the injuries complained of in both cases. Both complaints nominally purport to be simply tort cases rather than challenges to the governmental policy behind "Plan Columbia."

In the Plaintiffs' favor, however, the Court notes that the time periods of the two actions differ. The injuries alleged in Arias are alleged to have occurred due to spraying between January and February of 2002, while the injuries in the instant case are allegedly caused by spraying that began on or about December 1, 2000 and continues into the present.

Abercrombie & Fitch Stores, Inc., 370 F. Supp. 2d 686 (E.D. Tenn. 2005), and Walker v. Progressive Casualty Insurance Co., 2003 WL 21056704 (W.D. Wash May 9, 2003), for the proposition that where Plaintiffs in a second action are not named plaintiffs in the first filed action, but are within the scope of that action's putative class, the first filed rule compels dismissal. Because the Plaintiffs in the instant case would mostly fall within the putative class in Arias, Defendants argue that they have satisfied their burden of demonstrating overlapping plaintiffs between the two cases. However, the Court agrees with the Plaintiffs that the cases cited by Defendants are readily distinguishable from the case at hand. The Arias case has been pending for over five years now with no motion to certify a class. The procedure for certifying a class pursuant to Federal Rule of Civil Procedure 23 is complicated and by no means a sure thing.[5] The procedures under Rule 23 stand in stark contrast to the requirements of the "opt-in" collective action provision under the Fair Labor Standards Act ("FLSA").[6] Both Fuller and Walker were FLSA cases. In a FLSA case, a similarly situated employee has a guaranteed opportunity to "opt-in" to the collective action, whereas in a nation-wide class action it is much less certain that the "putative class" named in a complaint will ever materialize into a full-fledged class action. The Court is not willing to extend Fuller or Walker from the FLSA context to the Rule 23 class action

[5] As the Plaintiff points out, the Fifth Circuit has even held that mass tort cases involving highly individualized personal injuries and property damage are not appropriate for the class action mechanism. Steering Committee v. Exxon Mobil, 461 F.3d 598 (5th Cir. 2006).

[6] 29 U.S.C. §216(b) reads: "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." This section allows employees who are similarly situated to simply "opt-in" rather than going through the complicated procedures of Rule 23 of the Federal Rules of Civil Procedure.

context. The putative members of the Arias class simply cannot be considered "overlapping" parties for purposes of the federal first filed rule. Accordingly, because the Court finds that dismissal or transfer is not required pursuant to the first filed rule, the Court will proceed to address whether it should exercise its discretion to transfer the case to the District of Columbia under 28 U.S.C. § 1404(a).

b. Transfer Under §1404(a)

The District Court has broad discretion in determining whether to transfer this case to another district pursuant to § 1404(a). See Thermal Tech., Inc., v. Dade Serv. Corp., 282 F. Supp. 2d 1373, 1375 (S.D. Fla. 2003). Nevertheless, the moving party bears the burden of demonstrating to the Court that transfer of venue is proper. Cent. Money Mortgage Co., Inc. vs. Holman, 122 F. Supp. 2d 1345, 1346 (M.D. Fla. 2000).

The law governing the transfer of venue is found in § 1404(a), which provides that 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." 28 U.S.C. § 1404(a) (2006). The purpose of § 1404(a) is to provide for an "individualized, case-by-case consideration of convenience and fairness," Van Dusen v. Barrack, 376 U.S. 612, 622 (1964), in order to "prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" Id. at 616 (internal citations omitted). The statute calls for a two-step inquiry. See Meterlogic, Inc. v. Copier Solutions, Inc., 185 F. Supp. 2d 1292, 1299 (S. D. Fla. 2002). First, the court must consider whether the action "might have been brought" in the proposed transferee court and second, whether various factors are satisfied so as to determine if a transfer to the transferee forum is

more convenient and just. Id. In this case both parties agree that the case "might have been brought" in the Southern District of Florida, so the only remaining consideration is whether transfer would serve the convenience of the parties and the interests of justice.

In order to determine whether transfer is appropriate pursuant to § 1404(a), courts consider a variety of factors including: "(1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to the presence of unwilling witnesses; (5) the cost of obtaining the presence of the witnesses; and (6) the public interest." Jewelmasters, Inc. v. May Dep't Stores Co., 840 F. Supp. 893, 895 (S.D. Fla. 1993). This list is not exhaustive, but serves as a guide as to which factors may be relevant in a particular case. These factors as well as others that have been discussed by other courts and briefed by the parties are discussed below.

