UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	
Plaintiffs,	Case No. 1:08-CV-00827-GBL-JFA
v.	
CACI INTERNATIONAL INC, et ano,	
Defendants.	

DEFENDANTS' REPLY REGARDING CHOICE OF LAW FOR THE STATUTE OF LIMITATIONS APPLICABLE TO PLAINTIFFS' COMMON-LAW TORT CLAIMS

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I. INTRODUCTION

Plaintiffs' choice of law memorandum begins by telling the Court that, "[f]or the third time in this litigation," the CACI Defendants have filed a brief arguing that Ohio choice of law rules do not apply to the Plaintiffs asserting claims only in this Court (Pl. Mem. at 1), as if the CACI Defendants were beating a dead horse repeatedly opposed by Plaintiffs and rejected by the Court. *Au contraire*. In 2008, the CACI Defendants devoted an entire section of their summary judgment memorandum to explaining why Ohio's choice of law rules did not apply to these Plaintiffs' claims. Plaintiffs agreed and argued that *Virginia's* choice of law rules tolled their statutes of limitations. [Dkt. #59 at 4]. This Court also agreed, holding that "[a]s the *Wade* decision makes clear, the Court is required to apply Virginia's equitable tolling rules. . . ." [Dkt. #76 at 4].

At oral argument on the CACI Defendants' motion for reconsideration, Plaintiffs' counsel did not represent that the facts or law had changed one iota since 2008, and acknowledged that Plaintiffs had simply changed their mind on choice of law, no doubt motivated by the Virginia Supreme Court's unanimous decision in *Casey v. Merck & Co.*, 722 S.E.2d 842, 845-46 (Va. 2012). Indeed, the only thing that has changed since 2008 is that when this Court held in 2008 that Virginia's choice of law rules applied, the Court believed that Virginia law could be construed to toll the statute of limitations for Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e, and that end result is plainly not defensible today under Virginia law.

The Court should reject Plaintiffs' plea for results-oriented jurisprudence, where rulings are okay if Plaintiffs will prevail under them but must be changed if it turns out Plaintiffs will lose. As the CACI Defendants explained in their January 17, 2013 memorandum, and further explain below, there is no precedent allowing a Plaintiff to assert his claims only in Virginia and

claim an entitlement to application of Ohio's choice of law rules. The United States Supreme Court said as much twenty-three years ago in *Ferens v. John Deere Company*, 494 U.S. 516, 523 (1990), and no court since that time has suggested to the contrary. Moreover, applying Ohio choice of law rules to the claims of Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e, just because *some other plaintiff* filed his own claims in Ohio, is a quintessentially arbitrary result that does not comport with the requirements of due process.

II. ANALYSIS

A. Supreme Court Precedent Requires a Party to Actually Assert His Claims in the Distant Forum to Avail Himself of the Distant Forum's Choice of Law Rules

In 1990, the United States Supreme Court explained and refined its rule that plaintiffs whose claims are transferred under 28 U.S.C. § 1404(a) remain subject to the choice of law rules of the transferor court, with the Court holding that this rule applied regardless of whether the transfer was initiated by the plaintiff or the defendant. *Ferens*, 494 U.S. at 523. In the course of reaching its decision, the Court confronted the question whether a plaintiff actually has to assert his claims in the distant forum in order to take advantage of the distant forum's choice of law rules, as opposed to simply filing in a convenient forum and using the choice of law rules of a forum where he *could have asserted his claims*. In answering this question, the Court was emphatic: "Plaintiffs in the position of the Ferenses must go to the distant forum . . . ." *Id.* at 531.

The CACI Defendants' January 17, 2013 memorandum laid down a gauntlet. In that memorandum, the CACI Defendants stated that they had been unable to find, in the twenty-three years since the Supreme Court decided *Ferens*, a single case decided by any judge in the United States of America in which that judge held that a plaintiff asserting claims in a federal court may

utilize the choice of law rules of a state other than the forum state because some other plaintiff had claims transferred from the distant state's federal court. CACI Mem. at 5. Indeed, the CACI Defendants have not located a case decided in the history of American jurisprudence in which a plaintiff asserting claims in one federal court was allowed to proceed under the choice of law rules of another forum because the other forum's choice of law rules (unlike the forum's rules) would have rendered his claims viable.[1] Apparently, neither have Plaintiffs, as Plaintiffs have not cited a single case in which a plaintiff whose claims are time-barred under forum law was allowed to use another state's statute of limitations because another plaintiff had originally filed suit in that distant forum. Instead, Plaintiffs ask this Court to disregard the Supreme Court's command in *Ferens* based on a handful of cases that are entirely consistent with the Supreme Court's admonition in *Ferens* that a plaintiff must file claims in the distant forum to take advantage of the distant forum's choice of law rules.

