STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

RUSTEM NURLYBAYEV,
Plaintiff,

v. **Case No. 19-177527-CB**
Hon. James M. Alexander

SMILEDIRECTCLUB, INC, ET AL.,
Defendants.
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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motions for summary disposition. According to the Complaint, this is a securities class action case seeking claims under Sections 11, 12, and 15 of the Securities Act of 1933 (Securities Act) on behalf of all persons who acquired Class A common stock of SmileDirectClub.

Generally, Plaintiff's Complaint arises out of allegations that Defendants initial public offering (IPO) documents were negligently prepared, contained untrue statements of material fact or omitted to state necessary facts, failed to make necessary disclosures, and were false and misleading. SmileDirectClub had a successful IPO selling over 58.5 million shares of Class A common stock at $23 per share. Subsequently, information that was withheld from SmileDirectClub's public offering documents became public knowledge. As a result, Plaintiff argues that the value of the stock began to decline. Plaintiff seeks damages for the putative class based on the decline in market value of SmileDirectClub stock following the IPO.

On these general allegations, Plaintiff filed his Complaint on claims titled (Count I) violation of §11 of the Securities Act (against SmileDirectClub, the Individual Defendants, and

the Underwriter Defendants), (Count II) violation of §12(a)(2) of the Securities Act (against SmileDirectClub, the Individual Defendants, and the Underwriter Defendants), and (Count III) violation of §15 of the Securities Act (against SmileDirectClub, the Individual Defendants, and Camelot Venture Group).

The Nonresident Defendants' now move for summary disposition under MCR 2.116(C)(1).[1] arguing that they are not subject to personal jurisdiction in Michigan. A (C)(1) motion tests whether the Court has personal jurisdiction over a defendant. And the Michigan and Underwriter Defendants move for summary disposition under MCR 2.116(C)(6), or under the doctrine of forum non conveniens.[2]

I. Michigan and Underwriter Defendants' Motion

It makes sense to first address the Michigan and Underwriter Defendants' motion. Summary disposition is appropriate under (C)(6) where there is "[a]nother action has been initiated between the same parties involving the same claim." Such a motion is not limited those actions filed in this state or federal courts in the State of Michigan. *Valeo Switches & Detection Sys, Inc v Emcom, Inc*, 272 Mich App 309, 319; 725 NW2d 364 (2006).

"[T]he plain language of MCR 2.116(C)(6) is in keeping with the purpose of the plea of abatement by prior action rule, which was designed to prevent parties from 'litigious harassment' involving the same question and claims as those presented in pending litigation." *Valeo*, 272 Mich App at 319-320.

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[1] The Nonresident Defendants include SmileDirectClub, Inc., David Katzman, Alexander Fenkell, Kyle Wailes, Richard Schnall, Susan Greenspon Rammelt, Richard F. Wallman, and Carol Hamilton.
[2] The Michigan and Underwriter Defendants include Jordan Katzman, Camelot Venture Group, J.P. Morgan Securities, LLC, Citigroup Global Markets Inc., BofA Securities, Inc., Jefferies LLC, UBS Securities LLC, Credit Suisse Securities (USA) LLC, Guggenheim Securities LLC, Stifel, Nicolaus & Company, Incorporated, Loop Capital Markets LLC, and William Blair & Company LLC.

Further, it is not necessary that the parties and claims in the two actions be identical. "Complete identity of parties is not necessary" provided that the two suits are "based on the same or substantially the same cause of action." *J.D. Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986), quoting *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666-667; 341 NW2d 783 (1983).

In other words, summary disposition under (C)(6) is appropriate where "[r]esolution of either action will require examination of the same operative facts." *JD Candler*, 149 Mich App at 601.

Defendants argue that Plaintiff's Complaint should be dismissed because six prior related actions have been filed asserting the same claims on behalf of the same putative class, which are pending in Tennessee state and federal courts. Alternatively, Defendants argue that the cause should be dismissed under the doctrine of forum non conveniens because Michigan is an inconvenient forum to adjudicate the case. The Court agrees.

Here, as stated, when this action was filed, six related actions were already pending in other courts. Currently, those cases have been centralized in one state court and one federal court in Nashville, Tennessee. Two additional cases were filed after this action was initiated, one in the Middle District of Tennessee and the other in New York state court. The case filed in the Middle District of Tennessee has been consolidated with the federal action pending in Nashville, and the case pending in the New York state court has been stayed in deference to the Tennessee actions. As such, the instant action is the only outlier.

Defendants argue that all nine cases at issue (six of which pre-date this case) assert the same federal securities claims for the same relief on behalf of the same putative class against substantially the same defendants. Further, all actions are based on the same alleged

misrepresentations in SmileDirectClub's Offering Documents. Defendants argue that since the actions are based on the same or substantially similar causes of action and resolution of the actions would require examination of the same operative facts, Plaintiff's Complaint should be dismissed pursuant to MCR 2.116(C)(6).

