

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

HILLARY SCOTT, CHARLES)
KELLEY, DAVID HAYWOOD, AND)
LADY A ENTERTAINMENT LLC,)

Plaintiffs,)

v.)

ANITA WHITE,)

Defendant.)

No. 3:20-cv-00585

District Judge William L. Campbell, Jr.
Magistrate Judge Barbara D. Holmes

**MEMORANDUM IN SUPPORT OF DECLARATORY DEFENDANT'S
MOTION TO DISMISS OR TRANSFER COMPLAINT**

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I. INTRODUCTION

In the aftermath of George Floyd’s death, and the increased public focus on symbols of racism that followed, Plaintiffs Lady A Entertainment, LLC, Charles Kelley, David Haywood, and Hillary Scott (together, “Lady Antebellum”) changed their band name to LADY A. But there was already a LADY A. Defendant Anita White, an independent Seattle-based singer, had performed under the trademark LADY A for nearly 30 years.

Lady Antebellum, recognizing the inherent conflict created by their rebrand, promptly contacted Ms. White after announcing their name change. Plaintiffs encouraged her to speak with the band, and for her attorney to work with them on an agreement to address her concerns. After a few days of back and forth with Ms. White’s attorney, Lady Antebellum delivered a draft agreement that included payment of up to \$10,000 for legal fees, but no payment to Ms. White, and only vague promises to use best efforts to assist her career. Ms. White justifiably retained new representation. She assumed that the parties’ negotiations, then less than two weeks old, would continue. But Lady Antebellum had other plans.

Having lulled Ms. White into believing that the parties were engaged in good faith negotiations, Lady Antebellum filed a complaint seeking declaratory relief (Dkt. 1 (“the Complaint”)) the day after receiving her counter-offer—the first substantive communication Plaintiffs had received from her new counsel. Lady Antebellum’s declaratory judgment action is a transparent bullying tactic, filed pre-emptively to deprive the natural plaintiff of her choice of forum. The Court should dismiss this action in favor of Ms. White’s substantive trademark infringement claims against Lady Antebellum pending before the United States District Court for the Western District of Washington. Alternatively, the Court should transfer this action to the Western District of Washington, where it can be consolidated with Ms. White’s affirmative claims.

First, there is no personal jurisdiction over Ms. White in Tennessee. In a declaratory judgment action, the relevant contacts necessary to confer personal jurisdiction are those that give rise to the need for declaratory relief. Trademark enforcement communications and settlement negotiations directed at parties in the forum state do not, on their own, amount to purposeful

availment. Further, predicating personal jurisdiction on such activities does not comport with traditional notions of fair play and substantial justice.

Second, even if the Court concludes that the exercise of personal jurisdiction is proper, it should nevertheless decline to hear Lady Antebellum’s declaratory judgment claim. Lady Antebellum should not be rewarded for its rush to the courthouse with the forum of its choice, nearly 2,000 miles from Ms. White’s home. Now that Ms. White has filed a complaint in the Western District of Washington, that pleading is the more natural and efficient vehicle to resolve the parties’ dispute.

Finally, in the event that the Court declines to dismiss the Complaint, it should nevertheless transfer this matter to the Western District of Washington, where it can be consolidated with Ms. White’s substantive action. The most important factor in the transfer analysis is the convenience of non-party witnesses. Ms. White anticipates relying on testimonial evidence of her earliest uses of the LADY A mark from a number of non-party witnesses, most of whom are located in Washington. As an independent artist of limited means, Ms. White faces a significantly higher burden to litigating in a distant forum than Lady Antebellum, whom, by all accounts, are millionaires.

II. FACTUAL BACKGROUND

After the death of George Floyd on May 25, 2020, and the protests that followed, Lady Antebellum announced on June 11, 2020 that it would no longer perform as “Lady Antebellum.” Declaration of Anita White (“White Decl.”) ¶ 5. Thereafter, they would perform as “Lady A.” *Id.*

Ms. White, who has performed under the trademark LADY A for nearly three decades, learned of Lady Antebellum’s name change from texts from friends. *Id.* ¶ 6. As an independent artist of limited means, and having no experience with trademark disputes, Ms. White retained pro bono counsel in Memphis, Tennessee based on a referral from a friend. *Id.* ¶ 8.

The next day, Ms. White was contacted by Lady Antebellum’s management team, who invited her to participate in a call with Lady Antebellum’s counsel and Plaintiff Scott. *Id.* ¶ 9. This call led to a further invitation from Lady Antebellum for Ms. White to attend a June 15, 2020

Zoom meeting with the band to discuss her concerns about their use of the LADY A mark. *Id.* ¶ 10. Although Ms. White agreed to explore the possibility of coexistence, she remained deeply concerned that use of the LADY A name, in particular by a large, well-known and well-financed group like Lady Antebellum, would overwhelm and erase the brand identity that she had developed over decades of work. *Id.* ¶¶ 2, 8. Immediately after the June 15 meeting, Lady Antebellum had a draft agreement at the ready, *id.* ¶ 12, one that did not address the concerns that Ms. White had expressed. Compl. ¶ 28.

Over the next week, Ms. White's pro bono counsel continued to negotiate with Lady Antebellum. *Id.* ¶ 13. But the revised agreement that she received on June 24, 2020 included payment of up to \$10,000 "attorneys' fees and trademark filing fees incurred in the resolution of this dispute," without any compensation for her injury, or any concrete solution for the inherent conflict of the parties sharing the same name and trademark. *Id.* ¶ 14. Ms. White concluded that her counsel was not adequately representing her interests, and retained new pro bono counsel at Cooley LLP. *Id.* ¶ 15.

On June 25, 2020, Ms. White's new counsel, Brendan Hughes, contacted Lady Antebellum's attorneys to advise them of her new representation. Compl. ¶ 30. Mr. Hughes identified himself as trademark litigation counsel and asked that Lady Antebellum's attorneys direct further communications concerning the dispute to Cooley. *Id.* ¶ 30.

On July 6, Mr. Hughes provided Lady Antebellum with a revised draft settlement agreement. Declaration of Brendan J. Hughes ("Hughes Decl.") ¶ 4. This was only the second email communication between Lady Antebellum and Ms. White's new counsel, and the first substantive correspondence. *Id.* Without warning, Lady Antebellum filed the Complaint on July 8th. Dkt. 1; Hughes Decl. ¶ 5.

On September 15, 2020, Ms. White filed a complaint against Lady Antebellum in the United States District Court for the Western District of Washington, Ms. White's home forum. Hughes Decl. ¶ 6, Ex. A. Ms. White alleges that Lady Antebellum's use of the LADY A trademark infringes her common law trademark rights in the name, in violation of the Lanham Act and

Washington State common law. *Id.* Because Ms. White has been based in Washington for her entire career, most of the evidence and anticipated non-party witnesses are located in that State. White Decl. ¶¶ 17-18.

III. ARGUMENT

A. The Court Should Dismiss the Complaint for Lack of Personal Jurisdiction.

Lady Antebellum bears the burden of establishing that this Court has personal jurisdiction over Ms. White. *See Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002). “Personal jurisdiction may be found either generally or specifically.” *Miller v. AXA Winterthur Ins. Co.*, 694 F.3d 675, 678 (6th Cir. 2012) (citing *Air Prods. & Controls, Inc. v. Safetech Int’l, Inc.*, 503 F.3d 544, 549-50 (6th Cir. 2007)). “General jurisdiction depends on continuous and systematic contact with the forum state, so that the courts may exercise jurisdiction over any claims a plaintiff may bring against the defendant.” *Miller*, 694 F.3d at 678-79 (citing *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 149 (6th Cir. 1997)). “Specific jurisdiction, on the other hand, grants jurisdiction only to the extent that a claim arises out of or relates to a defendant’s contacts in the forum state.” *Miller*, 694 F.3d at 679 (citing *Kerry Steel*, 106 F.3d at 149).

