IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JUANA DOE I et al,

Plaintiffs

v.

IFC ASSET MANAGEMENT COMPANY, LLC,

Defendant.

Civil Action No. 17-1494-VAC-SRF

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXTEND TIME

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I. Introduction and Summary of Argument

Plaintiffs do not oppose a 30-day extension to file an answer or motion to dismiss, and to file a motion to transfer contemporaneously. Plaintiffs do oppose altering ordinary federal civil procedure in this case, and providing a 30-day extension simply for the purpose of allowing Defendant to seek a *further* indefinite extension while the Court considers venue transfer. It makes no sense to delay the answering deadline in order to hear a venue transfer motion, which is inextricably tied to Rule 12 issues of subject matter jurisdiction, particularly since Defendant's Rule 12 argument that it is immune precludes transfer. Moreover, Rule 12 specifically prohibits Defendant's alternate suggestion to bifurcate their Rule 12(b) arguments.

II. Nature and Stage of Proceedings

On March 9, 2017, Plaintiffs in this case filed a complaint in the District Court for the District of Columbia, based on the same factual allegations as the present case, against both Defendant and its parent, the International Finance Corporation (IFC). D.I. 4, *Doe v. Int'l Finance Corp.*, 1:17-c-003630-CRC (D.D.C. Mar. 9, 2017). At that time, the framework for international organization immunity was under review by the D.C. Circuit in the case of *Jam v. Int'l Finance Corp.*, 860 F.3d 703 (D.C. Cir. 2017), subsequently decided on June 23. The *Jam* decision held that the IFC was entitled to "complete immunity," *id.* at 706, in contrast to the Third Circuit's holding that international organizations are not immune under the immunity exceptions provided by the Foreign Sovereign Immunities Act, including for their commercial activities. *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010).[2]

On August 9, 2017 Plaintiffs agreed to Defendants' proposal to brief only the issue of

[2] Notably, Judge Pillard sided with the Third Circuit, stating that if she were not bound by prior D.C. Circuit precedent, she "would hold that international organizations' immunity under the IOIA is the same as the immunity enjoyed by foreign states. *Accord OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 762-64 (3d Cir. 2010)[.]" *Jam*, 860 F.3d at 710 (Pillard, J., concurring).

immunity, D.I. 15, *Doe v. Int'l Finance Corp.*, 1:17-c-003630-CRC (D.D.C. Aug. 9, 2017). This decision was motivated by the fact that the Plaintiffs in *Jam* had petitioned for *en banc* rehearing and that they thought the state of the immunity law in the D.C. Circuit would be clarified before the briefing had concluded. The text of the parties' Proposed Scheduling Order, D.I. 17 & Exhibit B, shows that the parties were negotiating in the context of the pending Petition for Rehearing *En Banc* in *Jam.*

On September 26, 2017, the D.C. Circuit denied *en banc* rehearing in the *Jam* case. *Jam v. Int'l Fin. Corp.*, 2017 U.S. App. LEXIS 18598 (D.C. Cir. Sep. 26, 2017).

On October 24, 2017, the Plaintiffs voluntarily dismissed the D.C. action without prejudice. D.I. 18, *Doe v. Int'l Finance Corp.*, 1:17-c-003630-CRC (D.D.C. Oct. 24, 2017). On the same day, the same Plaintiffs – save one who had been murdered, as part of the same pattern of violence at issue in this case, after the filing of the D.C. action – filed the instant action. Plaintiffs' counsel immediately notified counsel from the D.C. action, including Jeffrey Green, that they had voluntarily dismissed their action in the District of Columbia and had filed suit against Defendant IFC-AMC in the District of Delaware. The same counsel continues to represent IFC-AMC in this action.

III. Argument

A. Delaying a motion to dismiss to hear a transfer motion makes no sense where jurisdictional issues will arise in the transfer motion and Defendant's position on immunity precludes transfer.

Defendant wishes to indefinitely delay briefing a Rule 12(b) motion to dismiss and instead file only a motion for venue transfer. Of course, a transfer motion does not ordinarily delay a defendant's answer deadline – only a Rule 12 motion does so. *Compare* Fed. R. Civ. Proc. 12(a)(4) *with* 28 U.S.C. § 1404(a). In the ordinary course, filing a motion to transfer does not eliminate a defendant's obligation to answer or move to dismiss.

