

FILED

NOT FOR PUBLICATION

FEB 11 2010

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEURALSTEM, INC., a Maryland
corporation,

Plaintiff - Appellant,

v.

RENEURON, LTD., a United Kingdom
corporation,

Defendant - Appellee.

No. 08-56546

D.C. No. 2:08-cv-02168-R-AGR

MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Submitted February 9, 2010**
Pasadena, California

Before: THOMAS and SILVERMAN, Circuit Judges, and FOGEL,*** District
Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision
without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jeremy D. Fogel, United States District Judge for the
Northern District of California, sitting by designation.

Neuralstem, Inc. appeals the district court's dismissal on forum non conveniens grounds of its claims against ReNeuron, Ltd. We reverse. Because the parties are familiar with the factual and procedural history of this case, it is unnecessary to recount it here

I

The district court properly found that England is an adequate alternative forum. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006) (an alternative forum is generally available where “the defendant is amenable to service of process and the forum provides ‘some remedy’ for the wrong at issue”) (citations omitted). ReNeuron tendered evidence showing that England offers a remedy for each of Neuralstem's claims.

Neuralstem argues that it may seek amendment of its complaint to assert a claim under 35 U.S.C. § 256 for correction of inventorship and that its complaint requests as a remedy for ReNeuron's alleged breach of contract that ReNeuron be compelled to assign any pending patent applications to Neuralstem.

These facts do not give rise to a conclusion that England is an inadequate alternative forum. First, Neuralstem has not shown that it will be unable to file a separate action in United States courts in the event that it wishes to assert a claim under 35 U.S.C. § 256. While the possibility of duplicative action is appropriately

factored into the analysis of private and public interest factors governing forum non conveniens dismissals, it does not mandate a finding that a foreign forum is inadequate. Second, while Neuralstem argues that one of its *requested* remedies (assignment of ReNeuron's patent applications) is not available in an English forum, it has not shown that England offers *no* remedy for Neuralstem's claims. In determining whether an adequate alternative forum exists, courts ask only whether *some* remedy exists; whether the remedy afforded is less favorable in the foreign forum is not determinative. *See Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143-44 (9th Cir. 2001). Neuralstem has not submitted any evidence to rebut ReNeuron's evidence that English law offers a remedy for each of Neuralstem's claims, even if not Neuralstem's requested remedy.

II

Neuralstem argues that the district court failed to accord Neuralstem's choice of forum proper deference. We agree.

ReNeuron relies upon *Gemini Capital Group v. Yap Fishing Co.*, 150 F.3d 1088, 1090-91 (9th Cir. 1998) to contend that Neuralstem's choice of forum was afforded all due deference given the fact that Neuralstem, a Maryland-based corporation, brought suit in California, a forum to which it has little connection. However, we have recently clarified that a United States citizen's decision to bring

suit in a state in which the plaintiff is not a resident is still entitled to deference. *See Boston Telecommunications Group, Inc. v. Wood*, 588 F.3d 1201, 1207 (9th Cir. 2009).

Here, although the district court purported to give Neuralstem's choice of forum "the appropriate regard," and included the residence of the parties in its enumeration of private interest factors, it did not actually weigh Neuralstem's United States residency and choice of forum in its private interest factor analysis, focusing instead on the residency of potential witnesses. This was an abuse of discretion.

III

Neuralstem argues that the district court abused its discretion in weighing the public and private interest factors relevant to a forum non conveniens determination. We agree.

In dismissing an action on forum non conveniens grounds, a district court "must examine: (1) whether an adequate alternative forum exists, and (2) whether the balance of private and public interest factors favors dismissal." *Lueck*, 236 F.3d at 1142 (citations omitted).

The district court made several errors in weighing the private interest factors. First, as noted above, it failed to accord adequate deference to

Neuralstem's choice of forum. Second, the district court failed to give sufficient weight to the fact that Neuralstem's claims are reliant upon third-party witnesses and documentary evidence located in California and elsewhere in the United States, focusing instead on the evidence and witnesses located in England.

However, the district court failed to hold ReNeuron to its burden of proof to provide sufficient information regarding "the materiality and importance" of the anticipated witnesses and documentary evidence in England, and thus had no opportunity to determine their "accessibility and convenience to the forum." *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1335-36 (9th Cir. 1984) (citations omitted). In addition, the district court did not consider the fact that most if not all of the documentary evidence located in England is within ReNeuron's control, and thus can be brought to court wherever the forum. *See Lueck*, 236 F.3d at 1146-47 (concluding that the private interest factors weighed in favor of dismissal where all of the documentary evidence and witnesses in the United States were under the control of the parties, but much of the evidence in the alternative foreign forum was not).

The district court also made several errors in weighing the public interest factors. Most notably, the district court improperly discounted the interests of California and the United States in the litigation. While England has stronger ties

to the parties' performance of their contractual obligations, California has stronger ties to the issue central to this case – ReNeuron's alleged *breach* of the agreement. The allegedly unlawful conduct constituting a breach of the parties' agreement has occurred almost exclusively in California and elsewhere in the United States.

ReNeuron argues that the "locus" of any harm stemming from its conduct occurred in Maryland, not California. But this court "need not hold . . . that California is the principal locus of the case or that California has more of an interest than any other jurisdiction in order to conclude that California has a meaningful interest in this litigation. With this public interest factor, we ask only if there is an identifiable interest in the controversy, not whether another forum also has an interest." *See Boston Telecommunications*, 588 F.3d at 1212. California has an identifiable interest in preventing unlawful conduct from taking place within its borders. *See id.*

IV

Because the district court failed to hold ReNeuron to its burden of making a clear showing of facts required to merit the "exceptional tool" of a forum non conveniens dismissal, *see Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000) and improperly balanced the private and public interest factors, it abused its discretion in ruling that England is a more convenient forum in which to pursue

this action. We reverse the order of the district court dismissing this action on the basis of forum non conveniens. We therefore need not and do not reach any other issue urged by the parties.

REVERSED AND REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings (December 2009)

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
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* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk