IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

COURSE IN MIRACLES SOCIETY, a Nebraska Corporation, Plaintiff, vs. THE FOUNDATION FOR "A COURSE IN MIRACLES," INC., a New York Corporation, and THE FOUNDATION FOR INNER PEACE, INC., a New York Corporation, Defendants.	)	8:00CV211 **ORDER**

Before me are 1) the plaintiff's motion (Filing No. 4) to enjoin the defendants from proceeding with their suit in Kentucky, and 2) the defendants' motion (Filing No. 11) to dismiss or transfer venue. The plaintiff's complaint (Filing No. 1) seeks a declaratory judgment that 1) the defendants' copyright is invalid and unenforceable, and 2) it has not infringed the defendants' copyright. Both motions are supported by indexes of evidence (Filing Nos. 5, 12, and 13). A hearing on the motions was held on May 11, 2000, at which the attorneys for the parties appeared both telephonically and in person. I find that the plaintiff's motion to enjoin should be denied and the defendants' motion to transfer should be granted. I will defer to the United States District Court for the Western District of Kentucky on the defendants' motion to dismiss.

It appears from the evidence that the plaintiff, a Nebraska corporation, chose to operate the public portions of its business in Kentucky: both the mailing address given on plaintiff's website and on the fliers and e-mails it distributes is in Louisville, Kentucky. No mention is made of any Nebraska connection. When attempts to persuade the plaintiff to cease its alleged infringement failed, the defendants filed suit in Kentucky on April 6, 2000. The defendants served counsel for the plaintiff with copies of all pleadings and papers along with a waiver of notice form by mail, overnight mail, and electronic mail. Judge Johnstone held a hearing on the defendants' motion for a temporary restraining order against the plaintiff on April 7, 2000. At the hearing, counsel for the plaintiff revealed that the plaintiff had filed this action for a declaratory judgment against the defendants on April 3, 2000. The defendants, however, knew nothing of this suit because counsel for the plaintiff had not notified them or served them with a copy of the summons and the complaint.

At the conclusion of the hearing, Judge Johnstone entered a temporary restraining order against the plaintiff. The plaintiff then filed its motion to enjoin in this court, arguing that the "first-filed" rule bars further proceedings in the Western District of Kentucky.

A federal court in which an action is first filed has the power to enjoin the parties from proceeding with a later-filed action in another federal court. *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1004 (8th Cir. 1993). The purpose of this "first-filed" rule is obvious: "[t]o conserve judicial resources and avoid conflicting rulings." *Id.* at 1006. The first-filed case thus generally should proceed "in the absence of compelling circumstances." *United States Fire Ins. Co. v. Goodyear*, 920 F.2d 487, 488 (8th Cir. 1990) (*quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1174 (11th

Cir. 1982)). Application of the rule, however, should not be "rigid, mechanical, or inflexible." *Orthmann v. Apple River Campground Inc.*, 765 F.2d 119, 121 (8th Cir. 1985).

In *Northwest Airlines*, the Eighth Circuit identified two factors that "send up red flags that there may be compelling circumstances." *Northwest Airlines*, 989 F.2d at 1007. One factor is whether the first-filer knew that the other party was considering filing suit and thus raced to the courthouse to preempt the second filing. The timing of the filings is often an indicator of the first-filer's intent. In *Northwest Airlines*, for example, the court found that because six weeks passed between a letter in which American first "blew smoke" about potential litigation and Northwest's suit, and then another six weeks passed between the filing of Northwest's suit and the filing of American's suit, American had not contemplated filing suit until after Northwest had filed. It appears that the plaintiff's suit in this court was an attempt to preempt a suit in Kentucky. As the tone of the defendant's communications with the plaintiff became more demanding, the plaintiff knew that suit was imminent.

The second factor noted by the *Northwest Airlines* court is the nature of the first-filed suit. An action for declaratory judgment, for example, may "be more indicative of a preemptive strike than a suit for damages or equitable relief." *Northwest Airlines*, 989 F.2d at 1007. Since the plaintiff's action was one for declaratory judgment, filing in Nebraska clearly seems preemptive.

I conclude that under 28 U.S.C. § 1406(a), this case should be transferred to Kentucky. The plaintiff is subject to personal jurisdiction in Kentucky, but it is unclear whether this court could ever have personal jurisdiction over the defendants. The plaintiff uses a Kentucky mailing address to receive payments and orders for its allegedly infringing materials, as well as for its website and solicitations. One of the plaintiff's directors

purportedly resides in Kentucky. For all these reasons, venue is better laid in Kentucky than in Nebraska. I therefore decline the plaintiff's invitation to enjoin the Kentucky District Court, and I transfer this action to the jurisdiction of that court.

IT IS THEREFORE ORDERED:

1. The plaintiff's motion (Filing No. 4) to enjoin the defendants from proceeding with their suit in the United States District Court for the Western District of Kentucky is denied.

2. The defendants' motion (Filing No. 11) to dismiss is denied.

3. The defendants' motion (Filing No. 11) to transfer venue is granted.

DATED this 17 day of May, 2000.

BY THE COURT:

Joseph F. Bataillon
United States District Judge