There is no reason to alter that procedure here, where ruling on Defendant's proposed motion to transfer requires review of issues that Defendant would raise in its motion to dismiss. In

making a section 1404(a) motion, it is initially Defendant's "burden to demonstrate that the Court has subject matter jurisdiction over this action." *Ontel Products Corporation v. Yeti Coolers, LLC*, 2017 WL 3033436 (D. Del. June 30, 2017); *see also CIBC World Mkts., Inc. v. Deutsche Bank Sec., Inc.*, 309 F. Supp. 2d 637, 643 (D.N.J. 2004) ("A court must itself have subject matter jurisdiction over an action before it may transfer that action under §1404(a)."). But Defendant has already suggested that it intends to argue that this Court *does not* have subject matter jurisdiction.

Furthermore, under section 1404(a),[3] it is *also* Defendant's burden to show that the D.C. court "could have exercised personal and subject matter jurisdiction in the action." *Joao Control & Monitoring Sys. v. Ford Motor Co.*, C.A. No. 12-cv-1479, 2013 WL 4496644 at *4 (D. Del. Aug. 13, 2013). Indeed, the Third Circuit has held that transfer is allowed only if a plaintiff had an "'unqualified right' to bring the action in the transferee forum at the time of the commencement of the action." *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 24 (3d Cir. 1970). "Prior to ordering a transfer the district court must make a determination that the suit could have been rightly started in the transferee district." *Id.* Again, however, Defendant has already argued that the D.C. court *does not* have subject matter jurisdiction over this case; in the D.C. action, Defendant argued that it benefits from 'absolute immunity' in the District of Columbia. D.I. 17, *Doe v. Int'l Finance Corp.*, 1:17-c-003630-CRC (D.D.C. Sept. 6, 2017). And herein lies the true reason for Defendant's preferred strategy: Defendant seeks to transfer this suit back to a forum where it has argued, and presumably will argue, that Plaintiffs' case is dead upon arrival.[4] Moreover, Defendant seeks to achieve this before this Court decides subject matter jurisdiction under the clear authority of the Third Circuit, which has rejected the D.C. Circuit's approach to immunity upon which Defendant relies. *OSS*

[3] By email, defense counsel confirmed that their "motion to transfer" refers to a section 1404(a) motion. Nonetheless, similar issues would be raised under 28 U.S.C. § 1631 and 28 U.S.C. §1406(a), which would both require Defendant to show that jurisdiction is proper in the transferee district.
[4] Plaintiffs do not accept or concede IFC-AMC's arguments that it is immune under the law in the D.C. Circuit.

Nokalva, 617 F.3d at 764. And it seeks to elide the fact that their argument for immunity and their argument for transfer are mutually exclusive.

Thus, not only is Defendant's proposed transfer motion intertwined with its motion to dismiss arguments, it is also extremely unlikely to succeed.

B. Rule 12 does not permit successive, bifurcated motions to dismiss.

Defendant's alternate strategy – brief only immunity now, and raise other issues later – is expressly foreclosed by Rule 12(g)(2) of the Federal Rules of Civil Procedure.

"The aim of Rule 12 is to afford an easy method for the presentation of defenses but at the same time prevent their use for purposes of delay. To effectuate that goal, Rule 12(g) requires a party who raises a defense by motion prior to answer to raise all such possible defenses in a single motion. They cannot be raised in a second, pre-answer motion." *Myers v. American Dental Ass'n*, 695 F.2d 716, 720 (3d Cir. 1982) (citing 2A J. Lucas & J. Moore, Moore's Federal Practice para. 12.02, at 2225 (2d ed. 1982)). This "consolidation rule" is intended "to eliminate unnecessary delay at the pleading stage" by encouraging "the presentation of an omnibus pre-answer motion in which the defendant advances every available Rule 12 defense" simultaneously rather than "interposing these defenses and objections in piecemeal fashion." Charles Alan Wright & Arthur R. Miller, 5C Fed. Prac. & Proc. Civ. § 1384 (3d ed. 2014).[5]

Thus, Defendant's suggestion that "Plaintiffs' proposal may generate unnecessary Rule 12 motions," D.I. 17 at 4, is a red herring. Defendant is entitled to only a single Rule 12 motion prior to answering.