Plaintiff, in response, argues that MCR 2.116(C)(6) does not apply when the prior action in pending in another state. Further, Plaintiff argues that dismissal is not proper since the action do not involve the same parties and the same claims. Specifically, Plaintiff argues that the actions in Tennessee do not name Defendants Richard F. Wallman or Carol Hamilton. And do not assert a claim for violation of §12(a)(2) of the Securities Act. Additionally, Plaintiff argues that the case should not be dismissed under the doctrine of forum non conveniens because the relevant private and public factors weigh in favor of litigating this action in Michigan.

First, Plaintiff's argument that MCR 2.116(C)(6) does not apply where another action is pending in another state fails.[3] As stated, Michigan's established and controlling law states that MCR 2.116(C)(6) "in no way limits the other action to those actions filed in courts of this state

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[3] Plaintiff argues that the Court should follow the holdings of *Sovran Bank, NA v Parsons*, 159 Mich App 408; 407 NW2d 13 (1987), and *Hoover Realty Co v Am Inst of Mktg Sys, Inc*, 24 Mich App 12; 179 NW2d 683 (1970). However, *Valeo* disagreed with and declined to follow both cases Plaintiff's relies on. "Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed. Indeed, in order to avoid an arbitrary discretion in the courts, it is indispensable that courts should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *McCormick v Carrier*, 487 Mich 180, 209-210; 795 NW2d 517 (2010) (internal citations and quotation marks omitted). Further,

> Michigan has a hierarchical judicial system, and trial courts are required to follow applicable rules, orders, and caselaw established by appellate courts, including the United States Supreme Court. This structure is essential to the orderly, uniform, and equal administration of justice. A trial court is not free to disregard rules, orders, and caselaw with which it disagrees or to become a law unto itself. Although a trial court is not required to agree with appellate rules, orders, and caselaw, as with litigants and all other citizens seeking to comply with the law, the court is required in good faith to follow those rules, orders, and caselaw. *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 352-53; 785 NW2d 45 (2010).

Based on the foregoing, the Court is bound by the precedent established in *Valeo* and is required to follow the same.

or federal courts located in this state." *Valeo*, 272 Mich App at 319. As such, a motion pursuant to (C)(6) is not limited those actions filed in this state or federal courts in the State of Michigan.

Next, Plaintiff argue that his case should not be dismissed because he, as Plaintiff in this case, is not a named party in any of the prior actions. Further, Plaintiff has named two additional defendants, Wallman and Hamilton, in this action, but are not named as defendants in the prior action. Based on the same, Plaintiff argues that the case cannot be dismissed since the prior actions do not involve the same parties. This argument also fails.

As stated, "[c]omplete identity of parties is not necessary" provided that the two suits are "based on the same or substantially the same cause of action." *JD Candler*, 149 Mich App at 598. Here, Plaintiff brought this action individually and on behalf of all others similarly situation. In fact, according to Plaintiff's Complaint, "[c]ommon questions of law and fact exists as to all members of the Class and predominate over any questions solely affecting individual members of the Class." (Complaint, ¶26). Here, the fact that different plaintiffs are attempting to represent a putative class nationwide attempting to recover for the same alleged wrongs does not preclude dismissal. The same is true for the additional defendants named in Plaintiff's Complaint.[4]

Rather, the Court must determine if the suits are based on the same or substantial the same cause of action. Plaintiff argues that the suits are not the same because none of the prior actions assert a claim under §12(a)(2) of the Securities Act. However, Plaintiff does not dispute, or even allege, that resolution of the actions would not require examination of the same operative facts. Here, the basis of Plaintiff's Complaint is that Defendant SmileDirectClub made material

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[4] It should be noted that Plaintiff's Complaint does not make any actual allegations against the additional Defendants in this case (Wallman and Hamilton). And, a different defendant who "does not inject new theories or standing, new claims, or new defenses . . . does not alter the essential identity of the parties between the two suits." *JD Chandler*, 149 Mich App at 599.

misrepresentations or omissions in its Offering Documents, which ultimately affected the value of the shares. Plaintiff's Complaint alleges the same general conduct and wrongs that the six prior actions do. (*See* Defendants' Exhibits B-G). The instant action would necessarily require examination of the same set of the same operative facts.

As previously stated, summary disposition under (C)(6) is appropriate where "[r]esolution of either action will require examination of the same operative facts." *JD Candler*, 149 Mich App at 601. Since this case presents the same or substantially similar allegations against the same parties, resolution of this action and the prior six actions, require examination of the same operative facts. Based on the same, summary disposition under (C)(6) is appropriate.

Based on the foregoing, Defendants' motion for summary disposition of Plaintiff's Complaint is GRANTED. Plaintiff's Complaint is DISMISSED in its entirety.

