IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 06 L 7663

LOIS M. FOWLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY FOWLER, DECEASED,
Plaintiff,
v.
BALLY TOTAL FITNESS, CORP.,
Defendant.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE

Plaintiff, Lois M. Fowler, Personal Representative of the Estate of Gary Fowler, deceased ("Fowler"), for her Memorandum of Law in Opposition to the Motion of Defendant Bally Total Fitness, Corp. ("Bally") to Dismiss And/Or Transfer Based on *Forum Non Conveniens*, states as follows:

Introduction and Argument Summary

There is nothing inconvenient about Cook County for any party.

Bally does not even try to argue inconvenience, the ultimate basis for a *forum non conveniens* argument. Even if the factors were split between Illinois and Maryland, Plaintiff's choice in Defendant's home county should prevail, especially where most of the key witnesses are in Illinois, and Illinois law will apply.

Defendant Bally's corporate headquarters is 8700 Bryn Mawr in Cook County. Bally cannot claim inconvenience in its home county. Nor may Bally claim that Plaintiff's choice is inconvenient to Plaintiff. For Plaintiff, the primary topic of proof is Bally's tardy and prolonged "investigation" and decision-making with respect to equipping its clubs with defibrillators and saving members' lives.

The most important evidence is in Cook County, which has a strong interest in the conduct of its own corporate citizens. Under Maryland wrongful death law, Illinois substantive law will apply, if the "wrongful act" took place outside of Maryland. The "wrongful acts," which are the essence of Plaintiff's complaint, all arise from decisions made at corporate headquarters in Cook County:

1. A decision not to deploy AEDs in a timely fashion throughout Bally's system, despite knowledge of a need for them and the life-saving efficacy of deployment; and

2. A decision to use release language in membership agreements to shield itself from liability, rather than taking active measures to protect members' lives and safety.

The effects of that decision have been felt in various Bally clubs throughout the United States. Because Illinois has a strong interest in ensuring proper conduct by its corporate domiciliaries, Cook County venue is proper.

The private factors of the *forum non conveniens* analysis (discussed below) are convenience of the parties, access to proof, and practical considerations for trial. Apart from convenience, these factors depend entirely on the Plaintiff's case – the theories of recovery and elements to be proved. These are set out in detail in Mrs. Fowler's Complaint, a summary of which is attached as Exhibit A.

Plaintiff's claims are essentially for wrongful death (Counts I, II, III, IV, VI), based on Bally's decision not to have defibrillators in its clubs. Plaintiff brings a single count to invalidate Bally's unlawful adhesion membership contract. Contrary to the impression created by Bally's Motion, almost all of the parties' proof in this action will relate to the wrongful death counts, as to liability and damages.

Because Mr. Fowler died suddenly in a Bally club, there are no medical facility witnesses necessary in Maryland. All records can be obtained by subpoena. Apart from the EMTs who attempted to resuscitate Mr. Fowler and a couple of members, the rest of the percipient

witnesses—a small group—are Bally employees.

Bally fails in its burden to show that the relevant factors “strongly favor” Maryland as a venue. Nor is there any other good basis to disturb Plaintiff’s choice. Bally’s motion should be denied.

General Principles

It is undisputed that venue is proper in Cook County, Illinois. By statute, Bally is deemed to be a resident of "any county in which it has its registered office or other office or is doing business." 735 ILCS 5-2102(a). Under general venue principles, "every action must be commenced (1) in the county of residence of any defendant who is joined in good faith and with probable cause for the purpose of obtaining judgment against him or her and not solely for the purpose of fixing venue in that county, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose. 735 ILCS 5-2101.

The above-quoted venue statute, is "designed to ensure that the action will be brought either in a location convenient to the defendant, by providing for venue in the county of residence, or convenient to potential witnesses by allowing venue where the cause of action arose. *Langenhorst v. Norfolk Southern RY, Co*., 219 Ill.2d 430, 441 (2006).

"*Forum non conveniens* is an equitable doctrine founded in considerations of fundamental fairness in the sensible and effective administration of justice." *Id*. The trial court has considerable discretion in ruling on a *forum non conveniens* motion. *Id*., at 441-42.

