IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LEONARD ROWE, ROWE ENTERTAINMENT, INC., LEE KING, and LEE KING PRODUCTIONS, INC.,	:	Civil Action File No. 1:16-CV-01499-MHC
Plaintiffs,	:	
-against -	:	
GARY, WILLIAMS, PARENTI, WATSON AND GARY, P.L.L.C., WILLIE E. GARY, SEKOU M. GARY, MARIA SPERANDO, and LORENZO WILLIAMS,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO DISMISS OR TRANSFER

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO DISMISS OR TRANSFER

Plaintiffs Leonard Rowe, Rowe Entertainment, Inc., Lee King, and Lee King Productions, Inc. (collectively, "Rowe") submit this memorandum in opposition to the motions to dismiss or transfer filed by defendants Gary, Williams, Parenti & Watson, P.L.L.C. (the "Gary Firm"), Willie E. Gary, Sekou M. Gary, and Lorenzo Williams (collectively, the "Gary Defendants") on August 8, 2016 [ECF 21], and by defendant Maria Sperando ("Sperando") on August 10, 2016 [ECF 22].

PRELIMINARY STATEMENT

> *"'Wings II' provides the Gary law firm with the ability to handle cases throughout the United States. . . . 'We can meet with people in Atlanta, Chicago, and Carolina the same day and still be home for dinner.'"*
>
> -- Gary Firm press release announcing purchase of Gary's Boeing 737 jet, *Wings of Justice II*

This is a diversity action asserting state-law legal malpractice and fraud claims against the Gary Defendants and Sperando (collectively, the "Gary Lawyers"). The Gary Lawyers represented Rowe and other black concert promoters in a potentially landmark race discrimination and antitrust case against talent/booking agencies and white concert promoters, *Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al.*, 98 Civ. 8272 (RPP) (S.D.N.Y.) (the "Civil Rights Action").

In a prior action filed in March 2015, Rowe asserted federal and state RICO claims as well as the same state-law claims asserted in this action, *Rowe Entertainment, et al. v. Gary, et al.*, Civil Case No. 1:15-CV-0770-AT ("*Rowe I*"). Complaint at ¶¶ 138-143. The premise of the RICO action was that the only plausible explanation for the Gary Lawyers' gross malpractice was that they had engaged in a corrupt conspiracy with the defendants in the Civil Rights Action (the "Civil Rights Defendants"). *Id*.

On March 31, 2016, Judge Totenberg dismissed *Rowe I*, finding that although Gary's alleged malpractice was "inexplicable," the allegations of a

corrupt conspiracy between the Gary Lawyers and the Civil Rights Defendants, without direct evidence, did not meet the *Twombly* and *Iqbal* plausibility requirements:

> *It is inexplicable why the Gary Firm failed to obtain the actual underlying emails* [showing that employees of the defendants in the Civil Rights Action used racially derogatory terms], and if that is indeed so, might demonstrate a continuing thread of negligent handling of the case and presentation of evidence.
>
> However, the Plaintiffs' Complaint fails to bridge the gap necessary to state a plausible claim that the Gary Firm orchestrated and engaged in a RICO conspiracy to protect William Morris and CAA and intentionally lose the case on summary judgment in consideration of a bribe.

Exhibit E (March 31, 2016 Order in Rowe I) at 57-58 (emphasis added) (paragraph formatting altered).[1]

The Gary Lawyers now argue that this action should be dismissed based on lack of personal jurisdiction or, alternatively, transferred to New York based on a forum selection clause in the June 2001 retainer agreement between the plaintiffs in the Civil Rights Action (the "Civil Rights Plaintiffs") and the Gary Lawyers. Motions to Dismiss or Transfer [ECF 21, 22]; Exhibit 1 (2001 retainer agreement) at ¶ 8.

As set forth in more detail below and in the accompanying declaration of Leonard Rowe, those allegations lack merit. Willie Gary and his firm bill

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[1] Exhibits are annexed to the accompanying declaration of plaintiff Leonard Rowe. Exhibits A through D are also annexed to the complaint [ECF 1].

themselves as handling cases nationwide, specifically touting their ability "to meet in *Atlanta*, Chicago, *and* Carolina on the same day and still be home for dinner." Exhibit F (undated Gary Firm press release announcing the purchase of a Boeing 737 jet called *Wings of Justice II*).