Facing a properly supported motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), a “plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction.” *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). The Court then may decide the motion on the affidavits alone or permit discovery, or it may conduct an evidentiary hearing to resolve any factual questions. *Id.* If this Court holds an evidentiary hearing, Lady Antebellum must prove that the exercise of personal jurisdiction over Ms. White is proper by a preponderance of the evidence. *See Conn v. Zakharov*, 667 F.3d 705, 711 (6th Cir. 2012). Alternatively, if this Court decides the issue on affidavits alone, Lady Antebellum must, at a minimum, make a prima facie showing that personal jurisdiction exists to survive the motion. *Id.*

As set forth in detail below, Lady Antebellum cannot meet its burden. Ms. White's minimal contacts with Tennessee are insufficient to subject her to general or specific jurisdiction in the State in connection with the Complaint.

1. Ms. White Is Not Subject to General Jurisdiction in Tennessee.

Lady Antebellum cannot plausibly allege general jurisdiction over Ms. White. For general jurisdiction to apply, a defendant's "affiliations with the State [must be] so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). The Supreme Court has cautioned that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. 'For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.'" *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (quoting *Goodyear*, 564 U.S. at 924)). Following *Daimler*, this Court has held that, without more, even defendants with an office in Tennessee, *Top Tobacco, L.P. v. Abdelshahed*, 439 F. Supp. 3d 992, 999 (M.D. Tenn. 2020), or a distribution and manufacturing facility, *Bauer v. Nortek Glob. HVAC LLC*, 2016 WL 5724232, at *6 (M.D. Tenn. Sept. 30, 2016), are not subject to general jurisdiction.

Ms. White's contacts with Tennessee encompass performances in the state over a period of years, White Decl. ¶ 3, the availability of her music for download throughout the United States, *id.* ¶ 4, and her communications with counsel and Lady Antebellum in connection with this dispute. *Id.* ¶¶ 9-15. These limited contacts with Tennessee, which are of a magnitude less than those of the defendants in *Top Tobacco* and *Bauer*, are facially insufficient to support the exercise of general jurisdiction. The Court should decline to do so here.

2. Ms. White Is Not Subject to Specific Jurisdiction in Tennessee.

The Court also lacks specific jurisdiction over Ms. White, because her relevant contacts with Tennessee amount to a handful of virtual communications with Lady Antebellum. The Sixth Circuit has established a three-part test for determining whether the exercise of specific jurisdiction

is consistent with due process: (1) the defendant must purposefully avail herself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise from the defendant's activities there; and (3) the acts of the defendant or consequence caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). These factors weigh decisively against the exercise of specific personal jurisdiction over Ms. White.

In a declaratory judgment action, the relevant inquiry for establishing specific jurisdiction is “the extent to which a defendant purposefully directed enforcement activities at residents of the forum, and the extent to which the declaratory judgment claim 'arises out of or relates to those activities.” *Power Sys., Inc. v. Hygenic Corp.*, 2014 WL 2865811, at *6 (E.D. Tenn. June 24, 2014) (internal quotations omitted). This is because claims for declaratory relief arise from the defendant's enforcement efforts, and the extent to which enforcement activities were directed to the forum, rather than the allegedly non-infringing activity. *Id.* at *6-7. Accordingly, while a declaratory defendant's business in the state *may* be relevant to the purposeful avilment analysis, it has no bearing on the issues giving rise to the claim for declaratory relief. *Id.* See e.g. *J.M. Smucker Co. v. Promotion in Motion, Inc.*, 420 F. Supp. 3d 646, 654-55 (N.D. Ohio 2019) (finding no purposeful avilment despite “massive sales, marketing, and promotional activities targeting Ohio consumers”); *Ontel Prods. Corp. v. Mindscope Prods.*, 220 F. Supp. 3d 555, 561 (D.N.J. 2016) (explaining that “the relevant contacts relate to the defendant's enforcement activities, not to where the defendant commercialized its products.”).

