

ENTERED

July 05, 2018

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ENERGY INTELLIGENCE GROUP,	§	
INC., and ENERGY INTELLIGENCE	§	
GROUP (UK) LIMITED,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:17-CV-3767
	§	
BANK OF AMERICA, N.A.,	§	
	§	
Defendant.	§	

MEMORANDUM & ORDER

Energy Intelligence Group, Inc. and Energy Intelligence Group (UK) Limited (collectively, “EIG”) produce specialized publications for the energy industry. EIG contends that Defendant Bank of America, N.A. (“BANA”), a subscriber to numerous EIG publications, repeatedly exceeded the bounds of its licensing agreement with EIG. In EIG’s view, this constitutes infringement of EIG’s exclusive rights to reproduce and distribute its copyrighted works.

EIG chose to commence this action here in the Southern District of Texas; BANA insists the Southern District of New York is the more convenient venue and seeks transfer there. (Doc. No. 32.) This litigation could reasonably be conducted in either place. Events relevant to this lawsuit occurred in both cities; likewise, persons connected to this lawsuit may be found in both. Transfer should be granted when another venue is “clearly more convenient.” *In re Volkswagen of America, Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc) (“*Volkswagen II*”). Not finding that to be the case here, the Court holds that transfer to the Southern District of New York is not warranted.

As an alternative to transfer, BANA seeks dismissal of this action on various grounds. Finding its arguments unpersuasive, the Court declines to dismiss EIG's claims.

I. BACKGROUND

EIG, Inc. and EIG (UK)—a Delaware corporation based in New York City and a UK company based in London, respectively—have produced specialized reporting and commentary for the global energy industry for many years. (Doc. No. 1 at 1–2.) EIG has sixty employees at seven bureaus, including New York City and Houston. (*Id.* at 4.) Its publications at issue here are *Oil Daily*, *Natural Gas Week*, *World Gas Intelligence*, *Petroleum Intelligence Weekly*, *Energy Intelligence Finance*, and *Nefte Compass*. (*Id.* at 2–3.) Each, with the exception of *Oil Daily*, is a weekly publication. BANA is a federally chartered banking association headquartered in North Carolina, with a substantial business presence in New York, Houston, and elsewhere. (Doc. No. 32 at 3; Doc. No. 39 at 2–3.)

EIG registers its publications with the U.S. Copyright Office on a monthly basis. (*Id.* at 7–18.) Its Complaint is accompanied by Certificates of Registration from the U.S. Copyright Office going back to the February 2013 issues of its various publications. (Doc. No. 1-8 to 1-24.) EIG asserts that it provides clear copyright notices and warnings on its publications, its website, and its emails. For instance, an email distribution of *Oil Daily* from 2014 contained the following:

Copyright (c) 2014 Energy Intelligence Group, Inc. All rights reserved.

Reproduction or distribution internally or externally in any manner (photostatically, electronically, or via facsimile), including by sharing printed copies, or forwarding or posting on local- and wide-area networks and intranets, or sharing user name and password, is strictly prohibited without appropriate license from Energy Intelligence -- contact CustomerService@energyintel.com for more information.

(Doc. No. 1-7.) Similarly, a supplement to *Oil Daily* from 2014 stated the following just beneath its heading: “Copyright © 2014 Energy Intelligence Group. All rights reserved. Unauthorized access or electronic forwarding, even for internal use, is prohibited.” (Doc. No. 1-1 at 8.)

EIG explains that its publications are aimed not only at the energy industry, but also at the financial sector. (Doc. No. 1 at 3.) Among EIG’s subscribers are various BANA employees, since at least 2013. EIG identifies four persons, based in BANA’s Houston, New York City, and Hong Kong offices, who have subscribed to *Oil Daily*; five persons, based in BANA’s Houston, New York City, and London offices, who have subscribed to *Natural Gas Week*; one person, based in BANA’s Houston office, who has subscribed to *World Gas Intelligence*; two persons, based in BANA’s London office, who have subscribed to *Petroleum Intelligence Weekly*; one person, based in BANA’s Houston office, who has subscribed to *Energy Intelligence Finance*; and one person, based in BANA’s Moscow office, who has subscribed to *Nefte Compass*. (Doc. No. 1 at 18–25.)