Willie Gary has two daughters who live in Atlanta and he and his colleagues regularly litigate in Georgia state and federal court. A substantial part of the events or omissions giving rise to this action took place in Atlanta, including:

(i) the initial meeting at which Gary solicited Rowe's business and Rowe agreed to retain the Gary Lawyers, Rowe Decl. at ¶¶ 19-27;

(ii) one of the major depositions in the Civil Rights Action, *id*. at ¶ 49;

(iii) the primary strategy meeting at which Gary made the fraudulent misrepresentations on which this action is based, *id*. at ¶¶ 38-39;

(iv) and hundreds of telephone calls, faxes, and communications making similar fraudulent misrepresentations to Mr. Rowe in Atlanta *id*. at ¶ 51.
.

As a result, there is no question that this Court has personal jurisdiction over the Gary Lawyers under Georgia's long-arm statute and that the assertion of personal jurisdiction comports with the requirements of the 14th Amendment.

For those same reasons, namely that a substantial part of the events or omissions giving rise to this action took place in this district, venue is proper here

under 28 U.S.C. § 1391(b)(2). And the New York forum selection clause in the 2001 retainer agreement is not enforceable because, as plaintiffs Messrs. Rowe and King explain in their declarations, the Gary Lawyers induced the Civil Rights Plaintiffs to agree to that clause through fraud and misrepresentation. Rowe Decl. [ECF 26] at ¶¶ 44-45; King Decl. [ECF 27] at ¶ 6. In particular, when Rowe questioned why the clause was necessary after Gary's New York co-counsel withdrew from the case in late 2002, Gary fraudulently stated that the law required New York to be the forum because the Civil Rights Action was filed in New York. *Id*.

Many of the facts establishing personal jurisdiction and proper venue were not alleged in the original complaint. Rowe did not anticipate that the Gary Lawyers would challenge his choice of forum since the Gary Defendants did not object to personal jurisdiction or venue in *Rowe I* and Judge Totenberg ignored defendant Maria Sperando's jurisdiction and venue challenges.[2]

Accordingly, Rowe requests that the Gary Lawyers' motions be dismissed based on the allegations of the complaint, as supplemented by the Rowe and King declarations, and that Rowe be permitted to file an amended complaint incorporating those allegations.

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[2] *Compare* Sperando's Motion to Dismiss *Rowe I* [Case 1:15-0770-AT, ECF 22] at 1 (Sperando "moves to dismiss . . . for lack of personal jurisdiction and improper venue) *with* Judge Totenberg's March 31, 2016 Order dismissing *Rowe I* without addressing Sperando's procedural defenses [Case 1:15-0770-AT, ECF 71).

STATEMENT OF FACTS

The relevant facts are set forth in the complaint, as supplemented by the accompanying Rowe and King declarations, which must be taken as true on a motion to dismiss. Those facts are summarized below for the Court's convenience.

A. The Legal Malpractice and Fraud Claims Asserted in this Action.

Although Willie Gary is one of the country's most successful trial lawyers, he also has a documented history of defrauding his clients and gross malpractice. In 2003, for example, one of Gary's clients accidentally discovered a spreadsheet showing that Gary had defrauded her and other gender discrimination plaintiffs in a case against Ford Motor Company. The spreadsheet, which was inadvertently misfiled with the client's personal papers, showed that Gary had misrepresented the amount of the settlement. The actual amount of the settlement was $67.5 million and the Gary Lawyers had misappropriated $51.5 million for themselves.

In the subsequent lawsuit against Willie Gary and his firm, a Michigan federal judge concluded after examining Gary's allegedly privileged emails that a fraud probably had been committed, and that the emails were discoverable under the fraud/crime exception:

> *There is probable cause to believe that a fraud has been attempted or committed* and that the [allegedly privileged] communications at issue were made in furtherance of it.

Exhibit J (Opinion and Order Granting Plaintiffs' Motion for Order Compelling Discovery dated February 17, 2005, *Kubik v. Willie Gary, et al*., Civil Action No. 03-CV-73350-DT (E.D. Mich.)) at 9 (emphasis added).

