UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

DEFENDANTS' RESPONSE TO PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S MOTION TO CHANGE VENUE (DOC. 9)

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DEFENDANTS' RESPONSE TO PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S MOTION TO CHANGE VENUE (DOC.9)

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Dated: July 3, 2019

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1446(a), the Eastern District is the correct venue to remove this case given that that the case was pending in Detroit, Michigan before Judge Cynthia Stephens in the Michigan Court of Claims.

2. Whether Plaintiff has met its burden of demonstrating that fairness and practicality strongly favor the Western District when Plaintiff did not object to venue when this case was pending before the Michigan Court of Claims in Detroit and the interest of justice weigh in favor of maintaining venue in the Eastern District.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Mich. Comp. Law § 600.6410

Mich. Comp. Law § 600.6413

28 U.S.C. § 1441(a)

28 U.S.C. § 1446(a)

Polizzi v. Cowles Magazines, Inc., 345 U.S. 663 (1953)

McCahan v. Brennan, 492 Mich. 730 N.W.2d 747 (Mich. 2012)

Pedreira v. Sunrise Children's Services, 802 F.3d 865 (6th Cir. 2015)

Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 S.Ct. 2239 (1988)

Phelps v. McClellan, 30 F.3d 658 (6th Cir. 1994)

INTRODUCTION

Plaintiff Catholic Charities West Michigan may characterize itself as a "reluctant plaintiff," but it certainly is not a helpless one. It chose to file this case, with federal claims, in the Michigan Court of Claims, thereby subjecting itself to the rules and procedures of this court as set forth in the Michigan Court of Claims Act, Mich. Comp. Laws §§ 600.6401, *et seq*. Then, as now, a Court of Claims action could be filed in any of the four court of appeals districts throughout the state, but such action is considered pending in only one location—the "district where a court of appeals judge serving as a judge of the court of claims sits…." Mich. Comp. Law §§ 600.6410(2) & 600.6413.

For purposes of this case, filed on April 25, 2019, and assigned to the Honorable Judge Cynthia Diane Stephens, the Michigan Court of Claims sat in Detroit, Michigan. *See* Mich. Ct. of Claims Home Page, Ct. of Claims Judges, https://courts.michigan.gov/courts/coc/pages/default.aspx; *see also* Mich. Ct. of Appeals Office and Courtroom Locations, District 1, https://courts.michigan.gov/Courts/COA/clerksoffice/Pages/Locations.aspx.

For more than a month after the case was assigned to this Detroit-based judge, Plaintiff did not request a change in venue or express concern about the convenience of witnesses. Instead, Plaintiff filed a motion for injunctive relief.

On June 5, 2019, Defendants properly removed this case to the federal district court located in the same city, less than four miles away from Judge Stephens' courtroom in Detroit, Michigan. (Doc.1.)

The United States District Court for the Eastern District of Michigan is the only appropriate venue to which this case could be removed. Pursuant to 28 U.S.C. § 1446(a), a state court case with federal claims may be removed to a federal district court in the "district and division within which such action is ***pending***[.]" 28 U.S.C. § 1446(a). (Emphasis added.); *accord* 28 U.S.C. § 1441(a) (authorizing removal only to "the district and division embracing the place where such action is pending.") Contrary to Plaintiff's arguments, the statute does ***not*** authorize removal to a district and division within which the complaint (or any other documents) was ***filed***.

Moreover, the Eastern District is the appropriate venue regardless of the federal removal statute. Plaintiff's complaint challenges a

settlement agreement entered in *Dumont v. Gordon*, Case No. 2:17-cv-13080 (E.D. Mich.) (Borman, J.). Judge Borman retained jurisdiction to enforce the settlement agreement in his order of dismissal filed on March 22, 2019.[1] (*Dumont*, 2:17-cv-13080, Doc. 83, Pg. ID 1468-69.) The relief requested by Plaintiff here would place Defendants in direct contradiction with Judge Borman's order if granted. And, as explained below, any benefit for convenience is slight, at best, and only became an issue for Plaintiff after the case was removed to federal court.

This Court should deny Plaintiff's motion to change venue.

[1] The Sixth Circuit defines a consent decree as "a settlement agreement subject to judicial policing." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). It has the "unique properties" of a "voluntary settlement agreement which could be fully effective without judicial intervention" and "a final judicial order" that places the power and prestige of the court upon which the compromise struck by the parties." *Id.* In *Williams,* the Sixth Circuit identified "suggested protocol," i.e., a three-step process for approving the consent decree – not all of which were completed by Judge Borman in *Dumont. Id.* at 921. These procedures were not included in the Sixth Circuit's definition of the consent decree itself but were, instead, characterized as "suggested." *Id.* Nonetheless, if any procedural irregularities exist with respect to the consent decree entered in *Dumont,* Defendants maintain that such irregularities should be resolved by Judge Borman.

BACKGROUND

Administration of CPA Contracts in Michigan

Defendant Michigan Department of Health and Human Services (MDHHS) administers foster care management and adoption services for children for whom a court has determined that they cannot safely remain in their family homes due to abuse or neglect.

In large part, MDHHS provides these services through 137 contracts with 57 private child placing agencies (CPAs). (Affidavit of Sarah Goad at ¶¶ 4-6, *Buck v. Gordon*, No. 1:19-cv-00286 (W.D. Mich. Apr. 15, 2019) (*Buck*), ECF No. 34-2, attached as Ex. A; Affidavit of Patricia Neitman at ¶¶ 5-6, *Buck*, ECF No. 34-3, attached as Ex. B.) Some of these CPAs are faith-based, and others are not. The Department is aware of no evidence that faith-based or religiously affiliated CPAs are more effective than other CPAs. (Affidavit of Catherine Hoover at ¶ 12, *Buck*, ECF No. 34-5, attached as Ex. C.)

Plaintiff Catholic Charities West Michigan is one of these CPAs. Exhibits 6 and 7 to its Complaint include a copy of the contracts that Plaintiff voluntarily entered with MDHHS, entitling it to taxpayer

funds in exchange for provision of certain services. (Doc. 1-2, Pg. ID 83-190.)

The Plaintiff's adoption contract, since at least 2016, has included a non-discrimination provision that reads as follows:

> c. The Contractor shall comply with the MDHHS non-discrimination statement:
>
> Michigan Department of Health and Human Services (MDHHS) will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs or disability.
>
> The above statement applies to all applications filed for adoption of MDHHS supervised children, including MDHHS supervised children assigned to the contracted agency.

(Doc. 1-2, § 2.9(c), Pg. ID 144.)

This provision has also been included in one or more of Plaintiff's foster care contracts with MDHHS. (Doc. 1-2, Ex 6, § 2.9(c), Pg. ID 83, 88).