Moreover, while only those actions giving rise to a claim for declaratory relief are relevant to the specific jurisdiction analysis, personal jurisdiction must rest upon “other activities” directed at the forum besides mere threats of infringement litigation, such as prior litigation in the forum, or active efforts to prevent use of the mark. See e.g. *Hygenic Corp.*, 2014 WL 2865811, at *7-9 (citing cases); *Smucker*, 420 F. Supp. 3d at 657 (citing cases). It is well established that “a non-resident defendant who sends infringement-based letters and makes infringement-based telephone

calls to a trademark infringing resident plaintiff does not, by those acts alone, purposefully avail himself of the benefits and protections of the laws of the resident plaintiff's state sufficient under due process to be" subject to specific jurisdiction. *America's Collectibles Network, Inc. v. Scorpiniti*, 2007 WL 470351, at *3 (E.D. Tenn. Feb. 8, 2007) (citing cases). As one district court explained:

“[A]ny other holding would discourage parties from attempting to resolve their conflicts without resort to the legal system. If any attempt by an intellectual property holder to put an alleged wrongdoer on notice forced the property holder to submit to the jurisdiction of the alleged wrongdoer's forum, an intellectual property owner would be forced to file an action in his own jurisdiction in order to avoid the threat of being haled [sic] before a court in another, possibly distant state.”

Hygenic Corp., 2014 WL 2865811, at *8-9 (quoting *Douglas Furniture Co. v. Wood Dimensions*, 963 F. Supp. 899, 903 (C.D. Cal. 1997)).

Lady Antebellum alleges that Ms. White purposefully availed herself of doing business in Tennessee by having (1) performed in Tennessee, (2) while located in Seattle, Washington, communicated with Plaintiffs who were located in Tennessee, and (3) retained pro bono counsel who was located in Tennessee. Compl. ¶ 8. As the cases in this Circuit make clear, however, these facts do not the exercise of personal jurisdiction.

First, Ms. White's rendering of goods and services in Tennessee, whether through her performances or downloadable music, does not bear on Lady Antebellum's claim for declaratory relief. *See Hygenic Corp.*, 2014 WL 2865811, at *6 (finding “defendant's own commercial activity within Tennessee is immaterial to the determination” of non-infringement action); *Smucker*, 420 F. Supp. 3d at 656-57.

Second, Ms. White's communications with Lady Antebellum, which began with Lady Antebellum's contacting Ms. White, amount to a videoconference and a handful of telephone calls and electronic messages over a period of less than a month. White Decl. ¶¶ 9-15; Hughes Decl. ¶¶ 3-4. This is exactly the type of activity that courts routinely hold insufficient to confer specific jurisdiction over a declaratory defendant. *See, e.g., Hygenic Corp.*, 2014 WL 2865811, at *7-9 (citing cases); *Smucker*, 420 F. Supp. 3d at 657 (citing cases). In fact, the case is even stronger

here than in other decisions in the Circuit favoring dismissal, given that there is no allegation that Ms. White sent Lady Antebellum a demand letter or threatened litigation. *See* Compl.

Third, by Lady Antebellum's own admission, Ms. White's relationship with prior pro bono counsel is unrelated to their alleged need to seek declaratory relief. As noted above, prior counsel never threatened Lady Antebellum with litigation and never sent them a demand letter. His only involvement, which lasted less than two weeks, was limited to negotiation of an agreement that had a payment of up to \$10,000 in legal fees while failing to address his client's concerns. White Decl. ¶ 14. As Lady Antebellum represents in the Complaint, it was the combination of statements made by Ms. White (located in Seattle, Washington), *id.* ¶ 2, and actions by new counsel (located in Washington, D.C.), that allegedly "giv[es] rise to this Court's jurisdiction under 28 U.S.C. §§ 2201 and 2202." Compl. ¶ 31. Ms. White's relationship with prior pro bono counsel is neither here nor there.