The Michigan judge also determined that Gary may regularly engage in similar fraudulent conduct "in a variety of cases":

> [The Gary Firm] may have used a common fraudulent settlement agreement scheme *in a variety of cases*, and that discussions [among the Gary Lawyers] about *the prospective structure of this scheme may have involved advice in furtherance of fraud*.

Id. at 8 (emphasis added).[3]

After reviewing the Gary Lawyers' documented conduct in the Civil Rights Action, two federal judges have concluded that the Gary Lawyers potentially committed malpractice. First, the judge presiding over the Civil Rights Action, Hon. Robert P. Patterson, explained to Mr. Rowe at a January 14, 2014 hearing that Gary was "at fault" for failing to obtain the racially derogatory emails identified on the E-Discovery Memorandum prepared by Gary's e-discovery firm:

> Judge Patterson: . . . this is something I think that you didn't fully understand, and continue not to understand fully, that [the E-Discovery Memorandum] is not a document

[3] Just as he did in the Ford case, Gary is asserting procedural defenses here in order to avoid, or at least delay, resolution on the merits. After the Michigan court rejected Gary's procedural defenses, he settled for an undisclosed amount under a strict confidentiality agreement. Complaint at ¶ 143.

> that was prepared by any of the defendants. It was prepared by [your] electronic discovery company . . . So you don't know anything [about the underlying emails] from [the E-Discovery Memorandum].
>
> Rowe: You know, Judge Patterson, you're right. You're 100 percent correct. But that's easy for you to prove. You could have said, come forth with the [emails] so we can see. . . .
>
> Judge Patterson: Look, but that isn't my job. *That's up to the attorneys' to do. . . And your lawyer was the Gary firm. They had the power to do that.* Now it wasn't the responsibility of the [New York] lawyers here . . . *So the fault, if any, lies with the Gary firm*. And they're not being pursued here.

Rowe Decl. [ECF 26] at ¶ 11 (quoting Complaint at ¶ 136 (quoting Exhibit D (transcript of January 24, 2014 hearing before Judge Patterson) at 8:18-22, 9:6, 9:9-12, 9:21 – 10:5 (emphasis added))).

Second, in her decision dismissing *Rowe I*, Judge Totenberg acknowledged:

> It is *inexplicable* why the Gary Firm failed to obtain the actual underlying emails [identified on the E-Discovery Memorandum].

Exhibit E (October 31, 2016 Order in Rowe I) at 57 (emphasis added).

Contrary to the Gary Lawyers' unsupported assertions, a substantial part of the events and omissions giving rise to Rowe's malpractice and fraud claims took place in Atlanta. Mr. Rowe sets forth those events and omissions in detail in his accompanying declaration. Rowe Decl. at ¶¶ 19-25, 48 (Gary's solicitation of the Civil Rights Plaintiffs at the Fulton County courthouse in April 2002); ¶ 49 (March

20, 2002 deposition of a major defendant in the Civil Rights Action that defendant Maria Sperando took in Atlanta); ¶ 50 (December 2002 strategy meeting at the Atlanta Hilton hotel at which all of the Gary Lawyers attended and misrepresented that the E-Discovery Memorandum constituted a "smoking gun" that guaranteed the defeat of the motions for summary judgment); ¶¶ 51-52 (phone calls, faxes, and other communications with Rowe in Atlanta making various misrepresentations).

Indeed, the December 2002 strategy meeting that the Gary Lawyers organized at the Atlanta Hilton hotel alone constitutes a sufficient nexus with this district to assert personal jurisdiction and venue in this action. Mr. Rowe explains:

> After [the New York lawyers] withdrew in December 2002, Gary called for an in-person strategy meeting with the Civil Rights Plaintiffs. Gary, Sperando, and at least two or three of his other lawyers flew to Atlanta on Gary's private jet for the meeting. The meeting took place in the conference room at the Atlanta Hilton. . . .
>
> At [that] meeting . . . , Gary dismissed my concerns about the withdrawal of the New York lawyers since they had the responsibility of responding to the motions for summary judgment. Gary knew at that time that he never obtained the racially derogatory emails, yet he fraudulently stated that the emails were the "smoking gun" that guaranteed denial of the summary judgment motions and ultimate victory for over a billion dollars.
>
> Moreover, by the December 2002 meeting in Atlanta, Gary and his colleagues had perpetrated their massive fraud on their clients in a Michigan gender discrimination lawsuit against Ford Motor Company. . . . The Gary Lawyers did not disclose their fraudulent activities in the Ford case . . . Had [we] known

> of the Gary Lawyers' conduct in the Ford case in 2002, we certainly would have fired the Gary Lawyers and made other arrangements to continue prosecuting the Civil Rights Action.

Rowe Decl. at ¶¶ 38-39, 52-53.

Gary also negligently dismissed Rowe's concerns about the withdrawal of the New York lawyers at that meeting. Rowe told Gary that the Civil Rights Plaintiffs were worried that the New York lawyers had been assigned responsibility for opposing the upcoming motions for summary judgment and asked whether the Gary Lawyers were capable of effectively opposing the motions at the last minute. The Gary Lawyers fraudulently stated that they were fully capable of opposing those motions, and that the E-Discovery Memorandum guaranteed that those motions would be defeated. Rowe Decl. at ¶ 52.

B. The Gary Lawyers' Fraud in Negotiating the New York Forum Selection Clause.

Mr. Rowe describes in detail the history of the forum selection clause and the Gary Lawyers' fraudulent representations that prevented him from fairly understanding or negotiating that clause. Rowe Decl. at ¶¶ 28-46; King Decl. at ¶ 6. In particular, Gary never pointed out or discussed with Rowe or the other Civil Rights Plaintiffs the forum selection clause in the original 2001 retainer. Rowe Decl. at ¶¶ 29-30.

When the New York lawyers withdrew from the case in December 2002,

however, Rowe raised several issues with the Gary Lawyers concerning modifications to the retainer agreement. *Id*. at ¶¶ 38-47. Those issues included reducing the 48% contingency fee since there were fewer lawyers working on the case and calculating the contingency fee on net recovery, after expenses had been deducted, rather than on the gross recovery. *Id*. at ¶ 42.[4]

At a meeting in Gary's Florida office in April 2003, Mr. Rowe and Mr. King reviewed each paragraph of the 2001 retainer agreement. Mr. Rowe describes the Gary Lawyers' fraudulent misrepresentations when they came to the choice of law and forum selection clause set forth in paragraph 8:

> As we reviewed each paragraph of the 2001 retainer, we finally came to paragraph 8, the choice of law and forum selection clause on which the Gary Lawyers now rely. I had never noticed or understood the provision, so I asked what it meant.
>
> Gary explained that any disputes between the Civil Rights Plaintiffs and the Gary Firm would be governed by New York law and any lawsuit arising from such a dispute would have to be brought in state or federal court in New York. *I then pointed out that it made no sense to resolve disputes in New York since I reside in Georgia and the Gary Lawyers reside in Florida. I asked why a dispute between us would be governed by a third state's law and be required to be brought in a third state, which was inconvenient to both of us. Gary replied that the law required that New York law govern any dispute with lawyers*

[4] Gary refused to consider either modification, fraudulently asserting that the Florida bar rules required that contingency fees be calculated on gross recovery. Rowe Decl. at ¶¶ 42-43. Gary's fraud was especially outrageous because the Civil Rights Plaintiffs, not Gary, paid all expenses in advance. *Id*. at 43; Exhibit A (2001 retainer agreement) at ¶ 5.

> *litigating a federal or state case in New York. He said we had no right under the law to bring a lawsuit arising from such a dispute anywhere except in New York.*

Rowe Decl. at ¶¶ 44-45. Accord King Decl. at ¶ 6.