The administrative rate paid to CPAs under contract for foster care and adoption services is provided in exchange for all services performed under the respective contracts, including recruiting prospective foster and adoptive applicants, training, home studies, and

other tasks required pursuant to the express language of the contract, Act 116 of 1973, Mich. Comp. Laws § 722.111 *et seq.*, Mich. Admin. Code R. 400.12101 *et seq.*, and Department policy, as found in the Department's Children's Foster Care Policy Manual[2] and the Adoption Services Policy Manual.[3] (Ex. A (Goad Aff.), ¶¶ 7-10; Ex. B (Neitman Aff.), ¶¶ 7, 9; Ex. C (Hoover Aff.), ¶¶ 6-11.)

The *Dumont* Litigation

On September 20, 2017, two same-sex couples sued Defendants Gordon and Chang,[4] in their official capacities, alleging that the MDHHS had a "practice" of contracting with private agencies that "use religious criteria to screen prospective foster and adoptive parents… and to turn away qualified families on the basis of sexual orientation." (*Dumont* Compl., No. 2:17-cv-13080, Doc. 1, Pg. 1-2, ¶¶ 1-3.) The

[2]http://www.mfia.state.mi.us/OLMWeb/ex/FO/Public/FOM/000.pdf#pagemode=bookmarks. Last accessed May 29, 2019.

[3]http://www.mfia.state.mi.us/OLMWeb/ex/AD/Public/ADM/000.pdf#pagemode=bookmarks. Last accessed May 29, 2019.

[4] Pursuant to Fed. R. Civ. P. 25(d), Director Gordon replaced former MDHHS Director Nick Lyon and Executive Director Chang replaced former Executive Director Herman McCall, all of whom were – and are – sued in their official capacities.

Dumont plaintiffs asserted that by contracting with CPAs that "refuse to accept prospective families headed by same-sex couples or to place children with same-sex parent families due to the agencies' religious objections to such families[,]" MDHHS violated their rights under the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. (*Dumont* Compl., No. 2:17-cv-13080, Doc. 1, Pg. ID 2, ¶¶ 3 & 5, and Pg. ID 5, ¶ 14.)

Judge Borman presided over *Dumont* through eighteen (18) months of litigation, including motion practice and extensive discovery. On September 14, 2018, he issued a 93-page opinion that include an analysis of at least one of the constitutional claims that Plaintiff raises in its Complaint. (*Cf. Dumont* Order, No. 2:17-cv-13080, Doc. 49, Pg. ID 1151-56 (analyzing, and rejecting, intervening defendants' Free Exercise claim), *with* Compl., Doc. 1-2, Pg. ID 57-59, ¶¶ 196-212.)

On March 22, 2019, the *Dumont* parties entered a Settlement Agreement, which became a Consent Decree by Judge Borman's Order entered that same date. Judge Borman's Order dismissed *Dumont* "with prejudice pursuant to the terms of the Settlement Agreement." (*Dumont* Order, Doc. 83, Pg. ID 1469.) Judge Borman expressly

"retain[ed] jurisdiction over the enforcement of the Settlement Agreement in [*Dumont*]." (*Id.*)

The Consent Decree requires, among other things, that MDHHS continue to include a Non-Discrimination Provision in its contracts with CPA's for foster care and adoption services that prohibit, without limitation, a CPA from "turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services" under the applicable contract with MDHHS. (*Dumont*, No. 2:17-cv-13080, Doc. 82, Pg. ID 1445.)

The *Dumont* settlement did not result in a "new" policy but, rather, reaffirmed MDHHS's long-standing policy that CPAs providing foster care or adoption services under contract with MDHHS may not discriminate against any individual on the basis of religion, sexual orientation, gender identity, race, ethnicity, or another reason set forth in the non-discrimination provision when providing such services. (Affidavit of Stacey Bladen at ¶ 8, *Buck*, ECF No. 34-4, attached as Ex. D.) Indeed, Plaintiff was the subject of investigations in January 2017 and May 2018. MDHHS established a violation in each instance based

on Plaintiff's refusal to complete a child's adoption in a placement that was determined to be in the child's best interest and, failing to place siblings together because the siblings decided with a same-sex couple. (Ex. D, (Bladen Aff.), ¶ 7.) In each case, a Corrective Action Plan (CAP) was submitted by Plaintiff and accepted by the Department. (Ex. B, (Neitman Aff.), ¶¶ 22-24.)

The Michigan Court of Claims

Plaintiff chose to file its complaint, with federal claims and against a state agency, in the Michigan Court of Claims. In so doing, it submitted to the policies and procedures contained in the Michigan Court of Claims Act. This Act serves as Michigan's "controlling legislative expression of waiver of the state's sovereign immunity from direct action suit against it and its agencies and of their submission to the jurisdiction of a court." *Greenfield Const Co. Inc. v. Michigan Dep't of State Highways*, 402 Mich 172, 195; 261 N.W.2d 718, 724 (Mich. 1978). Its practices and procedures are governed by legislative enactment and even the Michigan Supreme Court lacks authority to restrict or amend them. *McCahan v. Brennan,* 492 Mich. 730, 732-33; 822 N.W.2d 747, 748 (Mich. 2012).

The Court of Claims is composed of four judges from the Michigan Court of Appeals, representing at least two Michigan Court of Appeals districts. Mich. Comp. Laws § 600.6404(1). It must hold "at least 4 sessions in each year." Mich. Comp. Laws § 600.6407. For purposes of a specific case, the Michigan Court of Claims "sit[s] in the court of appeals district where a court of appeals judge serving as a judge of the court of claims sits, unless otherwise determined by the chief judge of the court of claims." Mich. Comp. Laws § 600.6413.

Here, upon filing on April 25, 2019, Plaintiff's complaint was assigned to Judge Stephens, who sits in Michigan Court of Claims District 1, in Detroit, Michigan. For more than a month, and before Defendants removed the case to federal court, Plaintiff did not request a change in venue before Judge Stephens. Instead, Plaintiff proceeded with litigation by filing a motion for preliminary injunctive relief. Two weeks after Defendants removed the case to federal court – in the district where the case was pending and where Judge Borman reviewed and considered similar issues in *Dumont* – Plaintiff first complained that venue was not to its liking.

ARGUMENT

I. Defendants properly removed this case to the United States District Court for the Eastern District of Michigan.

Defendants appropriately removed this case to the Eastern District. Under federal law, the only venue to which an action may be removed is the "district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). As of the date of removal, this action was pending before Judge Stephens in Detroit, Michigan. The Eastern District was the only appropriate venue for removal.

A. Removal must be to the district and division in which the action is *pending*.

Only one venue is appropriate upon removal – and, in this case, that is the Eastern District. Venue of removed actions is governed solely by the federal removal statute, 28 U.S.C. § 1441(a). *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953). This statute authorizes removal to "the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a).