A standard licensing agreement, renewed yearly, governs the various subscriptions held by BANA employees. EIG attaches these to its Complaint. For instance, the license agreement in effect for 2017 shows a Bank of America contact, Wendy Fernandez, based in New York City; the period of the agreement; the fee schedule; and the individual BANA employees associated with each subscription. (Doc. No. 1-26.) The agreement also contains a text that defines the scope of the “limited, non-exclusive and non-transferable license” conferred on “Authorized Users” of EIG’s publications. (*Id.* at 3.) It provides:

Use. When [Energy Intelligence] Services are accessed and/or provided electronically, Authorized Users may download the licensed EI Services only for their respective individual referential use. In addition, Authorized Users may occasionally distribute a copy of a story from the EI Services to a few individuals, and in a non-systematic manner in the ordinary course of business, provided the copyright and other proprietary rights notices are included and that Subscriber

and/or Authorized User does not edit, alter or abridge the content from the EI Services. For the avoidance of doubt, no such distribution is permitted if in Energy Intelligence's sole judgment it could serve as a substitute for a subscription to publications and/or the content of the publications within the EI Services. Except as otherwise noted in this Section . . . no content from the EI Services may be downloaded, transmitted, broadcast, transferred, assigned, reproduced or in any other way used or disseminated in any form, to any person not specifically identified herein as an Authorized User, without the explicit written consent of Energy Intelligence in each instance.

(*Id.*)

At the heart of EIG's Complaint are two episodes involving BANA employees. First, in February 2015, a BANA employee named Shang Gao emailed an EIG account manager, Jessie Da Silva Sims, asking for access to a particular *Oil Daily* supplement. (Doc. No. 1 at 25–26.) They spoke several times, with Gao evidently telling Sims that he received *Oil Daily* regularly from Erika Smith, a Houston-based BANA employee and subscriber to that publication. (*Id.* at 26.) Gao also indicated that Smith either put *Oil Daily* on an internal library system or forwarded it to him. (*Id.*) This led EIG to contact Daphne Joseph, then EIG's contact at BANA, about the unauthorized copying and distribution of EIG's publications. (*Id.*) According to EIG, Joseph spoke with the managers of "various business groups" at BANA and received their assurance that such unauthorized distribution would not recur. (*Id.* at 27.) Through Joseph, BANA also evidently declined to purchase a "Global Enterprise License" for EIG's publications. (*Id.*) After EIG's exchange with Joseph, Gao again contacted Sims, in the process revealing that he had continued to receive *Oil Daily* via forwarding from other employees. (*Id.*)

Second, in June 2017, two EIG sales employees went to BANA's New York office to visit with Gregg Brody, a subscriber to *Natural Gas Week*. (Doc. No. 1 at 28.) While there, they spoke with Shanna Qiu, a research analyst who worked with Brody. (*Id.*) Qiu allegedly told the EIG employees that Brody "forward[ed] the publication to her and the 'entire team' every

week.” (*Id.*) Qiu identified one person specifically that also received Brody’s forwards, Steve Weiss, whom EIG believes to be a high-level executive at BANA. (*Id.* at 29.)

Based on the foregoing allegations, EIG brought six copyright infringement claims against BANA, one for each of the publications listed above. (Doc. No. 1 at 31–39.) Its Complaint requested a permanent injunction, damages, added damages for willfulness, disgorgement, and other relief. (*Id.* at 41–42.) The Complaint drew BANA’s pending motion to transfer or else to dismiss (Doc. No. 32), to which the Court now turns.

II. MOTION TO TRANSFER VENUE

Federal law generally permits a plaintiff to sue a defendant in any judicial district where the defendant resides, defining residency to include “any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.” 28 U.S.C. § 1391(a), (c). “Because large corporations . . . often have sufficient contacts to satisfy the requirement of § 1391(c) for most, if not all, federal venues, the general venue statute ‘has the effect of nearly eliminating venue restrictions in suits against corporations.’” *Volkswagen II*, 545 F.3d at 312 (quoting 14D Wright, Miller, & Cooper, Federal Practice & Procedure § 3802 (3rd ed., 2007)).

The venue transfer statute, 28 U.S.C. § 1404, curbs potential abuses of the general venue statute by preventing plaintiffs from subjecting defendants to inconvenient venues. *Volkswagen II*, 545 F.3d at 312. It provides: “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 or to any district or division to which all parties have consented.” 28 U.S.C. § 1404(a). This is “a powerful tool to bring forth efficient judicial case management

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