C. The Gary Lawyers' Continuous Contacts with Georgia.

Not only did a substantial part of the events and omissions giving rise to this action take place in Georgia, the Gary Lawyers have such regular and continuous contact with Georgia that they are essentially "at home" here. As Mr. Rowe explains:

> (i) The Gary Lawyers market their firm as having nationwide capability in light of their two jets, *Wings of Justice I* and *Wings of Justice II*, Rowe Decl. at ¶¶ 22-24, 57;
>
> (ii) The Gary Lawyers brag that their jet planes give them the capability to "meet with people *in Atlanta*, Chicago *and* Carolina the same day and still be home for dinner", *id*. at ¶ 24, 57 (quoting from Gary firm press release annexed as Exhibit F) (emphasis added);
>
> (iii) The Gary Lawyers regularly practice in Georgia state and federal courts, with at least seven published Georgia court decisions over the last fifteen years and probably many more cases in which they represent Georgia citizens in Georgia court, *id*. at ¶¶ 25-56;
>
> (iv) Gary has two daughters who live in Atlanta, id. at ¶¶ 27, 58; Exhibit G (media article stating that Gary has two minor daughters living with their mother in Atlanta).

In fact, the Gary Lawyers probably did not submit declarations in support of their motions to dismiss or transfer because their extensive activities in Georgia prevented them from doing so in good faith. Rowe Decl. at ¶ 25.

ARGUMENT

DEFENDANTS' MOTIONS TO DISMISS OR TRANSFER SHOULD BE DENIED

I. THE COURT HAS PERSONAL JURISDICTION OVER THE DEFENDANTS.

A. The Georgia Long-Arm Statute Confers Jurisdiction Over the Defendants.

The Gary Lawyers rely almost entirely on a 2003 Georgia Court of Appeals decision, *Gee v. Reingold*, 259 Ga. App. 894 (2003), for their argument that the Georgia long-arm statute, O.C.G.A. § 9-10-91, does not confer jurisdiction over them. Gary Defendants' Motion [ECF 21] at 13-15; Sperando Motion [ECF 22] at 13. The *Gee* case, however, is not only distinguishable from the facts of this case, its holding is no longer good law in light of the Georgia Supreme Court's 2005 decision in *Innovative Clinical & Consulting Servs. v. First Nat'l Bank*, 279 Ga. 672 (2005).

In *Innovative Clinical*, the Georgia Supreme Court held that the reach of the Georgia long-arm statute was co-extensive "to the maximum extent permitted by procedural due process" under the 14th Amendment. 279 Ga. at 675 (quoting *Coe & Payne Co. v. Wood-Mosaic*, 230 Ga. 58, 60 (1973)). In reaching that conclusion, the Supreme Court focused on subsection (1) of the statute, which

> authorizes a Georgia court to exercise personal jurisdiction over a nonresident who "transacts any business within" Georgia.

Id.

The Supreme Court explained that prior decisions restricting the scope of subsection (1) cannot be reconciled with the plain language of the statute:

> [T]here are no explicit legislative limiting conditions on this language. Nothing in subsection (1) limits its application to contract cases, *but see Whitaker v. Krestmark of Alabama, Inc.*, 157 Ga. App. 536 (1) (278 SE2d 116) (1981); nothing in subsection (1) requires the physical presence of the nonresident in Georgia or minimizes the import of a nonresident's intangible contacts with the State. *But see Wise v. State Board &c. of Architects*, 247 Ga. 206, 209 (274 SE2d 544) (1981). Although Georgia courts have engrafted these and other requirements onto subsection (1), such requirements conflict with the literal language of the statute.
>
> To be consistent with *Gust* [*v. Flint*, 257 Ga. 129 (1987)] and the well-established rules of statutory interpretation that preclude judicial construction of plain and unambiguous statutory language, *Six Flags Over Ga. II v. Kull*, 276 Ga. 210, 211 (576 SE2d 880) (2003), we must give the same literal construction to subsection (1) of OCGA § 9-10-91 that we give to the other subsections. *Accordingly, under that literal construction, OCGA § 9-10-91(1) grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State.*

Id. (emphasis added).