The fact that Plaintiffs previously agreed to a stipulation to isolate the issue of immunity for

[5] The Advisory Committee's Note to the 1966 amendments underlines the plain text of this rule, noting that defendants "should bring forward all the specified defenses" in the first instance "and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions." Fed. R. Civ. P. 12, Advisory Comm. Note (1966 Amendments); *see Emekekwue v. Offor*, 2012 U.S. Dist. LEXIS 152804, at *11 (M.D. Pa. Oct. 24, 2012).

preliminary briefing in the D.C. action is no reason to enter such an order *over Plaintiffs' objection* here.[6] At that time, Plaintiffs believed it made sense to brief immunity first since their ability to sue the IFC in the D.C. Circuit depended entirely on the D.C. Circuit granting *en banc* review in *Jam*. That exceptional circumstance is not presented here, where the Third Circuit's approach to immunity is clear. The Foreign Sovereign Immunities Act, which applies here, provides no defense because Defendant IFC-AMC, as a Delaware corporation, is a "citizen of a State" and therefore not entitled to immunity as an instrumentality, and in any event, its acts are commercial activity. 28 U.S.C. §§ 1603(b)(3), 1605(a)(2). The parties should not waste time briefing only immunity where, again, that defense is extremely unlikely to succeed.

C. This litigation should proceed expeditiously.

While Plaintiffs agreed to delay briefing in the D.C. action given the state of the law governing IFC immunity law there, a similar delay is unwarranted here, especially given strong interests in moving this matter forward. Plaintiffs face increasing violence in Honduras, due in part to the actions of Corporación Dinant, funded by Defendant. *See* D.I. Nos. 4-6. Violence in the Bajo Agúan region, where Plaintiffs reside, is ongoing and brutal; as noted, one plaintiff in the D.C. action was murdered after filing that lawsuit. Just last week, a 13-year-old child was murdered on Dinant's property.[7] News reports indicate that security forces acting for Dinant shot and killed the boy as he passed through the Paso Aguán Farm toward his family's plot of land.

Plaintiffs are not suggesting that these concerns should disrupt the orderly course of federal procedure; they have offered a 30-day extension to allow preparation of a motion to dismiss here

[6] Defendant's characterization of that stipulation as "blessed" by D.D.C. may overstate that court's feelings about entering a stipulated briefing schedule.

[7] Defensores En Linea, Preocupación y enojo por ataques contra menores en el Aguán (Nov. 15, 2017), available at http://defensoresenlinea.com/preocupacion-y-enojo-por-ataques-contra-menores-en-el-aguan/; Redacción Confidencial, Acusan a terratenientes del Agúan por represión contra el campesinado (Nov. 15, 2017), available at http://confidencialhn.com/2017/11/15/acusan-a-terratenientes-del-aguan-por-represion-contra-el-campesinado/.

and indicated that if Defendant needed more time Plaintiffs would consider that request. But in this case, there is no reason to make exceptions to the usual course of litigation by indefinitely delaying a motion to dismiss or allowing Rule 12(b) arguments to be made seriatim, which would only result in unnecessary delay.

IV. Conclusion

Defendant claims that Plaintiffs are "forum shopping," D.I. 17 at 3, but it is not Plaintiffs' fault that, with respect to federal law on international organization immunity, the D.C. Circuit and the Third Circuit disagree. Plaintiffs are the victims of gross and ongoing violations of human rights backed by Defendant, and seek a forum where there is no question that they will have their case heard on the merits. Defendant, instead, seeks to transfer this case not to hear it in a more proper forum where they believe the action "may have been brought," 28 U.S.C. § 1404(a), but for the impermissible purpose of arguing to the transferee court that it *has no jurisdiction*. This Court should not permit a strategy designed to evade the established standards for transfer and the immunity law of this Circuit, and deprive Plaintiffs of a chance to have a court hear the merits of their claims. *See Chavez v. Dole Food Co.*, 836 F.3d 205, 211 (3d Cir. 2016)(en banc)("As th[is] case comes to us today, there is a serious possibility that no court will ever reach the merits of the plaintiffs' claims. . . . [W]e think that outcome is untenable—both as a matter of basic fairness and pursuant to the legal principles that govern this procedurally complex [case]."). And it should not permit a briefing schedule calculated to hide the fact that Defendants' position on immunity forecloses transfer.

Plaintiffs' proposal to Defendant – a routine extension of 30 days to file both a motion to dismiss, under the ordinary Rule 12 procedures, as well as a venue transfer motion – remains the most sensible one.

Dated: November 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Misty A. Seemans, hereby certify that on November 22, 2017, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on November 22, 2017, I caused the foregoing document to be served via electronic mail upon the above-listed counsel and on the following:

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