II. Forum Non Conveniens

Assuming arguendo that the Court denied Defendants' motion under (C)(6), the Court would still dismiss Plaintiff's Complaint based on the doctrine of forum non conveniens.

"'Forum non conveniens' is defined as the 'discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.'" *Radeljak v Daimlerchrysler Corp*, 475 Mich 598, 604; 719 NW2d 40 (2006), quoting Black's Law Dictionary (6th ed.). The decision whether to grant or deny such a motion is within this Court's discretion. *Id.*

"'[T]he ultimate inquiry is where trial will best serve the convenience of the parties [and the ends] of justice.'" *Id.* at 605, quoting *Cray v General Motors Corp,* 389 Mich 382, 396; 207

NW2d 393 (1973), and *Koster v American Lumbermens Mutual Casualty Co,* 330 US 518, 527 (1947).

Such a motion is based on the factors set out in *Cray* and readopted in *Radeljak*:

1. The private interest of the litigant.
   a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;
   b. Ease of access to sources of proof;
   c. Distance from the situs of the accident or incident which gave rise to the litigation;
   d. Enforceability of any judgment obtained;
   e. Possible harassment of either party;
   f. Other practical problems which contribute to the ease, expense and expedition of the trial;
   g. Possibility of viewing the premises.

2. Matters of public interest.
   a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
   b. Consideration of the state law which must govern the case;
   c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of *forum non conveniens*. *Radeljak*, 475 Mich at 605-606; *Cray*¸ 389 Mich 382 at 396.

1. Private Interest

With regard to the first factor, "[t]he private interest of the litigant," Defendant argues that (1) key witnesses are located in Tennessee; (2) Defendant SmileDirectClub is headquartered in Tennessee; (3) all the sources of proof are primarily located in Tennessee; (4) litigating in Michigan poses a risk of inconsistent rulings; (4) litigation in both Michigan and Tennessee would be impractical and inefficient; and (5) permitting Plaintiff to pursue its class action separate from the related actions will lead to harassment.

Plaintiffs, on the other hand, argue that (1) Defendant SmileDirectClub was originally founded in Michigan; (2) several of the parties are located in Michigan, and key events occurred

in Oakland County; (3) Plaintiff could enforce a Michigan judgment in Tennessee; (4) Plaintiff's suit will no lead to harassment; (5) there is no risk of inconsistent rulings; and (6) there is no evidence that a trial in Michigan would be more difficult or expensive.

2. *Public Interest*

Regarding the second factor, Defendants argue that (1) the action does not involve Michigan Residents; (2) the action does not assert any claims under Michigan law; and (3) the action does not have a meaningful connection to Michigan.

Plaintiff, to the contrary, argues that (1) SmileDirectClub was founded in Michigan and Michigan has an interest in protecting Michigan shareholders; and (2) federal courts do not have a greater interest in litigating a Securities Act case.

3. *Reasonable Promptness*

Finally, regarding the last factor, "Reasonable promptness in raising the plea of *forum non conveniens*," Defendant raised lack of personal jurisdiction and *forum non conveniens* in the present motion (filed in lieu of an Answer).

Here, as more fully discussed above, this is one of nine pending action involving the parties asserting the same or substantially similar claims against the Defendants. Seven of the nine cases have been consolidated between one state court and one federal court in Tennessee, and the eighth case has been stayed in deference to the Tennessee actions. As stated, this is the only case outside of Tennessee that is active.

With seven of the nine cases pending in Tennessee, Tennessee is certainly the most convenient forum to litigate all pending cases. Specifically, key witness, evidence, and other proofs with be primarily located and litigated in Tennessee in the seven related actions. With all

but one action currently pending in Tennessee, it would be a great inconvenience to the parties and witnesses to be required to travel to Michigan to relitigate a substantially similar matter. Further, there is a high risk of inconsistent rulings between the courts.

Additionally, Michigan law does not govern the matter. And as argued by Defendants, Plaintiff does not allege to be a Michigan resident. Rather, in his response, Plaintiff argues that Michigan has an interest in unidentified shareholders of SmileDirectClub. Simply, Michigan does not have a greater interest in litigating the action than Tennessee.

Based on the foregoing, Defendants have persuaded the Court that the convenience of parties and ends of justice would be better served if action were brought and tried in another forum such that dismissal of the present action is appropriate. As a result, under the *Cray* factors, the Court concludes that (1) Michigan is not a reasonably convenient place for trial and (2) under a forum non conveniens analysis, this case is appropriately litigated in Tennessee.

For all the foregoing reasons, Defendant's motion for summary disposition, or alternatively, to transfer under forum non conveniens is GRANTED, and Plaintiff's Complaint is DISMISSED.[5]

This is a final order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

February 26, 2020	/s/ James M. Alexander
Date	Hon. James M. Alexander, Circuit Court Judge

[5] Based on the Court's rulings, the Court does not need to consider the Nonresident Defendants' motion to dismiss for lack of personal jurisdiction.