There is no exception. The Sixth Circuit and both federal district courts in Michigan all recognize that that the district embracing the place where the action is pending is the only venue to which a case can be removed. *Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531, 534 (6th Cir. 2002) (action removed to the Eastern District "from a state court within the area embraced by the Eastern District of Michigan" was "removed to the only venue permitted by § 1441(a)"); *Harhara v. Norville,* No. 07-cv-12650, 2007 WL 2336383, at *3 (E.D. Mich. Aug. 15, 2007), attached as Ex. E (removal of a case pending in state court in the Eastern District was appropriate even if state court was not appropriate venue); *Cont'l Identification Prods. v. EnterMarket, Corp.,* No. 1:07-CV-402, 2007 WL 2963378, at *2 (W.D. Mich. Oct. 9, 2007) attached as Ex. F (Western District was the only venue to which an action pending in Kent County Circuit Court could be removed).

Plaintiff's assertion that "federal courts generally determine the proper removal venue based on where the action is *filed*" is belied by the plain language of the federal statutes governing removal, 28 U.S.C. § 1441(a) and 28 U.S.C. §1446(a), which require removal to the district where the action is pending. The statutory language is unambiguous

and, therefore, this Court's "sole function . . . is to enforce it according to its terms." *United States v. Ron Pair Enters.,* 489 U.S. 235, 241 (1989), quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). This remains true regardless of whether a Court disagrees with the result. *Mullikin v. United States,* 952 F.2d 920, 932 (6th Cir. 1991).

Plaintiff's assertion is also belied by a case it cites in support thereof. In *Rinks v. Hocking,* No. 1:10-cv-1102, the court emphasized that "[v]enue in removed cases is governed solely by section 1441(a)… [and] "[t]he Sixth Circuit has made it clear that there is only one federal venue into which a state court action may be removed . . . ." 2011 WL 691242, at *2 (W.D. Mich. Feb. 16, 2011), attached as Ex. G.

Section 1441(a) authorizes removal to the district embracing the place where the action is pending – not where it was filed. Defendants' notice of removal complied with the law.[5]

[5] Plaintiff's motion to change venue under 28 U.S.C. § 1406(a) is limited to its contention that removal to the Eastern District was improper. Outside of removal, Plaintiff provides no reason why this case could not have been filed in the Eastern District or that venue in the Eastern District is otherwise improper. These arguments are, therefore, waived.

B. This case was pending in a state court located in an area embraced by the Eastern District.

When Defendants filed the Notice of Removal, this action was pending in a state court within the area embraced by the Eastern District. While a cause of action may be filed in the clerk's office for any district of the court of appeals, such cases are assigned to a specific judge on the Michigan Court of Appeals and sit in the district in which the judge is assigned. Mich. Comp. Laws §§ 600.6410(b); 600.6413. This case was assigned to Judge Stephens in Michigan Court of Appeals District 1, which is located in Detroit, Michigan.

Plaintiff's attempt to circumvent this by arguing against the Michigan Court of Claims Act has no relevance to the issue at hand. By suing in the Court of Claims, Plaintiff subjected itself to legislatively-mandated procedures for overriding sovereign immunity, over which even the state courts claim no authority to amend or restrict. See *Ross v. Consumers Power Co.*, 420 Mich 567, 598; 363 N.W.2d 641, 650 (Mich. 1984), *superseded by statute on other grounds* ("From statehood forward, Michigan jurisprudence recognized that the sovereign (the state) was immune from *all* suits" because "the state, as creator of the courts, was not subject to them or their jurisdiction" except according to terms and

conditions that the Legislature specifically authorized); *McCahan v. Brennan,* 492 Mich. 730, 732-33, 822 N.W.2d 747, 748 (Mich. 2012) (recognizing it is the "sole province of the Legislature to determine whether and on what terms the state may be sued, [and] the judiciary has no authority to restrict or amend those terms.").

In addition, to the extent such questions raise an equitable argument, such argument ignores the reality that Plaintiff chose the Michigan Court of Claims as the forum for its federal and state claims and, as a result, should not now be heard to protest the procedures governing it. Notably, it did not protest venue of Judge Stephens' assignment while the case was pending before her in Detroit. Defendants appropriately removed this case to the Eastern District, and Plaintiff's motion to change venue should be denied.

II. This Court should not transfer the case to the Western District under 28 U.S.C. § 1404(a).

Not only was the Eastern District the only appropriate venue upon removal, but this Court should decline Plaintiff's request for a change in venue pursuant to 28 U.S.C. § 1404(a). "Section 1404(a) is intended to place discretion in the district court to adjudicate motions to

transfer on an individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (internal quotations omitted); see also *Phelps v. McClellan,* 30 F.3d 658, 663 (6th Cir. 1994). Plaintiff must show by a preponderance of the evidence that "fairness and practicality strongly favor the forum to which transfer is sought." *Thomas v. Home Depot USA, Inc.*, 131 F. Supp.2d 934, 936 (E.D. Mich. 2001) (internal quotations omitted). Moreover, while convenience is a consideration, it need not be the ultimate factor if the interests of justice indicate otherwise. *Phelps,* 30 F.3d at 663.

A. The Western District was *not* Plaintiff's chosen venue for filing its complaint.

Although Plaintiff could have filed its federal and state claims in the United States District Court for the Western District, it did not do so. As explained above, Plaintiff chose to file its Complaint in the Michigan Court of Claims, which sat – for purposes of this case – in a location embracing the Eastern District. Mich. Comp. Laws § 600.6413. At no time did Plaintiff request an alternate venue while the case was

pending before Judge Stephens and, in fact, it litigated there by filing a motion for a preliminary injunction.

To the extent deference is given to Plaintiff's choice of forum, such deference weighs in favor of maintaining venue in the Eastern District.

B. Interests of justice weigh in favor of the Eastern District.

Not only did Plaintiff's choice of forum result in venue in the Eastern District, but Plaintiff has not met its burden to show that convenience or fairness strongly favor a transfer. Plaintiff's Complaint attacks a settlement agreement and order of dismissal entered in the Eastern District by Judge Paul Borman in *Dumont v. Lyon,* Case No. 2:17-cv-13080 (E.D. Mich. 2017). Defendants identified *Dumont* as a "Companion Case" when it filed its Notice of Removal on June 5, 2019, and are awaiting word from the Court as to whether the case will be reassigned as provided in Local Rule 83.11(b)(7).

The *Dumont* Consent Decree is at the heart of Plaintiff's Complaint. Plaintiff alleges – incorrectly – that the Consent Decree amounts to a "new policy" of "forc[ing] faith-based providers . . . to abandon or violate their belief as a condition to receiving government

contracts." (Compl., Doc. 1-2, Pg. ID 46-47, ¶¶ 131, 135.) Plaintiff further alleges that the so-called "new policy" violates Plaintiff's constitutional rights. (*Id.* at Pg. ID 51-62, ¶¶156-232.)