Plaintiffs' reliance on *Van Dusen v. Barrack*, 376 U.S. 612 (1964), is entirely unpersuasive. *Van Dusen* was decided twenty-six years before *Ferens*. Even more to the point, *Van Dusen* did not involve a change in parties, such as the addition of plaintiffs. Indeed, the Court in *Van Dusen* justified application of the transferor court's choice of law rules to the plaintiffs who had actually asserted claims there because such a rule "allow[s] plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected," and because "[t]here is nothing, however, in the language or policy of § 1404(a) to justify its use by

[1] Plaintiffs rely on *Pappion v. Dow Chemical Company*, 627 F. Supp. 1576, 1581 (W.D. La. 1986). But as the CACI Defendants noted in their January 17, 2013 memorandum, the operative issue in *Pappion* was the doctrine of relation back under Federal Rule of Civil Procedure 15(c), as the plaintiffs' claims were time-barred under the statute of limitations of both the transferor forum and the transferee forum. *Id.* at 1580. Moreover, the district court's decision in *Pappion* predates the Supreme Court's express statement in *Ferens* that a plaintiff must actually assert his claims in the distant forum to take advantage of the distant forum's choice of law rules. CACI Mem. at 5.

defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue." *Van Dusen*, 376 U.S. at 633-34.[2] While those principles might apply to Plaintiff Al Shimari, if Ohio was a proper forum for his claims, they have no application to Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e, who never selected an Ohio forum, were never subject to the uncertainty of transfer, and were never subject to the random assignment of a judge in this Court after transfer. *Ferens* makes clear that a plaintiff must actually be subject to these uncertainties to avail himself of the exception to the ordinary rule that the forum state's choice of law rules apply, *Ferens*, 494 U.S. at 531, and such a result is entirely consistent with the policies underlying the holding in *Van Dusen*.

Similarly, Plaintiffs rely on a few cases standing for the unremarkable proposition that a plaintiff who actually asserted his claims in a distant forum is permitted to amend his claims against the defendants post-transfer without losing the benefit of the choice of law rules of the forum he originally selected.[3] Plaintiffs also cite to a case standing for the unremarkable proposition that counterclaims asserted against a plaintiff who actually asserted his claims in a distant forum are governed by the choice of law rules of the transferor forum.[4] These cases are

[2] Plaintiffs argue that applying Virginia's statute of limitations to the common-law claims of Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e somehow would reward forum shopping by defendants. Pl. Mem. at 7. Not so. The CACI Defendants only moved to transfer the claims of one Plaintiff who asserted claims in Ohio, Plaintiff Al Shimari, and he is not the subject of the CACI Defendants' motion. The CACI Defendants did not choose the forum in which Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e asserted their claims, those Plaintiffs made that choice.

[3] Pl. Mem. at 9 (citing *Brown v. Hearst Corp.*, 54 F.3d 21, 24 (1st Cir. 1995), *Merlo v. United Way of Am.*, 43 F.3d 96, 102 (4th Cir. 1994)). Plaintiffs also cite to *In re Ski Train Fire in Kaprun, Aus.*, 257 F. Supp. 2d 717, 724 (S.D.N.Y. 2003), but that case involves the separate rules concerning choice of law for MDL cases. *Id.* Regardless, like the few other cases cited by Plaintiffs, the plaintiffs in *In re Ski Train* had actually asserted claims in the distant forum.

[4] Pl. Mem. at 9 (citing *DePuy Inc. v. Biomedical Eng'g Trust*, 216 F. Supp. 2d 358, 382 (D.N.J. 2001)).

unremarkable because they involve Plaintiffs who actually filed suit against the defendants in the distant forum, and are true to the premise in *Van Dusen* that plaintiffs who actually assert their claims in the distant forum should "retain whatever advantages may flow from the state laws of the forum they have initially selected." *Van Dusen*, 376 U.S. at 633-34.

Plaintiffs also continue to rely on *Riddle v. Shell Oil Co.*, 764 F. Supp. 418, 420-22 (W.D. Va. 1990), where the court held that the transferor court's choice of law rules applied when a plaintiff whose claims were transferred sought to add a new defendant by amendment. As with the cases cited above, however, the plaintiff in Riddle had done what Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e did not – file suit in the distant forum in order to take advantage of the distant forum's choice of law rules. Moreover, as the CACI Defendants noted in their July 17, 2013 choice of law memorandum, *Riddle* is an outlier, as every other case the CACI Defendants (and apparently Plaintiffs) have located has rejected the premise that a plaintiff who actually filed suit in the distant forum may use the transferor court's choice of law rules against a defendant added only after transfer.[5] Regardless, every single case cited by Plaintiffs, including *Riddle*, is consistent with the command in *Ferens* that a plaintiff must actually file suit in the distant forum to avail himself of the distant forum's choice of law rules, and these cases provide no justification for disregarding the Supreme Court's ruling in *Ferens*.

Equally specious is Plaintiffs' attempt to distinguish themselves from the relevant discussion in *Ferens* by arguing that they are "*not* in the position of the Ferenses." Pl. Mem. at 1. But the relevant language in *Ferens* belies Plaintiffs' position. As the Supreme Court explained:

[5] *Ormond v. Anthem, Inc.*, No. 1:05-cv-1908, 2009 WL 102539, at *5 (S.D. Ind. Jan. 12, 2009); *Z-Rock Commc'ns Corp. v. William A. Exline, Inc.*, No. C 03-02436, 2004 WL 1771569, at *6 (N.D. Cal. Aug. 6, 2004); *cf. Lombard v. Economic Dev. Admin. of Puerto Rico*, No. 94 CIV 1050, 1995 WL 447651, at *2 n.1 (S.D.N.Y. July 27, 1995).

> [O]ne might ask why we require the Ferenses to file in the District Court in Mississippi [the transferor forum] at all. Efficiency might seem to dictate a rule allowing plaintiffs in the Ferenses' position not to file in an inconvenient forum and then to return to a convenient forum through a transfer of venue, but instead simply to file in the convenient forum and ask for the law of the inconvenient forum to apply. Although our rule may invoke certain formality, one must remember that § 1404(a) does not provide for an automatic transfer of venue. The section, instead, permits a transfer only when convenient and "in the interest of justice." ***Plaintiffs in the position of the Ferenses must go to the distant forum*** because they have no guarantee, until the court there examines the facts, that they may obtain a transfer. No one has contested the justice of transferring this particular case, but the option remains open to defendants in future cases.

Ferens, 494 U.S. at 531 (emphasis added). The "position of the Ferenses," as described by the Supreme Court, is that of persons with claims that they have not yet asserted in any court and have to decide where to assert their claims. The *Ferens* Court's instruction is that if such a plaintiff desires to take advantage of a particular forum's choice of law rules, that plaintiff "must go to the distant forum" rather than doing what Plaintiffs Rashid Al-Ejaili, and Al Zuba'e did here, avoid the uncertainties of transfer, and of the random assignment of judges, and file suit in one forum but demand application of the choice of law rules of another forum where they contend they could have asserted (but did not assert) their claims.

B. Application of Ohio Choice of Law Rules to Plaintiffs Who Never Asserted Their Claims in Ohio Would Violate Due Process

Due process requires that choice of law determinations not be random, arbitrary, or unfair. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985). Accordingly, for the law of a state to be applied consistent with due process, the state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests.'" *Shutts*, 472 U.S. at 821-22 (quoting *Hague*, 449 U.S. at 312-13).

Plaintiffs concede "the basic proposition that the choice of state law by a court must comport with due process." Pl. Mem. at 10. Indeed, the Supreme Court recognized in *Van Dusen* that due process requirements apply to choice of law determinations made in the context of transferred cases. *Van Dusen*, 376 U.S. at 639 n.41. Plaintiffs also agree with the CACI Defendants as to the Supreme Court's holding in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729-30 (1988). As Plaintiffs characterize *Sun Oil*: "The Supreme Court held in *Sun Oil v. Wortman*, however, that a forum *applying its own statute of limitations* does not violate due process." Pl. Mem. at 10 (emphasis added). That was precisely the point made in the CACI Defendants' January 17, 2013 memorandum, that *Sun Oil* does not eliminate the requirement that the choice of law determination for the applicable statute of limitations comply with due process, but merely holds that a forum's selection of ***its own*** statute of limitations satisfies this requirement. CACI Mem. at 11. In other words, this Court's application of Virginia's statute of limitations comports with due process.

Indeed, as the Supreme Court explained in *Sun Oil*, there are two reasons why a state has a sufficient interest in litigation filed in its courts to apply its own statute of limitations consistent with due process. First, there is a long historical tradition, endorsed by the Supreme Court, of states applying their own statute of limitations as a matter of procedure. *Sun Oil*, 486 U.S. at 730. Second, a state has an interest "in regulating the work load of its courts and determining when a claim is too stale to be adjudicated." *Id.*

Try as they might, Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e cannot avoid the fact that their claims were filed in Virginia (not Ohio), and have never been asserted in any forum other than federal court in Virginia. Thus, while *Sun Oil* might allow application of Ohio's statute of limitations for claims asserted by Plaintiff Al Shimari, who actually asserted claims against the

CACI Defendants in Ohio, *Sun Oil* does not provide a constitutional basis for this Court to apply the statute of limitations of any state other than Virginia to the claims asserted in Virginia by Plaintiffs Rashid, Al-Ejaili, and Al Zuba'e. Moreover, the two state interests underlying the *Sun Oil* Court's due process ruling have no application here. There is no historical tradition by which courts have applied the statute of limitations of some other state to a plaintiff's claims simply because some other plaintiff originally asserted his claims in the other state. As noted in Section II.A, there is not a single case in the history of American jurisprudence permitting such a result. As for the second state interest underlying *Sun Oil* – a state's interest in determining when a claim is too stale to burden its courts – that interest is not implicated here because these Plaintiffs never filed suit in Ohio and thus were never a burden on the Ohio courts.