The Illinois Supreme Court has "repeatedly noted" that the court's discretion with respect to a *forum non conveniens* motion "should be exercised *only in exceptional circumstances* when the interest of justice requires a trial in a more convenient forum." *Id.*, at 442, *citing First National Bank v. Guerine*, 198 Ill.2d 511, 520 (2002)(emphasis in original).

"The Plaintiff has a substantial interest in choosing the forum where his rights will be vindicated, and the Plaintiff's forum choice should rarely be disturbed unless other factors strongly favor transfer. *Guerine*, 198 Ill.2d at 517. Considerable deference must be allowed even if the chosen forum is neither the Plaintiff's residence nor the site of the injury. *Guerine*, 198 Ill.2d at 517-18.

The Private and Public Factors

There are two categories of factors to be considered, private and public. The private factors are as follows:

> (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) all other practical problems that make trial of the case easy, expeditious, and inexpensive.

Langenhorst, 219 Ill.2d at 443, *citing Guerine*, 198 Ill.2d at 516.

Public interest factors include:

> (1) the interest in deciding controversies locally; (2) the unfairness of imposing trial expense and the burden of jury duty on residents of a forum that has little connection to the litigation; and (3) the administrative difficulties presented by adding litigation to already congested court dockets.

Id., at 443-44. These factors are relevant to both interstate and intrastate *forum non conveniens* analysis. *Id.*, at 444.

Private Factor: Convenience and Plaintiff's Choice of Defendant's Home Forum

Generally, the burden is on the defendant to show that the Plaintiff's chosen forum is inconvenient to the defendant, and another forum is more convenient to all parties. *Ellis v. AAR Parts Trading, Inc.*, 357 Ill.App.3d 723, 741 (2005). The defendant "cannot assert that the Plaintiff's chosen forum is inconvenient to the Plaintiff." *Ellis*, 357 Ill.App.3d at 742, *citing Guerine*, 198 Ill.2d at 518.

Bally does not even try to argue that Cook County is inconvenient to it. Bally is mistaken in trying to discount the importance of convenience; it is obviously central to the analysis. Bally is precluded from arguing that Illinois is inconvenient to the Plaintiffs. Defendants must then show that the forum they are advocating is more convenient for all parties. Here, because there are only two parties, Bally must show that its home county of Cook County, Illinois is inconvenient to it. This position has been not only rejected, but ridiculed, by the courts of Illinois.

Courts have termed "incredulous" and "incongruous" a defendant's effort to transfer a case away from his home county. In *Ellis*, Plaintiffs were mostly citizens of the Philippines who lost their lives in an air crash in the Philippines. Plaintiffs sued the owner of the plane and the maintenance company, both of which were based in Illinois. The case was filed in Cook County. The Court in *Ellis* quoted with approval the trial court's reaction to the defendants' attempt to transfer a case out of their own home county:

> It is incredulous for two Illinois resident corporations to argue that their home state is inconvenient to them to litigate this matter. It is also incredulous to observe that the defendants thoroughly ignore the fact that the theories of liability pled against them concern the alleged defective condition of the aircraft prior to its transfer to Air Philippines, and there has been no assertion by the defendants that the sources of proof, records and witnesses on all these issues are not located in Illinois.

Ellis, 357 Ill.App.3d at 743.

Similarly, in *Kwasniewski v. Schade*, 153 Ill.2d 500 (1992), a three-car accident which occurred in Wisconsin gave rise to suit in Illinois, in the defendants' home county. With respect to arguments as to inconvenience, the court stated: "it is all but incongruous for defendants to argue that their own home county is inconvenient." 153 Ill.2d at 555.

Nothing in Bally's papers prevents any claim of inconvenience from being similarly groundless. This factor overwhelmingly favors Cook County as a forum. Bally is simply wrong to say, as it does in its Motion at 4, that Bally's maintenance of its headquarters in Illinois "does

not affect the *forum non conveniens* analysis." Obviously, its location is central to the question of convenience. Bally's home in Cook County profoundly affects most of the relevant factors. The proof needed by Plaintiff is at the headquarters; the witnesses and documents are there; and Illinois courts and juries have an interest in policing a local corporation (as discussed below).

Bally may have meant that merely doing business in a county does not affect the analysis, as in the case of a national company like a large insurer. That principle has no application here, where Bally has its national headquarters in Cook County.