1. Plaintiff's Choice of Forum

One factor generally considered is the plaintiff's choice of forum. While it is true that the "plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations," Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996) (quoting Howell v. Tanner, 650 F.2d 610, 616 (5th Cir. 1981), it is also true that where the Plaintiff has chosen a forum that is not their home forum and has little or no connection to the litigation, the defendant seeking transfer will have less difficulty meeting this burden. Thermal Techn., 282 F. Supp. 2d at 1375-76.

Defendants argue that Plaintiffs' choice of forum is entitled to "minimal weight" here, where Plaintiffs are not residents in the chosen forum and the key events giving rise to their claim occurred elsewhere. Cellularvision Tech. & Telecomms., L.P. v. Cellco P'ship, 2006 U.S Dist.

LEXIS 75363, *3 (S.D. Fla. 2006). While Plaintiffs concede that the non-resident Plaintiffs are not entitled to the same degree of deference that a resident Plaintiff would be entitled to, Plaintiffs cite to several *forum non conveniens* opinions holding that less deference is not equal to no deference. See e.g., Murray v. British Broad. Corp., 81 F.3d 287, 290 (2d Cir. 1996) ("some weight must still be given to a foreign plaintiff's choice of forum."); Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) ("less deference is not the same thing as no deference."). While the Defendants are correct in pointing out that these cases are all *forum non conveniens* cases and do not therefore directly address the § 1404(a) context, the Court finds that the reasoning behind the *forum non conveniens* analysis also applies to the §1404(a) transfer context and is not inconsistent with the §1404(a) cases cited by the Plaintiff. See Cellularvision Tech. & Telecomms, L.P. v. Cellco P'ship, 2006 U.S. Dist. LEXIS 81641, *5-6 (S.D. Fla. July 27, 2006) (citing to *forum non conveniens* law on the issue of the level of deference shown to a foreign plaintiff and stating that "a foreign plaintiffs choice deserves less deference."). Accordingly, the Court finds that the foreign Plaintiffs' choice of forum deserves at least some deference and this factor weighs slightly in favor of the Plaintiffs.

2. Convenience of the Parties

Litigation in the Southern District of Florida will be more convenient for the Plaintiffs and less convenient for the Defendants. While this factor is relevant, the Eleventh Circuit has cautioned courts to be wary of transfers that simply seek to shift inconvenience from defendants onto plaintiffs. Robinson, 74 F.3d at 260. Although Defendants do not seek a transfer to their home forum, because Defendants' headquarters are located within 30 minutes of the courthouse in D.C., both parties agree that the District of Columbia is a more convenient forum for the

Defendants. However, Defendants dispute that the Southern District of Florida will actually be a more convenient forum for the Plaintiffs.[7] Defendants argue that since the Plaintiffs all reside in Ecuador and will have to fly internationally to reach either the District of Columbia or the Southern District of Florida, both forums are equally inconvenient for the Plaintiffs. However, travel from Ecuador to South Florida is significantly less expensive than from Ecuador to D.C. and necessary translation services are widely available in this largely bilingual community. Accordingly, the Court finds that this factor is a close call. However because the convenience to the Defendants in D.C. will be far greater than the convenience to the Plaintiffs here in the Southern District, the balance is tipped slightly in favor of Defendants.

3. Convenience of Non Party Witnesses; Cost of Obtaining the Presence of Witnesses and Ease of Access to Sources of Proof

The convenience of non-party witnesses is an important, if not the most important, factor in determining whether a motion for transfer should be granted. See Meterlogic, 185 F. Supp. 2d at 1301. Once again the Plaintiffs and the Defendants argue that their chosen forum will be more convenient for their witnesses and will more readily provide access to their sources of proof. Defendants argue that all evidence and all persons with knowledge concerning "Plan Columbia," the composition and selection of the glyphosate spray, and the details of Defendants' aerial eradication contract are located in Washington D.C.. The Plaintiffs point out that travel and translation services for the Plaintiffs' trial witnesses such as their medical care providers, family members, and Ecuadorian governmental officials will be more convenient in the Southern District

[7] Underlying this argument is the suggestion that the Southern District of Florida was only chosen for the convenience of the Plaintiffs' counsel, whose offices are located here in Fort Lauderdale. Of all the factors to be considered in a § 1404(a) transfer motion, the convenience of counsel is entitled to the least weight. Meterlogic, 185 F. Supp. 2d at 1304.

of Florida. For the reasons stated above with respect to the convenience of the parties factor, while a close call, the Court finds that this factor also weighs slightly in favor of Defendants.