In *Gee*, the Court of Appeals applied the restrictive, pre-Innovative Clinical interpretation of the "transacting business" subdivision of the Georgia long-arm statute and therefore refused to exercise personal jurisdiction under that subsection. 259 Ga. App. at 897. In light of the Georgia Supreme Court's decision in *Innovative Clinical*, the *Gee* analysis is no longer applicable. *See*, *e.g*., *Exceptional*

Mktg. Group v. Jones, 749 F. Supp. 2d 1352, 1361 (N.D. Ga. 2010) (distinguishing *Gee's* facts and questioning its analysis in light of "the expanded construction of subsection (1) expressed in *Innovative Clinical*").

In addition, the facts of this case are easily distinguishable from *Gee* and clearly fall within the scope of the Georgia long-arm statute even before *Innovative Clincal's* expanded construction of the statute. Indeed, unlike the defendants in *Gee*, the Gary Lawyers engaged in substantial activities in Georgia giving rise to this action. *See*, *supra*, Statement of Facts at § A; Rowe Decl. at ¶¶ 19-26, 48-58.

Indeed, not only does subsection (1) of the long-arm statute confer jurisdiction over the defendants in light of their transaction of business in Georgia, but subsection (2) confers "tort injury" jurisdiction over the defendants. Subsection (2) provides for jurisdiction where, as here, the defendant:

> Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.

O.C.G.A. § 9-10-91(3).

While the defendants in *Gee* did not satisfy subdivision (3)'s requirement of either regularly doing or soliciting business in the state or deriving substantial revenue in Georgia, the Gary Lawyers satisfy both of those requirements. Knowing that they regularly practice in the Georgia state and federal courts and derive

substantial revenue from those cases, the Gary Lawyers refrained from submitting declarations regarding their Georgia activities. The public record, however, demonstrates their extensive activities in Georgia. *See*, *e.g*., Rowe Decl. at ¶¶ 25-26.

B. Exercising Personal Jurisdiction Over Defendants Comports with Constitutional Due Process.

Where state long-arm statutes are as broad as *Innovative Clinical's* construction of the Georgia long-arm statute, courts of such states exercise personal jurisdiction over non-resident attorneys representing citizens of the state, even where, as in *Gee*, the legal work was performed out of state. *See*, *e.g*., *Schutze v. Springmeyer*, 989 F. Supp. 833, 836-838 (S.D. Tex. 1998).

In *Schutze*, Texas residents retained Nevada lawyers to represent them in Nevada litigation. After the Nevada litigation was dismissed, the Texas clients filed a legal malpractice case in Texas and the Nevada lawyers moved to dismiss based on lack of personal jurisdiction. The Texas federal court recognized that the Texas long-arm statute authorizing jurisdiction over non-residents who transact business in Texas extended jurisdiction to the maximum extent permissible under constitutional due process requirements, 989 F. Supp. at 835 – precisely the same holding as the Georgia Supreme Court reached for subsection (1) of the Georgia long-arm statute in *Innovative Clincal*.

In analyzing whether the exercise of personal jurisdiction over the Nevada lawyers was consistent with constitutional due process, the Texas federal court recognized that two elements must be satisfied:

> (i) "Defendant has 'minimum contacts' with Texas;" and
>
> (ii) "requiring Defendant to litigate in Texas does not offend 'traditional notions of fair play and substantial justice.'"

989 F. Supp. at 835.

The *Schutze* court had no trouble concluding that both of these requirements were satisfied. First, the court explained that minimum contacts exist when "the defendant should reasonably anticipate being haled into court there." *Id*. at 836 (citing *Holt Oil & Gas v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986) and *Ham v. LaCienega Music*, 4 F.3d 413, 415 (5th Cir. 1993)). Recognizing that "[a] single contact with the forum state can be sufficient to support specific jurisdiction," *id*., the court concluded that the Nevada lawyers should have reasonably anticipated being haled into court in Texas by agreeing to represent Texas clients, *id*. at 837.

As for whether the exercise of personal jurisdiction would offend "traditional notions of fair play and substantial justice," the *Schulte* court explained that such a determination requires

> balancing the burden on the defendant, the interests of the forum State, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the most efficient resolution

> of the controversy, and the shared interest of the several States in furthering fundamental substantive social policies.

989 F. Supp. at 836 (citing, *Asahi Metal Indus. Co. v. Superior Court of Cal*., 480 U.S. 102, 113 (1987) (quoting *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)); *Burger King v. Rudzewicz*, 471 U.S. 462, 476-77 (1985)).