Private Factor: Access to Proof and Trial Considerations

Not surprisingly, Bally ignores Plaintiff's main claims of wrongful death (Counts I, II, III, IV, and VI), and focuses on a single count (Count V) directed at Bally's adhesive membership contract. This latter count accounts for little of the proof Plaintiff will need. But since the employees who formulated the terms of the membership contract likely did so at corporate headquarters, this proof will also be in Cook County. Consequently, Bally's private factors analysis is groundless. Appropriate private factor analysis is provided by *Ellis*, a wrongful death case with two potential venues, the site of the plane crash (Philippines) and the domicile of the defendant companies (Illinois).

The court in *Ellis* considered and rejected many of the same arguments that Bally makes here. In that case, the defendants argued that, since the air crash occurred there, the Philippines was a more convenient forum for obtaining proof, especially witnesses to the crash and the service and maintenance of the plane. The court noted that the Plaintiff was proceeding on legal theories of both negligence and defective design, which would require proof not only from the Philippines but also from the defendants' corporations located in Illinois. *Ellis*, 357 Ill.App.3d at 745. This militated against transfer to the Philippines.

The defendants in *Ellis* also argued that a view of the accident site was available in the Philippines and should be considered. The court rejected this, ruling that a view of the accident site was neither necessary nor possible. *Id*., at 743. Similarly, here, no issue advanced by the defendant or the Plaintiff is established with a view of the Bally club in Maryland. Fowler's theory has nothing to do with the physical location or layout of the club, and everything to do with Bally's decision, made in Cook County, Illinois, that it would not supply defibrillators in its clubs.

The court in *Ellis* rejected the defendants' efforts to transfer to the Philippines for several reasons, among them the general principle that the defendant had failed to show that their home state of Illinois was inconvenient to them. Also in *Ellis*, the defendant argued that compulsory process of unwilling witnesses favored transfer to the Philippines. The court rejected this, noting that compulsory process of unwilling witnesses weighed equally against Cook County, Illinois and the Philippines. Either forum would result in witnesses that could not be compelled to appear, and thus did not "strongly favor" dismissal and transfer of the action. *Id*., at 743-44.

Here, the defendant is precluded from arguing that Plaintiff's chosen forum is inconvenient to Plaintiff. The only other witnesses in the case in Maryland are those who witnessed Gary Fowler's death and the EMTs who tried to revive him, but were unable to arrive in time to do so. These witnesses are not of crucial importance on the subject of liability or damages, because it is not the manner of Gary Fowler's death that is contested.

Rather, the parties will inevitably agree that he had a fatal cardiac event, and that no defibrillator was available in the club. This is not a case about a Bally employee failing to call 911 or perform CPR. The issue of Bally's liability is whether it was negligent in failing to have a

defibrillator. For a national chain like Bally with dozens of clubs in every state, the witnesses at its headquarters are the essential ones.

Most of the proof in this case, which would be available by process, is available in either Illinois or Maryland. Plaintiffs contend that most of the evidence, and the most important evidence, is in Cook County. Even if proof were split, this factor would nonetheless weigh against transfer to Maryland.

The crucial witnesses for the Plaintiff are those Bally officers who were responsible for, among other things:

- monitoring industry developments relating to AEDs, including the increasingly widespread adoption of AEDs by other large health club chains,
- reviewing and analyzing Bally data on club member cardiac events
- participating in the decision whether or not to install AEDs in Bally clubs
- emergency response policy and training
- evaluating the cost of a nationwide AED program
- the timing and requirements of a nationwide AED program.

Attached to this Opposition are excerpts of the sworn deposition testimony of Bally officers or employees, with some of these responsibilities, that Plaintiffs have obtained from other AED-based claims against Bally.

Deborah Deters is a Bally assistant vice president who, in May, 2003, was charged with developing and implementing a "nationwide" rollout of AEDs for the Bally clubs that was anticipated to last three or four years. She has knowledge about the corporate decision to put AEDs first only where mandated by law and then on a "market-size basis." (Deposition of Deborah Deters in Alix v. Bally, Exhibit B, at 8, 22-23, 51-53, 82, 95-96). Deters has always

worked out of Bally's Chicago headquarters. (Ex. B at 8-11). She has knowledge about which states' clubs were first equipped with AEDs, and why. (Ex. B at 56, 64-65, 95-96). She has knowledge about a training session held at Bally headquarters and attended by key employees from around the country in the summer of 2004. The purpose of the meeting was to train Bally employees as AED instructors (Ex. B at 97, 100)