4. The Public Interest

It is in the public interest to avoid the duplication of judicial resources. The Supreme Court has held that "[a]s between federal district courts, . . . the general principle is to avoid duplicative litigation." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). With respect to the §1404(a) transfer situation, the court in Meterlogic, held that to "permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that §1404(a) was designed to prevent." 185 F. Supp. 2d at 1303 (quoting Cont'l Grain Co. v. FBL-585, 364 U.S. 19, 26 (1996)). Although transfer to the District of Columbia is not *compelled* by the first-filed rule, the Court finds that this factor does weigh significantly in the Defendants' favor in the Court's determination concerning whether transfer is appropriate under §1404(a).

Defendant also argues that Washington D.C. has both a greater interest and greater expertise in adjudicating sensitive security matters than does the Southern District of Florida. At least one other court has held that transfer to D.C. was appropriate for this reason. See Gherebi v. Bush, 374 F.3d 727 (9th Cir. 2004) (transferring habeas petition filed by alleged foreign Al Qaeda combatant at Guantanamo Bay to the District of Columbia in recognition of that court's experience in addressing such cases.). However, as the Plaintiffs point out, under their reading of the case, this case is not at all a national security case, but is simply a personal injury case. Nevertheless, the District of Columbia certainly has a stronger interest in this litigation than does the Southern District of Florida and the burden of jury duty "ought not to be imposed upon the

people of a community which has no relation to the litigation." Ferens v. John Deere Co., 494 U.S. 516, 529-30 (1990), superseded by statute on other grounds. Accordingly, the Court finds that this factor weighs in favor of Defendants.

6. Relative Docket Congestion

Finally, Dyncorp argues that transfer is warranted because a refusal to transfer would delay the time in which this case would go to trial because the relative docket congestion here in the Southern District of Florida is greater than in the District of Columbia. While Plaintiffs point out that this Court's docket is under control and that the Southern District of Florida continues to be a very efficient district despite its heavy case load, this argument misses the point as, based on the statistics provided by the Defendants, the case load in the Southern District is clearly heavier than in the District of Columbia. However, the Court does not consider this factor to be a very weighty one in it balancing act under §1404(a). "Although docket congestion, if proven, may be an appropriate consideration in a § 1404(a) motion to transfer, case law does not suggest that docket congestion is, by itself, a dispositive factor." P&S Bus. Mach., Inc. v. Canon U.S.A., Inc., 331 F.3d 804, 808 (11th Cir. 2003). The Court finds that relative docket congestion weighs only slightly in favor of the Defendants.

III. CONCLUSION

In sum, each of the factors except for the Plaintiffs' choice of forum weighs in favor of the Defendants and in favor of transfer to the District of Columbia. However, with the exception of the public interest, each of the factors weighs only slightly in favor of transfer. While Washington D.C. is clearly a more convenient forum to try this case than is the Southern District of Florida, were the Plaintiffs not foreign and had the events giving rise to the suit not occurred so far from

Florida, it would be a close question as to whether the Defendants had made the showing necessary to overcome the strong presumption in favor of the Plaintiffs' choice of forum. However, because the foreign Plaintiffs' choice is entitled to less deference under the facts and circumstances of this case, the Court finds that the Defendants have satisfied their burden and that transfer pursuant to § 1404(a) is appropriate.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendants' Motion to Dismiss or Transfer Pursuant to the First-Filed Rule or, in the Alternative, to Transfer Pursuant to 28 U.S.C. § 1404(a) [DE 27] is hereby **GRANTED**. The Clerk is directed to **TRANSFER** this action to the United States District Court for the District of Columbia and to **CLOSE** this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of May, 2007.

WILLIAM P. DIMITROULEAS
United States District Judge

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