Here, as in *Hygenic* and *Smucker*, among others, the exercise of personal jurisdiction over Ms. White on the basis of her limited contacts with Tennessee would be unreasonable. In addition to a lack of material contacts with Tennessee, which alone justifies dismissal, the burden of litigating in a distant forum is significant for Ms. White, an independent artist of limited means. *Intera Corp. v. Henderson*, 428 F.3d 605, 618 (6th Cir. 2005) (holding that courts should consider, among other things, the burden on the defendant in assessing whether exercising personal jurisdiction is reasonable). The cost of travel and shepherding evidence and witnesses to Tennessee—easily thousands of dollars—are significant expenses that Ms. White should not have to bear because Lady Antebellum pre-emptively filed a complaint. White Decl. ¶ 18.

B. The Court Should Dismiss the Complaint Because it Is an Anticipatory Action Intended to Deprive Ms. White of Her Choice of Forum.

Even if Ms. White were subject to personal jurisdiction in Tennessee, which she is not, the instant proceeding should be dismissed as an improper anticipatory declaratory judgment action, undertaken to bully Ms. White and deprive her of her choice of forum.

“Under the Declaratory Judgment Act, the court has discretion *not* to hear a declaratory judgment action, even where jurisdiction exists.” *Encore Furniture Thrifts & More, LLC v. Doubletap, Inc.*, 281 F. Supp. 3d 665, 668 (M.D. Tenn. 2017) (emphasis in original). The Sixth Circuit has adopted a five-factor test to assess the propriety of a federal court’s exercise of discretion to hear a claim for declaratory relief:

(1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for a race for res judicata; (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Grand Trunk W. R.R. Co. v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984). Where a parallel coercive action is pending in another court, however, there is effectively a “presumption that the first-filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit.” *Encore Furniture*, 281 F. Supp. 3d at 669 (citing *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 552 (6th Cir. 2007)). Here, the balance of factors warrant dismissal.

The first factor (whether the judgment would settle the controversy) favors neither party, because both parties have the ability to assert claims/counterclaims in the Seattle action.

The second factor (whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue) strongly favors dismissal. The Complaint unnaturally postures Lady Antebellum, the infringer, as plaintiff without serving any useful purpose. As discussed below, “[n]ormally, when a putative tortfeasor sues an injured party for a declaration of nonliability, courts will decline to hear the action in favor of a subsequently-filed coercive action by the ‘natural plaintiff.’” *AmSouth Bank v. Dale*, 386 F.3d 763, 786 (6th Cir. 2004).

The third factor (whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for a race for res judicata) alone warrants dismissal.

The present action is a paradigmatic anticipatory lawsuit motivated by forum shopping. Ms. White was originally contacted by Lady Antebellum, and, on their invitation, engaged in discussions about how to address her concerns with their use of the LADY A mark. White Decl. ¶¶ 9-11. What followed was fewer than two weeks of negotiations driven by Lady Antebellum, before Ms. White replaced her pro bono counsel for failing to adequately represent her interests. *Id.* ¶¶ 12-15.

Ms. White assumed that Lady Antebellum would continue negotiations with her new pro bono counsel, and Lady Antebellum gave no indication to the contrary. Yet Lady Antebellum was apparently fully prepared to file a complaint for declaratory relief when it received the first substantive communication from Ms. White's new attorney, a revised draft agreement, on July 6. Hughes Decl. ¶ 4. It filed the Complaint without warning on July 8. *See* Dkt. 1.

In circumstances like this one, courts have not hesitated to dismiss a first-filed declaratory judgment claim in favor of the subsequently filed substantive complaint. For example, in *Zide Sport Shop of Ohio, Inc. v. Ed Tobergate Assocs.*, the Sixth Circuit affirmed the district court's decision to dismiss a declaratory judgment action that the plaintiffs brought a day before a negotiation deadline extension expired without informing the other side. 16 F. App'x 433, 437 (6th Cir. 2001). Quoting the district court's finding, the Sixth Circuit explained in language equally applicable here: "If Plaintiffs' conduct was not mere deceptive gamesmanship, then they would have informed Defendants that they did not intend to make another settlement offer and would prefer to seek a judicial resolution." *Id.* at 438. *See also AmSouth Bank*, 386 F.3d at 789-90 (holding that the factual record supported the "unavoidable conclusion that procedural fencing had occurred" when declaratory judgment plaintiffs filed the action during ongoing discussions with defendants regarding the course of litigation); *Catholic Health Partners v. CareLogistics, LLC*, 973 F. Supp. 2d 787, 795 (N.D. Ohio 2013) ("If plaintiffs wanted court intervention, they should have been clear about their intentions."); *Int'l Union v. Dana Corp.*, 1999 WL 33237054, at *6 (N.D. Ohio 1999) ("Dana's decision to sue before responding, as Mr. Waders had told Mr. Werking that it would, to the union's request for further information shows that it wanted to get to