Judith Lasch is the Bally Director of Liability Management, a position she has held since 1996. (September 29, 2004 Deposition of Judith Lasch, in VanDusen v Bally Exhibit C, ["Lasch I"] at 4-5). Her office is in the Cook County Bally headquarters. (Ex. C at 10). She participated in a study of cardiovascular fatalities at Bally facilities in the late 1990s, which disclosed seventy-one deaths from cardiovascular events in a two-year period (Exhibit E). She testified that the back-up information for the study is at the Chicago Bally offices. (Ex. C at 42, 59). She also has information about Bally's consideration of AEDs for its clubs. (Ex. C at 39-40, 49, 52). Her investigation of an earlier member cardiac fatality included consultations with others at the Chicago office. (Ex. C at 62-63).

Bally claims inconvenience because it will not be able to subpoena Maryland witnesses. The fact is, some witnesses will be beyond subpoena power no matter which forum the case is in. Bally wrongly assumes that all of the Bally employees Plaintiffs will seek testimony from are (1) still employed at Bally, and (2) can be compelled to appear in Maryland. For example, the two Bally CEOs during the period in question (From 2002 through November 2005) are no longer with Bally. Lee Hillman left office sometime in 2003 and was replaced by Paul Toback. Paul Toback resigned in August of 2006. (Ex. C at 63-64, Exhibit F).

Furthermore, Bally uses a third-party administrator, Cambridge Integrated Systems, to investigate all incidents in its clubs throughout the country. The office to which these reports are

sent is located in Chicago. (Ex. C at 35-36; January 17, 2006 Deposition of Judith Lasch in Alix v Bally, Exhibit D, [Lasch II] at 21-23).

AEDs were saving lives in health clubs going back to the early 1990s. By the time of trial, it is extremely doubtful all employees with relevant knowledge will still be with Bally. In addition, a Court's power to order a corporate party's employees to testify is not as clear as Bally suggests and is not, in any event, unlimited or unconditional.

Bally also argues, incorrectly, that Plaintiff's Count V depends on Maryland proof or that a claim under the Illinois statute is unavailable. The Bally membership contract is unfair and deceptive under either state's law. Plaintiff's allegations control this question, until Bally challenges the claim legally or provides contrary evidence. Little, if any, proof as to the contract will be needed, now that Bally has made the contract part of its Motion. Count V and the contract issue are of no significance in the venue analysis, as compared to the primary wrongful death claims.

For these reasons, Bally's reliance on Gridley v. State Farm Mutual Insurance Co., 217 Ill. 2d. 158 (2005) is wholly misplaced. That case was a consumer fraud case arising out of Louisiana conduct. This action is for wrongful death based on Illinois conduct against a Cook County company. Similarly misplaced is Bally's reliance on Avery v. State Farm, 216 Ill.2d 100 (2005), which was a consumer fraud case, with little resemblance to this case.

Public Interest Factor: Stake or Interest of the Forum

The court in *Ellis* agreed that residents of the Philippines, where the crash occurred, had an interest in determining a case in which its residents died.

> However, the residents of Illinois are certainly interested in this case because the aircraft was owned and/or operated by corporations that do business in the state of Illinois and take advantage of Illinois law. They are concerned about resident corporations and the quality of their products …

Ellis, 357 Ill.App.3d at 747. Here, Maryland has an interest in resolving the death of one of its residents, in Maryland. However, the decision resulting in that death, and dozens of other deaths, were made in Cook County. Illinois also has a definite interest in resolving a case against a corporate resident of the state, which employs hundreds in Illinois, and makes decisions with national life-and-death consequences in Illinois. Illinois also has an interest in the quality of their corporate residents' products and services. As discussed below, the parties will also be taking advantage of Illinois law. This factor weighs against transfer.

Public Interest Factor: Burden on the Forum's Citizens and Connection to the Litigation

Here, as in *Ellis*, Illinois and another forum have a connection to the litigation. Where Illinois' has an interest in the conduct of one of its corporate domiciliaries, if jury duty was a burden at all, it was "not an unfair one." *Ellis*, 357 Ill.App.3d at 747. Here, jurors in Maryland or Illinois would hear the case. Illinois has a stake in the conduct of its own resident. Under *Ellis*, jury duty for Cook County residents is not unfair. This factor weighs against transfer.