Plaintiffs devote considerable space in their memorandum to arguing that the series of decisions in the *Ferens* litigation somehow collectively reject the notion that it would violate due process to apply the transferor court's statute of limitations to plaintiffs who never asserted claims in the transferor court. Pl. Mem. at 11-12. That proposition is not borne out even by Plaintiffs' characterization of the cases. Plaintiffs note that in the *Ferens* litigation, the Third Circuit originally held that due process required application of the transferee forum's statute of limitations (Pennsylvania) rather than that of the transferor forum (Mississippi). *Ferens v. Deere & Co.*, 819 F.2d 423, 427 (3d Cir. 1987). The Supreme Court vacated and remanded the Third Circuit's decision in *Ferens* for reconsideration in light of *Sun Oil*, and the Third Circuit acknowledged that due process did not preclude the application of Mississippi's statute of limitations to the Ferenses claims. *Ferens v. Deere & Co.*, 862 F.2d 31, 32 (3d Cir. 1988). But that is exactly the CACI Defendants' point. *Sun Oil* stands for the simple proposition that due

process does not preclude a state from applying its own statute of limitations as a matter of procedure. *Sun Oil*, 486 U.S. 717, 729-30.

Given the holding in *Sun Oil*, it is not surprising, and indeed expected, that the Third Circuit would hold in *Ferens* that due process did not bar application of Mississippi's statute of limitations to claimants and claims first filed in Mississippi and then transferred to Pennsylvania. And it is equally unsurprising that the Supreme Court in *Ferens* would, as Plaintiffs put it, "express[] no due process qualms about Mississippi's statute of limitations being applied by the district court in Pennsylvania after the transfer"[6] because, as the Supreme Court noted in *Ferens*, the Ferenses had "actually go[ne] to the distant forum" and asserted their claims there. *Ferens*, 494 U.S. at 531. Thus, the "close reading of the *Ferens* litigation" urged by Plaintiffs (Pl. Mem. at 11) merely shows that a plaintiff who actually asserts claims in a distant forum may, after transfer, rely on the distant forum's choice of law rules with respect to the applicable statute of limitations.

Finally, Plaintiffs note that "while CACI is quick to list Plaintiffs' lack of ties to Ohio, it has been consistently, and conspicuously, silent about its own connections to Ohio." Pl. Mem. There is a reason for that: whether the CACI Defendants have any contacts with Ohio is irrelevant to whether this Court constitutionally may apply Ohio's statute of limitations to claims asserted by Plaintiffs only in Virginia, when Virginia courts treat statute of limitations as procedural matters governed by forum law. *See Wade v. Danek Med., Inc.*, 182 F.3d 281, 288-89 (4th Cir. 1999). The answer to that question is a resounding "no." The Supreme Court's decision in *Shutts* defeats Plaintiffs position that due process is satisfied whenever a defendant has contacts with the state whose law is to be applied. In *Shutts*, the class-action defendant was

[6] Pl. Mem. at 12.

one of the largest petroleum companies in the world, and some of the class plaintiffs had leases *in Kansas* with the defendant. 472 U.S. at 815 n.6; *see also id.* at 819. Nevertheless, the Supreme Court held that, despite the defendant's acknowledged contacts with Kansas, due process precluded application of Kansas law to claims involving operations in other states. *Id.* at 821-22. *Sun Oil* adds the notion that it is always constitutional for a forum to apply its own statute of limitations. *Sun Oil*, 486 U.S. at 722.

Virginia courts treat statutes of limitations as procedural matters that are always subject to forum law, without regard to the nature of contacts that might exist in states other than Virginia. *Wade*, 182 F.3d at 288-89; *see also* Dkt. #59 at 4 (Court's ruling that "the Court is required to apply Virginia's equitable tolling rules . . ."). Therefore, the minimal contacts the CACI Defendants might have in Ohio (and in many other states) do not provide a constitutional basis for disregarding the requirement that this Court apply Virginia's statute of limitations.

III. CONCLUSION

For the foregoing reasons, the Court should reconsider its summary judgment Order [Dkt. #76], conform its Order to Virginia law, and enter summary judgment in CACI's favor on the common-law claims (Counts X through XX) asserted by Plaintiffs Rashid, Al Zuba'e, and Al-Ejaili.

Respectfully submitted,

/s/ J. William Koegel, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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