the courthouse before the union knew the race was underway.”).

Lady Antebellum is guilty of the same kind of “deceptive gamesmanship” criticized by courts in the cases cited above. “The federal declaratory judgment is not a prize to the winner of the race to the courthouse.” *Dana*, 1999 WL 33237054, at *3 (quoting *Tempco Elec. Heater Corp. v. Omega Eng’g, Inc.*, 819 F.2d 746, 749-50 (7th Cir. 1987)). Accordingly, this Court should not reward Lady Antebellum for rushing to the courthouse with the forum of its choosing when it “is not the ‘natural’ or ‘true’ plaintiff.” *Catholic Health*, 973 F. Supp. 2d at 792. Such “misuse of the Declaratory Judgment Act to gain a procedural advantage and preempt the forum choice of the plaintiff in the coercive action militates in favor of dismissing the declaratory judgment action.” *Id.* (quoting *Dana*, 1999 WL 33237054, at *4).

Lady Antebellum may counter that under the first-to-file rule “the court in which the first suit was filed should *generally* proceed to judgment,” while subsequent related actions in other federal courts are stayed or dismissed. *Certified Restoration*, 511 F.3d at 551 (emphasis in original) (quoting *Zide Sport Shop*, 16 F. App’x at 437). But in determining whether to apply the rule, courts consider, among other things, whether any equitable considerations counsel against application of the rule, such as bad faith, anticipatory litigation, forum shopping, or inequitable conduct. *See Certified Restoration*, 511 F.3d at 551-52. Moreover, in “[c]ases construing the interplay between declaratory judgment actions and suits based on the merits of underlying substantive claims create, in practical effect, a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit.” *Id.* at 552 (quoting *AmSouth Bank*, 386 F.3d at 791 n.8); *see AmSouth Bank*, 386 F.3d at 791 n.8 (“[T]he first-filed rule is not a strict rule and much more often than not gives way in the context of a coercive action filed subsequent to a declaratory action.”).

As the Sixth Circuit explained:

Courts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a “natural plaintiff” and who seem to have done so for the purpose of acquiring a favorable forum. Allowing declaratory actions in these situations can deter settlement negotiations and encourage races to

the courthouse, as potential plaintiffs must file before approaching defendants for settlement negotiations, under pain of a declaratory suit. This also dovetails with the previous factor: where a putative defendant files a declaratory action whose only purpose is to defeat liability in a subsequent coercive suit, no real value is served by the declaratory judgment except to guarantee to the declaratory plaintiff her choice of forum — a guarantee that cannot be given consonant with the policy underlying the Declaratory Judgment Act.

AmSouth Bank, 386 F.3d at 788.

The fourth factor (whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction) is not relevant to the analysis here. And **the fifth factor** (whether there is an alternative remedy that is better or more effective) at least slightly favors hearing the case in Washington, where Ms. White is based (White Decl. ¶ 2) and where trial is likely to occur more quickly. Hughes Decl. ¶ 7, Ex. B.

C. Alternatively, the Court Should Transfer the Action to the Western District of Washington

Should the Court decline to dismiss Lady Antebellum’s declaratory judgment action, then this case should be transferred to the Western District of Washington pursuant to 28 U.S.C. § 1404(a). Section 1404 states that, “[f]or 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” 28 U.S.C. § 1404(a). Because Ms. White is a Seattle resident, venue is proper in the Western District of Washington, *see* 28 U.S.C. § 1391, and this court has broad discretion over whether to transfer the case under Section 1404. *Phelps v. McClellan*, 30 F.3d 658, 663 (6th Cir. 1994).