Public Interest Factor: Application of Forum Law

The public interest factors include whether a proposed forum would be applying its own law. *Kwasniewski*, 153 Ill.2d at 556; *Gridley v. State Farm Mutual Auto Insurance Co.*, 217 Ill.2d 158, 175 (2005). The substantive law of Illinois, including as to negligence, will apply in this case regardless of the forum. Bally is wrong to claim otherwise.

Maryland's wrongful death act provides: "if the wrongful act occurred in another state… a Maryland court shall apply the substantive law of that jurisdiction." Maryland Wrongful Death Act, Maryland Code §3-903; *Jones v Prince George's County*, 378 Md. 98, 835 A.2d 632 (2003)(copy attached). Fowler's theory of the case is that the "wrongful acts" of the defendant Bally occurred in Illinois: 1) its decision not to make defibrillators available in its health clubs,

despite what it knew about member cardiac arrest, and the effectiveness of defibrillators in the health club environment, and 2) its decision instead to seek shelter behind release language.

Under Maryland law, the Illinois law of negligence applies here. This is a public interest factor weighing in favor of Illinois as a forum, and weighing against Maryland.

Public Interest Factor: Relative State of the Docket

Finally, as to court congestion, this factor is "relatively insignificant and is not sufficient to justify transfer of venue when none of the other relevant factors weigh strongly in favor of transfer. *Ellis*, 357 Ill.App.3d at 748, citing *Dawdy v. Union Pacific R.R. Co*., 207 Ill.2d 167, 181 (2003). The docket congestion public interest factor has also been called the "least significant of the public interest factors." *Kwasniewski*, 153 Ill.2d at 555.

Bally places heavy, but mistaken, reliance on *Eads v. Consolidated Rail Corp.*, 365 Ill. App. 3d 19 (2006). The convoluted procedural background included a parallel action in Indiana (the site of the train crash at issue), and four separate motions based on forum non conveniens. In *Eads*, the site of the crash was Indiana, and Indiana law was found to apply. Neither factor is the same here. Under Maryland law, Illinois law will apply in this action. The negligence here was the corporate decision made in Chicago, though the resulting death occurred in Maryland.

In *Eads*, Indiana residents of the county where the crash occurred were found to have an interest in redressing the railroad's alleged negligence in their county. The railroad apparently was not based in Illinois though it did business here. In the instant case, Bally is based in Cook County and its corporate decisions were made here. This gives Cook County residents an interest in adjudicating the conduct of their own corporate citizens. *Ellis*, 357 Ill. App. 3d at 747.

In *Eads*, almost all of the witnesses were in Indiana, including the Plaintiff's treating and expert medical providers, as well as local law enforcement which investigated the crash. There

are no comparable witnesses to speak of here. There was no hospital treatment because Mr. Fowler died instantly of sudden cardiac arrest; and there was no law enforcement investigation. The few witnesses to Mr. Fowler's sudden cardiac arrest were Bally club employees and members, though there would appear to be little relevance to their testimony, beyond that he collapsed suddenly and died.

Eads does not support Bally's Motion.

Conclusion

Bally falls well short of its required burden. It cannot show that it will be inconvenienced in its home county. It cannot show that the private and public factors "weigh strongly" in favor of transfer, and it cannot show that there is any reason for disturbing Plaintiff Fowler's choice of forum. For all of the foregoing reasons, this Court should deny Bally's Motion to Transfer based on *forum non conveniens*.

PLAINTIFF LOIS M. FOWLER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY FOWLER, DECEASED

By: _____
Paul S. Weinberg, BBO No. 519550
Weinberg & Garber, P.C.
71 King Street
Northampton, MA 01060
(413) 582-6886
fax (413) 582-6881

and

_____
Robert B. Patterson, Esq.
Law Offices of Robert B. Patterson
221 North LaSalle Street, Suite 1050
Chicago, IL 60601
(312) 236 0995 (telephone)
(312) 984 5791 (fax)

CERTIFICATE OF SERVICE

I, Paul S. Weinberg, Esq., hereby certify that on this 26th day of October, 2007, I served a copy of the foregoing by mailing, postage prepaid, to counsel.

Subscribed under penalties of perjury.

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Paul S. Weinberg, Esq.