Applying that balancing test, the court concluded:

> Because he agreed to represent two Texas residents, [the Nevada lawyer] cannot now claim that it would be unfair for him to have to defend himself – against allegations of negligence in a Texas court. *Plaintiffs have a strong interest in being able to litigate their cause of action in Texas, and Texas has a strong interest in ensuring that its citizens' rights are well represented*.

Id. at 837-38 (emphasis added) (emphasis added).

These same considerations equally apply to this case, even if the only contact the Gary Lawyers had with Georgia was their agreement to represent Rowe in the Civil Rights Action. In contrast to *Schutze* and *Gee*, a substantial portion of the events and omissions giving rise to this action occurred in this district in addition to the Gary Lawyers' agreement to represent Rowe. *See*, *e.g*., Rowe Decl. at ¶¶ 19-22, 48-56. Thus, there can be no question that the exercise of personal jurisdiction over the Gary Lawyers comports with constitutional due process.

II. THE CASE SHOULD NOT BE TRANSFERRED TO NEW YORK.

A. Venue is Proper Because a Substantial Part of the Events or Omissions Giving Rise to this Action Occurred in this District.

Defendants concede that venue is proper where a "substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). In that regard, only a "substantial" part of such events or omissions must take place in the district for venue to be proper; it is not necessary that the district be where most of the events or omissions took place. *See*, *e.g. SE Prop. Holdings, LLC v. Center*, 2015 U.S. Dist. LEXIS 95168, **4-5 (S.D. Ala. 2015) ("The law is clear that 'under § 1391 a plaintiff does not have to select the venue with the most substantial nexus to the dispute") (citing, *inter alia*, *Morgan v. N. Miss. Med. Ctr., Inc.*, 403 F. Supp. 2d 115, 1122 (S.D. Ala. 2005)).

As set forth, *supra*, and in the accompanying declaration of Mr. Rowe, a substantial part of the events or omissions giving rise to this action. *See*, *supra*, Statement of Facts, § A; Rowe Decl. at ¶¶ 19-22, 48-56. Defendants mistakenly assert that the events and omissions that took place in Georgia are irrelevant to Rowe's malpractice and fraud claims. On the contrary, the Gary Lawyers' fraudulent statements made at the December 2002 meeting at the Atlanta Hilton constitute the basis for Rowe's fraud claims and constitute misrepresentations

regarding Rowe's central malpractice claim: that the Gary Lawyers failed to obtain defendants' racially derogatory emails in a race discrimination case! *Id*.

Thus, not only is venue proper in this district, there is no valid basis to disturb Rowe's selection of this district to resolve this action. *See*, *e.g*., *NGC Worldwide, Inc. v. Siamon*, 2003 U.S. Dist. LEXIS 6650, *6 (D. Conn. 2003) (plaintiff's choice of forum accorded substantial weight) (citing *Golconda Mining Corp. v. Heriands*, 365 F.2d 856, 857 (2d Cir. 1966). Since the Gary Lawyers are located in Florida and they market their ability to litigate nationwide, factors of convenience are not relevant, except, of course, for the convenience of Mr. Rowe, who lives in this district and is taking the lead in representing plaintiffs' interest in this action.

B. The Forum Selection Clause in Unenforceable Because it was Obtained by Fraud.

Forum selection clauses are unenforceable as "unreasonable under the circumstances," where:

(1) Their formation was induced by fraud or overreaching;

(2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum;

(3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or

(4) enforcement of such provisions would contravene a strong public policy.

Liles v. Ginn-La West End, Inc., 631 F.3d 1242, 1245 (11th Cir. 2011) (paragraph formatting altered).

Here, several of these circumstances apply and thereby render the New York forum selection clause in the parties' 2001 retainer agreement unenforceable. First, the choice of law and forum selection clause itself was obtained through fraud. *See*, *supra*, Statement of Facts, § B; Rowe Decl. at ¶¶ 28-47. Indeed, when Mr. Rowe asked about the clause at the parties' April 2003 meeting, Gary falsely stated that the law required New York law to govern and New York to be the forum for any dispute because the Civil Rights Action was filed there. Rowe Decl. at ¶ 44-45.