Defendants dispute that the Consent Decree implemented a "new policy," but regardless, this does not affect the analysis supporting venue in the Eastern District. The very relief Plaintiff seeks here – i.e., an Order prohibiting MDHHS from taking adverse action or otherwise penalizing Plaintiff for violating the nondiscrimination provisions of its foster care case management and adoption contracts by refusing to consider households headed by a same-sex couple – would place MDHHS in direct contravention of Judge Borman's Consent Decree. (*Cf.* Compl., Doc. 1-2, Pg. ID 62-63, *with Dumont* Settlement Agreement, Doc. 82, Pg. ID 1445-46.)

In addition, the interest of judicial economy favors venue in the Eastern District, particularly before Judge Borman. Having presided over the *Dumont* litigation for eighteen months, he is familiar with many facts and the constitutional questions at hand. *Purcell Graham, Inc. v. Nat'l Bank*, 93 Civ. 8786 (MBM), 1994 WL 584550, at *6

(S.D.N.Y. Oct. 24, 1994) (transferring to Eastern District where judge already acquired some factual knowledge) (Ex. H).

The situation presented here is similar to the Sixth Circuit's decision in *Pedreira v. Sunrise Children's Services,* 802 F.3d 865 (6th Cir. 2015). In *Pedreira*, the Sixth Circuit remanded claims by a religiously-affiliated organization to the district court which entered a consent decree affecting such organization's contract with the state. The Sixth Circuit first determined that the Judge's order constituted a consent decree because it approved the terms of settlement agreement and retained jurisdiction to enforce it. *Id.* at 869, 871. Second, the Sixth Circuit found the district court that entered the consent decree was the appropriate forum for addressing the religiously-affiliated organization's claims that it was negatively affected by it.

A similar analysis applies here. Judge Borman dismissed the *Dumont* litigation pursuant to the terms of the Settlement Agreement, retained jurisdiction over it, and Plaintiff now contests this on grounds that it is negatively affected by it. Interests of justice and judicial economy weigh in favor of maintaining venue in the Eastern District.

C. An appropriate balance of the convenience factors does not support a transfer.

Given the familiarity with the case and the fact that Plaintiff's initial choice of forum resulted in venue in this district, the Court should give Plaintiff's claims of inconvenience little weight.

This is not a situation where the parties or witnesses are located in different states. Detroit and Grand Rapids are within driving distance of each other and, in fact, Plaintiff's out-of-state attorneys may find it more convenient and cost-effective to fly into the larger Detroit Metropolitan Wayne County Airport – in the Eastern District. Plaintiff's CEO will have to drive no farther to appear at court in the Eastern District than he would have to drive to Catholic Charites' Grand Traverse office.

To the extent records or other documents are stored in Grand Rapids, "modern photocopying technology and electronic storage deprive this of practical or legal weight." *Roller Bearing Co. of Am., Inc. v. Am. Software, Inc.*, 570 F. Supp. 2d 376, 390 (D. Conn. 2008) (internal quotations omitted). The availability of e-filing also lessens the weight to be assigned to Plaintiff's claims of inconvenience. Defendants'

witnesses are willing and able to drive to the Eastern District when the need arises.

As explained above, the locus of operative facts allegedly occurred when the Consent Decree was issued before Judge Borman. There is no concern with any court's ability to compel attendance of witnesses, and it was Plaintiff's initial choice of forum that led to venue in this Court.

In sum, the interests of justice strongly outweigh any concerns of any minimal inconvenience to the parties from adjudication in the Eastern District. Plaintiff's motion to change venue should be denied.

CONCLUSION AND RELIEF REQUESTED

For the reasons explained above, Defendants respectfully request this Court deny Plaintiff Catholic Charities West Michigan's Motion to Change Venue.

Respectfully submitted,

Dana Nessel
Attorney General

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Dated: July 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2019, I electronically filed **Defendants' Response to Plaintiff Catholic Charities West Michigan's Motion to Change Venue** with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Joshua S. Smith
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UNITED STATES DISTRICT COURT
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INDEX OF EXHIBITS TO DEFENDANTS' RESPONSE TO PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S MOTION TO CHANGE VENUE (DOC. 9)

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Exhibit A - Affidavit of Goad

Exhibit B - Affidavit of Neitman

Exhibit C - Affidavit of Hoover

Exhibit D - Affidavit of Bladen

Exhibit E - *Harhara v. Norville*,
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Exhibit F - *Cont'l Identification Prods. v. Entermarket, Corp.*,
No. 1:07-CV-402, 2007 WL 2963378 (W.D. Mich. 2007)

Exhibit G - *Rinks v. Hocking*,
No. 1:10-CV-1102, 2011 WL 691242 (W.D. Mich. 2011)

Exhibit H - *Purcell Graham v. Nat'l Bank of Detroit*,
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(S.D.N.Y. 1994)

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

AFFIDAVIT OF SARAH GOAD

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Sarah Goad, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (Department) as a State Administrative Manager, Office of Child Welfare Policy and Programs.

2. I have served the Department in this capacity for three years and four months, and make this affidavit based on my experience and knowledge of foster care policy, contracts and state and federal laws related to foster care.

3. My job duties include overseeing development and implementation of the children's foster care policies, programs; including integration of federal and state laws into policy and providing bill analysis and leadership on child welfare bills. Additionally, my position oversees the Title IV-E State Plan and resulting Program Improvement Plan. My duties also include interpretation and administration of private provider contracts for foster care and residential placement.

4. The Department is the Title IV-E agency in Michigan responsible for administering Foster Care and Adoption Services programs.

5. The foster care program for children provides placement and supervision of children when a court finds they have been abused and/or neglected and cannot remain in their family homes safely. Services must be focused on resolving the problems which necessitated removal. There are approximately 13,500 children in foster care, about 2,000 of whom are available for adoption. That care is provided in foster-family homes, child-care institutions, and relative homes. Mich. Comp. Laws § 712A.13a(1)(e).

6. The department holds 137 contracts with 57 private child placing agencies, or CPAs, to provide foster care or adoption services throughout Michigan, including St. Vincent Catholic Charities located in Ingham County.

7. The Department contracts with CPAs to provide foster and adoption services. In addition, the Department itself is a CPA and may provide foster care services, including licensing foster parents. The Department does not generally provide direct adoption services; most adoption services in Michigan are privatized.

8. The Department does not require St. Vincent or any other CPA to endorse or approve of a specific relationship or type of relationship.

9. The Department contracts with CPAs, including St. Vincent, to provide foster care and adoption services pursuant to the Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 et seq., administrative rules , Mich. Admin. Code R. 400.12101 et seq., contracts, and Department policy, as found in the Department's Children's Foster Care Policy Manual (http://www.mfia.state.mi.us/OLMWeb/ex/FO/Public/FOM/000.pdf#pagemode=bookmarks) and the Adoption Services Policy Manual (http://www.mfia.state.mi.us/OLMWeb/ex/AD/Public/ADM/000.pdf#pagemode=bookmarks).