In evaluating the propriety of transfer, courts balance case-specific factors. *Sacklow v. Saks Inc.*, 377 F. Supp. 3d 870, 877 (M.D. Tenn. 2019). “Private interests include: (1) the location of willing and unwilling witnesses; (2) the residence of the parties; (3) the location of sources of proof; (4) the location of the events that gave rise to the dispute; (5) systemic integrity and fairness; and (6) the plaintiff’s choice of forum,” whereas “[p]ublic interests include the enforceability of

the judgment, practical considerations affecting trial management, docket congestion, local interest in deciding local controversies at home, public policies of the fora, and familiarity of the trial judge with the applicable state law.” *Id.* (citations omitted). Because Ms. White resides in Seattle, Lady Antebellum could have brought its suit against her there. Here, the most pertinent factors are the location of non-party witnesses, docket congestion, and the relative means of the parties, which together weigh decisively in favor of transfer. With the exception of the plaintiff’s choice of forum, which is entitled to less deference in a declaratory judgment action, *Emerging Vision, Inc. v. For Eyes Optical Co.*, 2009 WL 702243, at *5 (S.D.N.Y. Mar. 16, 2009), the remaining factors favor neither transfer nor hearing the case in Tennessee.

This Court has recently explained that “[t]he convenience of witnesses, especially non-party witnesses, is perhaps the most important factor in the transfer analysis.” *Sacklow*, 377 F. Supp. 3d at 878. At this early stage, Ms. White anticipates that critical corroboration of her rights will come from witnesses whom she has collaborated with over the years, and who reside in Washington. These include, by way of example, Messrs. Sonny Byers and Todd Ivester. White Decl. ¶ 17. Ms. White has no way to compel these individuals to testify in Tennessee, and no means to support their travel to another state. *Id.* ¶ 18.

Relatedly, Ms. White is at a significant financial disadvantage relative to Lady Antebellum litigating in a forum nearly 2000 miles away. “The relative means of the opposing parties may support or discourage transfer of venue if there is a significant financial disparity between the parties.” *Herbert Ltd. P’ship v. Elec. Arts, Inc.*, 325 F. Supp. 2d 282, 290 (S.D.N.Y. 2004). Ms. White is represented pro bono, and earns less than \$75,000 per year, White Decl. ¶ 8; whereas Lady Antebellum has, presumably, earned millions of dollars in revenue from sales of millions of Lady Antebellum records. Hughes Decl. ¶ 8, Ex. C. There is no dispute that Lady Antebellum is

in a much better position to bear the burden of travel for themselves, for witnesses, and for physical documents and other materials that may need to be transported during discovery and for trial.

Finally, the relative congestion of the courts' respective dockets indicates that the case will be adjudicated more quickly in Washington. According to the most recent Judicial Caseload Profile compiled by the Administrative Office of the U.S. Courts, the time from filing to trial in civil cases averages 19.1 months in the Western District of Washington, and 31.2 months in the Middle District of Tennessee. Hughes Decl. ¶ 7, Ex. C. To the extent that Lady Antebellum's declaratory judgment complaint was genuinely brought to clear the air of allegations of infringement, Washington is the more efficient forum to hear the case.

Considering all of the foregoing, transfer to the Western District of Washington is warranted.

IV. CONCLUSION

Lady Antebellum's Complaint should be dismissed for lack of personal jurisdiction over Ms. White or, alternatively, because the Complaint constitutes an improper anticipatory lawsuit intended to deprive Ms. White of her choice of forum.

Dated: September 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16 2020, I electronically filed the foregoing Memorandum in Support of Declaratory Defendant's Motion to Dismiss or Transfer Complaint with the Clerk of the Court by using the CM/ECF system. I further certify that a copy of the foregoing has been served upon the following counsel of record via the Court's electronic filing system:

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