Second, Gary's fraudulent misrepresentations prevented the Civil Rights Plaintiffs from freely negotiating the choice of law and forum selection clause. In *Brown v. Partipilo*, 2010 U.S. Dist. LEXIS 108106, *13 (N.D. W.Va. 2010), for example, the District Court for the Northern District of West Virginia refused to enforce a forum selection clause in a legal malpractice case where, as here, the lawyers failed to "adequately communicate the nature of the forum selection clause" to the clients. Like the lawyers in *Brown*, Gary failed to communicate anything regarding the choice of law and forum selection clause to the Civil Rights Action when 2001 retainer agreement was executed. Rowe Decl. at ¶ 30. As a result, the Civil Rights Plaintiffs were unaware of the clause or its significance. *Id*.

Unlike the lawyers in *Brown*, however, Gary thereafter affirmatively misrepresented the law regarding such clauses, fraudulently misleading Rowe to believe that there was no choice but to select New York as the forum for any dispute. *Id*. at ¶ 45.

Third, enforcement of the clause is contrary to Georgia's strong public policy interest in assuring that its citizens are adequately represented by legal counsel. *See, e.g., Schutze v. Springmeyer*, 989 F. Supp. at 837-38 ("Texas has a strong interest in ensuring that its citizens' rights are well represented [by out-of-state counsel]").

Fourth, plaintiffs may be deprived their day in court if this case is transferred to New York. Defendants have no legitimate reason to seek transfer, but they seek to do so in order to continue their efforts to avoid litigating the merits of this dispute. In that regard, the New York statute of limitations for legal malpractice is three years rather than the four or six year limitations provided under Georgia law. *Compare RA Global Servs. v. Avicenna Overseas Corp*., 817 F. sup. 2d 274, 285 (S.D.N.Y. 2011) (NY statute of limitations is three years) (citing NY CPLR 214(6)) with *Gowen Oil Co. v. Foley & Lardner, LLP*, 562 Fed. Appx. 958 n.1 (11th Cir. 2014) ("The statute of limitations for legal malpractice actions [in Georgia] is four years") (citing *Shores v. Troglin*, 260 Ga. App. 696, 697 (Ct. App. 2003)).

Thus, defendants intend to raise an additional procedural defense that this action is time barred under New York's three-year statute of limitations for legal malpractice claims. In fact, this action was commenced well within even a three-year limitations period based on Judge Totenberg's decision as to the questions of fact arising from Rowe's equitable tolling arguments. *See* March 31, 2016 Order in *Rowe I*, [Civil Action No. 1:15-CV-0770-AT, ECF 71] at 30 ("The Complaint's allegations as bolstered by the Due Diligence Timeline may arguable demonstrate that Rowe acted with reasonable due diligence in investigating his [RICO] injury") and 20 n.2 (acknowledging that Georgia equitable tolling doctrine for Georgia state-law claims is "more lenient").

Accordingly, should this Court consider transferring this case to New York, a condition of such a transfer should be that defendants waive any defense based on the New York statute of limitations.

CONCLUSION

Defendants' motions to dismiss or transfer should be denied and Rowe should be allowed to file an amended complaint incorporating the jurisdiction and venue allegations set forth in the accompanying Rowe declaration.

Dated: September 6, 2016

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CERTIFICATE OF FONT AND POINT SELECTION

I hereby certify that the foregoing was prepared in Times New Roman font, 14 point type, in compliance with Local Rule 5.1(C).

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing, as well as the accompanying declarations of Leonard Rowe [ECF 26] and Lee King [ECF 27] have been filed with the U.S. District Court's CM/ECF System and that pursuant thereto, a copy of this pleading has been served upon the following persons by email:

James F. Bogan III, jbogan@kilpatricktownsend.com
Jeffrey Fisher, jfisher@kilpatrictownsend.com

I further certify that a true and correct copy of the foregoing was emailed and mailed to the following person by U.S. mail, first-class postage prepaid, addressed to:

Maria Sperando, Esq.
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Stuart, Florida 34994

Dated: September 6, 2016

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