10. Under the Department's contracts, CPAs recruit prospective foster and adoptive applicants, complete home studies and assess whether the person or family meets the Department's licensing requirements. Those licensing requirements are set forth in Act 116 and administrative rules.

11. The Department does not ask or require CPAs providing foster care or adoption services under a contract to endorse or approve of any relationship, including same-sex marriages. Nor does the Department ask or require CPAs

speak in favor of any relationship, including same-sex marriages. The Department's contracts only require the CPA to determine whether the foster applicant meets the minimum licensing requirements mandated by law. And only the Department can certify a foster home applicant by issuing a license.

12. Under the terms of the contracts, the Department pays CPAs for the services they render. One of the many tasks undertaken by government and non-government CPAs is to license foster families. Other services undertaken by CPAs include: placement and supervision of children who are or have experienced out of home care; reunification and other permanency planning efforts as appropriate; assessment of needs and progress for children and parents; service referral; and documentation of all case management services.

13. The administrative rate paid to CPA's for foster care and adoption services is for all services performed under the respective contracts.

14. The Department's foster care and adoption contracts with CPAs include non-discrimination clauses.

15. The Private Agency Foster Care (PAFC) Contract, at § 2.9(b), states:

> "The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.
>
> The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency."

16. Adoption Contract Section, at § 2.9(c), states:

> The Contractor shall comply with the MDHHS non-discrimination statement:
>
> > The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.
> >
> > The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

17. St. Vincent Catholic Charities is a licensed CPA and the Department holds contracts with St. Vincent Catholic Charities to provide foster care and adoption services.

18. Since September 8, 2015, the Department's adoption contract with St. Vincent has included the non-discrimination clause.

19. Since July 8, 2016, the Department's signed and executed foster care contract with St. Vincent has included the non-discrimination clause.

Sarah Goad

Sarah Goad

Subscribed and sworn to by Sarah Goad before me on the 24th day of May, 2019.

Signature Katherine L McClain

Printed name Katherine L. McClain
Notary public, State of Michigan, County of Eaton
My commission expires 12/31/19
Acting in the County of: Ingham

Katherine L. McClain
Notary Public - Michigan
Eaton County
My Commission Expires Dec. 31, 2019
Acting in the County of Ingham

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

AFFIDAVIT OF PATRICIA NEITMAN

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Patricia Neitman, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (DHHS) as a Director, Division of Child Welfare Licensing (DCWL).

2. I have served the Department in this capacity for two months and make this affidavit based on my experience and knowledge of the Child Care

Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 *et seq.*, Licensing Rules, and foster care and adoption contract requirements.

3. Prior to my current position I worked in child welfare as a licensing worker, licensing supervisor, clinical therapist, and program manager in private child placing agencies for 12 years; worked as a licensing consultant in the DCWL for 13 years, and as the DCWL program manager for over 2½ years, before assuming the position of DCWL director.

4. My job duties include oversight of the Division of Child Welfare Licensing (DCWL). DCWL staff are responsible for regulation of child placing agencies and child caring institutions licensed in Michigan, including responsibility for monitoring compliance with licensing rules and MDHHS contract requirements.

5. The Department of Health and Human Services administers Michigan's foster and adoption system.

6. This system provides temporary care and custody to children when a court finds that children have no legal guardian or have been neglected or abused. There are approximately 13,000 children in foster care, about 2,000 of whom have a permanency goal of adoption. That care is provided in foster family homes, child-care institutions, and relative homes. Mich. Comp. Laws § 712A.13a(1)(e).

7. The Department contracts with CPAs provide foster and adoption services. In addition, the Department itself is a CPA and may provide foster care services, including licensing foster parents. The Department does not provide adoption services; all adoption services are private in Michigan.

8. Child Placing Agencies, or CPAs, including St. Vincent Catholic Charities, must be licensed by the Department in order to provide foster care and adoption services.

9. CPAs are required by contract and administrative licensing rules to perform a home study on prospective foster or adoptive families. Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 et seq., requires that an on-site inspection be completed by the CPA for prospective foster homes. (See DHS-3130 Home Study, Attachment 1.)

10. The Department mandates the criteria for home studies, which include a review of several factors, including the "[s]trengths and weaknesses" of the parents and the "[s]trengths of the relationship" between the couple, including "level of satisfaction" and stability of the relationship and their relationship history. Other factors that must be assessed include marital and family status and history, including current and past level of family functioning and relationships, parenting skills and childrearing techniques, values and the role of religion in the family. The Department requires assessment of these criteria for all CPAs, including the Department itself.

11. These criteria are used to determine whether and to what extent foster applicants or adoptive families are able to meet the needs of children served by the agency or Department. These criteria are also used to determine whether a child may be a good fit for a particular family.

12. A CPA's assessment of these factors does not constitute an endorsement, recommendation or approval of a specific relationship or a type of relationship. Nor does a CPA's assessment of these factors constitute an endorsement of any particular religious faith or the absence of a religious faith. Nor can these factors be used as a means of discriminating against prospective foster parents or adoptive families on the basis of their sexual preference or same-sex marital status. Instead, a CPA must assess on these factors and make a determination of compliance or noncompliance with administrative licensing rules and statute.

13. CPAs must follow the requirements of Michigan law, including Act 116, administrative rules and Department policy. CPAs must also perform their duties under their contracts, including following the non-discrimination clause, which states:

> The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability. The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.
>
> (Private Agency Foster Care (PAFC) Master Contract Template, page 6, 2.9 Compliance Requirements, c)).

14. When allegations of noncompliance with licensing rules, statute, or contract requirements are made, DCWL will initiate an investigation. The investigation is assigned to a DCWL licensing consultant, who will conduct investigatory activities including interviews and review of documents, in order to make a determination of compliance or noncompliance with applicable rules, statute, or contract requirements.

15. At the conclusion of the investigation the licensing consultant will conduct an exit meeting with the agency's administrators to discuss preliminary findings of the investigation. The licensing consultant will complete an investigation report, which is reviewed and approved by the consultant's manager. The report will detail the allegations, investigative activities, findings of compliance or noncompliance, and a recommendation regarding the status of the license and contract.

16. If there are findings of noncompliance, a corrective action plan to address the noncompliance will be required and this will be indicated in the investigation report. The corrective action plan is due within 15 days from receipt of the report by the agency and must be approved by the consultant. Failure to submit an acceptable corrective action plan will result in a recommendation for disciplinary action, which may include revocation of the license and termination of the contract.

17. A recommendation for any disciplinary action on the license is reviewed by the DCWL director and the Child Services Agency (CSA) director. A recommendation for any disciplinary action on the contract is reviewed by the

DCWL director, the CSA director, and the contract administrator. If a recommendation for disciplinary action on the license is made, the licensee has the opportunity to appeal the recommendation, which includes a compliance conference and an administrative hearing. If a recommendation for disciplinary action on the contract is made, the licensee/contractor has the opportunity to appeal this recommendation during a meeting with the contract administrator.

18. Unless and until an investigation is complete, the Department does not know whether a statute, rule, policy or contract provision has been violated.

19. In the present case, the Department was unaware that St. Vincent did not follow the non-discrimination clause it agreed to until the *Dumont v. Lyon* lawsuit was filed. The *Dumont* plaintiffs alleged that they had been denied the opportunity to serve as foster or adoptive parents by St. Vincent, Bethany Christian Services of Madison Heights and Bethany Christian Services of East Lansing.

20. When that lawsuit was filed, the Department investigated the allegations in the same manner as it investigates other complaints. It opened investigations of St. Vincent, Bethany Madison Heights and Bethany Christian East Lansing.

21. The Department was required to open these investigations, as follows:

a. Mich. Comp. Laws § 722.120 (1): The department may investigate, inspect, and examine conditions of a child care organization and may investigate and examine the books and records of the licensee.

b. Mich. Comp. Laws § 722.113(1): The rules promulgated by the department under this act shall be used by the department, the

bureau of fire services, and local authorities in the inspection of and reporting on child care organizations covered by this act.

c. PAFC Master Contract Template, page 21, § 2.21: The Division of Child Welfare Licensing: DCWL shall be responsible for review of the Contractor's compliance with the Contract and any court orders, via an Annual Compliance Review (ACR) and Special Investigations. DCWL may review, analyze, and comment on all activities covered within the terms of the Contract or court order.

d. DCWL Policy and Procedure Manual, Chapter 6 Special Investigation, page 46: 6-5. Special Investigation: DCWL responds to complaints where it is alleged that the licensee has not complied with the terms of the statute, rules, the Implementation, Sustainability and Exit Plan (ISEP) from *Dwayne B. v. Whitmer*, E.D. Mich. No. 06-13548, Department policy, and contracts. DCWL encourages individuals who want to file a complaint to utilize the public website's online complaint form. DCWL will also accept complaints verbally or in other written formats.

e. A. Upon receipt of an allegation, the DCWL field consultant will initiate a special investigation (SI). The DCWL field consultant will not dismiss allegations without consultation with the area manager. Intake allegations are logged into the database system by DCWL central office staff or the DCWL field consultant within 24 hours or the next business day.

22. Earlier, in January 2017 and May 2018, the Department opened two investigations of Catholic Charities of West Michigan in (CB610201023), Investigation # 2017C0208001, and Catholic Charities of West Michigan (CB410245705), Investigation # 2018C0223029.

23. The Department found noncompliances in Investigation 2017C0208001 as follows: Adoption Contract 2.9, Mich. Comp. Laws § 722.124e, and CPA Rule 400.12602 (1), for failure to comply with the non-discrimination statement, the agency's refusal to complete adoptions in three assigned contracted cases based on

the sexual orientation and marital status of the identified adoptive applicants, and failure by the agency to follow their own program statement. A corrective action plan was submitted by the agency and accepted by the Department.

24. The Department found noncompliances in Investigation 2018C0223029 as follows: ISEP 6.10, Mich. Comp. Laws § 722.124e, and FOM 722-03, for failure by the agency to placed three siblings who were contracted cases assigned to the agency, together into one foster home due to the sexual orientation and marital status of the foster parents. A corrective action plan was submitted by the agency and accepted by the Department.

25. Due to the then-pending *Dumont* lawsuit, the Department did not finalize its investigations of St. Vincent, Bethany Madison Heights and Bethany Christian East Lansing.

26. Since the *Dumont* case has ended, Bethany Christian Services has agreed that it will comply with its legal contract requirements, including the non-discrimination clause.

27. Because of the present lawsuit, the Department has not been able to finalize its investigation of St. Vincent.

28. Should that investigation be complete and a violation found, St. Vincent would have the opportunity to complete a corrective action plan demonstrating how it would achieve compliance.

29. If St. Vincent chooses not to comply with the provisions of its contracts with the Department, including the non-discrimination clauses, the Department could take licensing and/or contract action.

30. And if St. Vincent chooses to cease providing foster care and/or adoption services, the Department has a process for finding new placements for the children St. Vincent serves without any sacrifice in the quality of care received by those children.

31. Plaintiffs Chad and Melissa Buck have not had a foster home license since June 16, 2016.

Patricia Neitman

Subscribed and sworn to by Patricia Neitman before me on the 25th day of May, 2019.

Signature Elisabeth Paurazas

Printed name Elisabeth Paurazas

Notary public, State of Michigan, County of Oakland

My commission expires December 24, 2023

Acting in the County of Washtenaw

Elisabeth Paurazas
Notary Public - State of Michigan
County of Oakland
My Commission Expires December 24, 2023

ATTACHMENT 1

INITIAL FOSTER/ADOPTION HOME EVALUATION

Michigan Department of Health and Human Services
Division of Child Welfare Licensing

Applicant(s) interested in:

☐ Relative Assessment.
If yes, please describe legal relationship: _____

☐ Foster Care

☐ Adoption

AGENCY NAME:
AGENCY LICENSE NUMBER: Date of Report:

1. **FOSTER/RELATIVE/ADOPTIVE HOME INFORMATION:**
Home name:

Foster home license number, (CF # or CG#): _____

Address:

Home telephone number: Other telephone number (s):

Email address:

Driver's license number/State ID number for all adult members of the household; verification of valid driver's license:

MEMBERS OF HOUSEHOLD:

Name	DOB	Relationship to Caregiver	Date of Placement (if applicable)
"Click Here and Type"			

DIRECTIONS TO THE HOME:
"Click Here and Type"

SOCIAL WORK CONTACTS:

Date	Persons	Type of Contact/Place
"Click Here and Type"		

2. **CENTRAL REGISTRY:**
Michigan Date of Central Registry Check: _____ Has applicant lived in any other states in the last 5 years? ☐ Yes ☐ No
If yes, identify what states the person lived in. There must be a central registry clearance from that state.

The confidentiality of information in this section of this document is protected by the Michigan Child Protection Law. Anyone who violates this protection is guilty of a misdemeanor and is civilly liable for damages (1975 PA 238, as amended, MCL 722.621 et seq.).
Central Registry Results:

☐ N/A: Not found

☐ Yes, there is a history of child abuse or neglect.

a. Describe the length of time since the substantiation and any services that have been provided to rectify the concern.

b. Address any risk factors that might impact the safety of the child and describe what protective interventions are in place currently.

***If there is any household member who is on Central Registry, THE HOME CANNOT BE LICENSED.**

Are there any rules that are in non-compliance? ☐ Yes ☐ No

If Yes, list all rules and headings:

☐ Willful ☐ Substantial

Supporting documentation:

ART: ☐ Yes ☐ No

3. **COMMUNITY:**

Type of community (rural, urban, etc.):

Socio-economic makeup:

Racial/cultural makeup:

Availability of recreational facilities:

School system, including special education:

Hospitals and medical care, noting facility utilized by family:

Availability of churches, noting family's choice of church:

4. **DESCRIPTION OF HOME:** (R.400.9206, R.400.9301, R.400.9302, R.400.9303, R.400.9304, R.400.9305, R.400.9306, R.400.9307, R.400.9308, R.400.9309, R.400.9401, R.400.9410, R.400.9411, R.400.9414, R.400.9418, R.400.9419)
Description of home and all rooms, noting condition, layout, appearance: (Does the home meet the minimum level of cleanliness necessary to meet the needs of the child to be placed? If not, is the applicant taking action to address the home's deficiencies?)

Description of play space:

Safety considerations, including weapons or pets:

- Are there pets in the home? ☐ Yes ☐ No Does the pet have current vaccinations? ☐ Yes ☐ No
- Is the pet friendly or is the pet a safety concern? (Explain what makes the pet a friendly or a safety concern. Describe how does the pet interacts with others.)
- Is the pet well cared for? ☐ Yes ☐ No
- Are there any water hazards on or near the premises? ☐ Yes ☐ No If yes, describe how the caregiver plans to safeguard children around them. Any exterior door that leads directly to the area where there is a water hazard needs an alarm. Any pool, spa, hot tub or pond needs rescue equipment available.
- Are there working smoke detectors on each floor and between each sleeping area and the rest of the home? ☐ Yes ☐ No

- Is there a working carbon monoxide detector installed as recommended by the manufacturer? ☐ Yes ☐ No

- If there are weapons in the home, specify what they are, where they are stored and how they are secured. Document all weapons (rifles, handguns, bow and arrows, air/paint guns, etc.), registrations, trigger locks/inoperable and storage. Weapons must be inoperable and locked in a place separate from ammunition or stored in a locked gun safe.

- Where are medications stored?

Explain the proposed sleeping arrangements for family members and foster/adoptive children.

Is there a CPSC compliant crib if there are children under the age of 2 or the home is to be licensed for children 0-2?

Do all bedrooms have a window and a door than can be used to get out of the house in an emergency? ☐ Yes ☐ No
If "NO", please explain:

Are there people sleeping in other rooms in the home? Please describe.

Water, sewer, refuse arrangements, health inspection results if applicable:

Water temperature tested 120° Fahrenheit or less? ☐ Yes ☐ No

Emergency procedures information completed and posted in view of the home telephone:

Adequacy of the house, property, neighborhood, schools and community for the purpose of fostering/adopting as determined by on-site visits:

Means of transportation; i.e. ages and makes of automobiles, reliability, proof of insurance on each vehicle, availability of required safety seats for young children, accessibility of public transportation if needed:

DESCRIBE PLANS FOR DAY CARE AND/OR SUBSTITUTE CARE. (R400.9403(d)(ix), R400.9412)

Routine Day Care:

After hours and emergency substitute care:

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance requested? ☐ Yes ☐ No

5. **FINANCIAL:** (R.400.9201, R.400.9206)
Date family provided with information of Ineligible Grantee Funds, Medicaid, Food Stamps, WIC in DHS-Pub-114 for children in relative care:

Source of income, how this was verified, stability of income, how expenses were verified. Does the family have a plan for any known financial changes that may occur in the future i.e., unemployment payments ending, cash assistance ending?

If income is based on disability, i.e. SSI, Social Security Disability, long term disability payments from a job, workmen's compensation, etc., describe the verification of the physical or mental disability and an assessment of how that impacts the ability to provide foster/adoptive care or be a member of the household.

If child support payments are ordered, are the payments being made and are they current? If there are arrears, how much and what is the plan to bring the payments current? How was this verified?

Detail a financial statement that specifies the amount of net income for the household and identifies all ongoing and routine bills and expenses including, but not limited to, housing (mortgage or rent, insurance, property taxes), utilities, food, clothing, transportation (car payments, insurance, fuel), credit cards, student loans, contributions to religious organizations, savings contributions, etc.

Assess the family's money management skills and ability to meet their needs with their current income. Is the family current on their bills? Can the family meet the financial expenses of having a relative/foster child placed in their home prior to payment starting?

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance? ☐ Yes ☐ No

6. **SOCIAL HISTORY:** (for each adult member of the household, including adult children who live in the home) (R.400.9201, R.400.9202, R.400.9206)
Descriptive information: Age, height, weight, hair color, nationality, race or ethnicity, place of birth. American Indian heritage must be consistent with information on the BCAL-3889 and the BCAL-0120-A. Family of origin description. Include:

Number of siblings, parents' roles, personalities, expectations, parenting involvement, styles, values.
Relationship with each parent and siblings (if any) growing up and now.
Parents'/primary caretakers' childrearing techniques, including discipline.
How family dealt with losses. Describe family celebrations.
Parents' substance use and how it affected the family, lasting impact on individual.
How family dealt with any abuse or victimization issues, continuing impact on individual.
Role of religion in the family.
Other significant influences when a child, e.g. grandparents, step parents, aunts, uncles.

Any history of out of home care? This should include any history in non-court-ordered out of home care.
Educational history and any special skills and interests:
Employment history – If the person does not have an employment history or there are large gaps in the employment history, explain how they were supported during that period of time:
Relationship history – Significant relationships prior to current one; how they ended; if previously married, whether divorce has been obtained or considered and whether there is verification.

Any children from previous relationships. ☐ Yes ☐ No

Note any history of involvement in domestic violence, including as a victim, or absence of history:

Description of personality, personal goals, hobbies, interests

Strengths and weaknesses, worker's assessment in addition to what the applicant tells you:

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

7. **FAMILY LIFE:** (R.400.9201, R.400.9202, R.400.9206, R.400.9405, R.400.9418)
Marital and family status and history, including current and past level of family functioning and relationships and any incidents of domestic violence:

Current relationship. Include:

Brief history, including date and place of marriage, if applicable.
Any history of infertility and how that has been dealt with.
Any history of separations or domestic violence.
Strengths of relationship, areas of work or attention.
Common/shared interests or lack thereof.
Roles, division of labor, decision-making process, handling stress or disagreements.
Assess level of satisfaction, stability.
Describe relationship w/parent of children if separated.

Family:

Activities, goals, values, role of religion, church involvement:

Challenges, stressors, any history of help-seeking:

Losses and how dealt with:

Expected impact of fostering/adopting on all members of the household:

Any individuals other than children of applicants currently living with the family, impact of those individuals on family functioning.

8. **CHILDREN:** (R.400.9201, R.400.9202, R.400.9206, R.400.9404, R.400.9407)
All children must be interviewed/observed apart from the parents, even adult children no longer living in the home, or the agency must note all attempts to contact them. If unsuccessful, the applicant's explanations as to why you were unable to contact them.

For each child living in the home including relatives/foster children:

Identifiers: name, birth date, race (if different from parents') school and grade, and/or employment. Date of placement for children already placed in the home (relatives).
Parents' description of child's personality, interests, activities.
General adjustment, note if any involvement with law enforcement or the criminal justice system.
Worker's assessment of child's adjustment, development, special needs, relationships with parents and their significant others, and other strengths and weaknesses.
Child's ideas and attitudes about fostering/adopting based on interview with the child.
Child's description of the discipline techniques used in the family.

For children who are grown and/or out of the home:

Identifiers: name, age, where living, marital status.
School and/or employment.
General adjustment: note if any problems with law enforcement or the criminal justice system.
Their opinion of their parents' parenting skills and of their desire to foster/adopt children.
Description of the discipline techniques used when they were a child.
The willingness of the adult child to provide substitute care, if appropriate, or be involved with the foster/adopted children who may be placed into the home.
Any ongoing reliance by the adult child on the applicant for child care, monetary assistance, etc.

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance? ☐ Yes ☐ No

9. **HEALTH:** (For each member of the household, both adult and children): (R.400.9201, R.400.9202, R.400.9206)
Assessment of physical, mental and emotional health and substance use history.

Indicate current health status. (Is anyone in the household prescribed medication? If so, list the medications. How long has he/she been taking these medications/what are the medications prescribed to treat?)

Does anyone in the household have a physical or mental health diagnosis or condition that would make care of the child difficult? If so, describe how it may affect the care of a child.

Describe current substance use patterns, history if indicated. If there is a past substance use problem (including alcohol use) indicate how diagnosed, resolved, and when. What is the current treatment?

Does any member of the household smoke? ☐ Yes ☐ No If yes, do they smoke in the house? ☐ Yes ☐ No

Reference a medical statement, completed within the 12 month period before conclusion of the evaluation, for each member of the household that indicated that the member has no known condition which would affect the care of a foster/adoptive child or any other determination if different. Does anyone require special care? Please describe:

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance requested? ☐ Yes ☐ No

10. **PARENTING:** (R.400.9201, R.400.9206, R.400.9306, R.400.9401, R.400.9403, R.400.9404, R.400.9417)
Parenting skills and attitudes toward children:

Parenting values:
Most important things for parents to do, what they will do similarly to their parents, what they hope to improve upon.

Knowledge of child development, appropriateness of expectations of children.

Ability to provide infant care:
Equipment, safety measures in place (e.g. gates, monitor, car seat, play area, pets)

Safe Sleeping requirements have been trained and reviewed

Understanding of infant care:

Capacity and disposition to give a foster child guidance, love and affection and to deal with difficult children with unacceptable behavior, children who are rejecting and/or oppositional, or children with medical needs.

1. What kinds of behaviors require intervention?

2. How will caregiver intervene/handle that type of behavior? How will they be supportive and nurture children?

Methods of discipline. Flexibility and age appropriateness of approaches, willingness to follow the case plan for the child if it differs from their normal approach to discipline.

Awareness of variety of techniques, use of positive and negative methods.

Understanding of agency's discipline policy and willingness to abide by it. If the family has used spanking or other corporal punishment, or was raised with it, document their current attitudes.

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

11. **MOTIVATION FOR FOSTER CARE/ADOPTION:** (R.400.9201, R.400.9202, R.400.9206, R.400.9403, R.400.9404, R.400.9405, R.400.9411)
Reasons for wanting to provide care for relative/foster/adoptive children, including infertility, if indicated.

Each member's attitude towards accepting a relative/foster/adoptive child.

Previous experience in providing child foster care, child day care, or adult foster care.

Previous adoptive evaluations or placements.

Previous licenses, including applications that did not result in a license. Reference communication with previous agency.

Level of understanding of foster/adoptive care and the potential impact of their family. For example, does the caregiver understand that a social worker will visit the child and relative at least monthly until reunification with parents occurs or permanent custody is achieved?

Evaluation of motivators, (if adoption/relative placement in particular).

Applicant(s) agree to encourage visits and follow health care, religious and discipline policies of this agency

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

12. **FAMILY'S ATTITUDES TOWARD THE CHILDREN'S PARENTS AND WORKING WITH THE AGENCY:** (R.400.9201, R.400.9202, R.400.9206, R.400.9403)
Understanding of permanency and concurrent planning.

Family's level of understanding of foster/adoption care.

Family's willingness to comply with the child's case plan. If child is in the home, assess current situation.

- The family is willing to cooperate with the supervising agency.

- The family is willing to cooperate with the school system.
- The family is willing to cooperate with the child's therapist.
- The family is willing to cooperate with the parenting time plan outlined in the treatment plan.
- The caregiver is willing and able to protect the child(ren) from further harm.

Attitudes toward the legal parents. How will foster parents discuss legal parents with and around foster/adoptive children?

How will foster parents discuss reasons children entered foster care and/or became available for adoption?

Family understands the goal of the agency in providing foster care and they are willing to support the agency in working toward reuniting a foster child with his or her family.

For Relative Placements:

- Does the family agree to not release the child to anyone, including birth parents, without the supervising agency's approval? ☐ Yes ☐ No
- Does the family agree they will not allow the foster child(ren)'s parents to live in their home without the supervising agency's approval? ☐ Yes ☐ No
- Does the family understand they cannot be licensed to care for foster children whose parents live in the home? ☐ Yes ☐ No

Ability to empathize and work with the parents and children.

Openness to maintaining significant relationships.

Openness to providing permanency to the relative/foster child if needed.

Ability to comply with agency policies and procedures.

Summarize experience of caseworkers for children who have been placed in the home. Assess current compliance.

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

13. **TRAINING NEEDS:** A statement of the number of hours the person/couple need to comply with the training rules is not sufficient. (R.400.9415)
Orientation and training hours credited; include topics covered.

Types of training the family believes they could benefit from.

Worker's assessment of additional training needs and the agency's plan to provide the identified training.

Openness to learning.

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance requested? ☐ Yes ☐ No

14. TYPE OF CHILDREN DESIRED – INTEREST IN PERMANENCY/ADOPTION PLANNING: (R.400.9201, R.400.9202)
Gender, race, ethnic background and special characteristics of children preferred by applicants.
Types of children the family is willing to consider.

Ability and willingness to care for special needs children, and the problems of the children.

Interest in adoption.

If this evaluation is being completed for an adoption of a specific child, the DHS 612, Adoptive Family Assessment Addendum, must be completed.

15. CROSS CULTURAL PLACEMENT:
Willingness to parent cross-racially or cross culturally and to create an atmosphere that fosters racial identity and culture of a foster child.

Races or cultures requested or that the family does not believe they can effectively parent.

16. REFERENCES: (R.400.9206)
At least three references must be obtained from persons not related to the applicant(s).

Summarize the information received from each reference. If negative information was received, explain how the negative information was resolved.

An agency may choose to obtain additional references from related or unrelated persons, including adult children.

If this is an adoption assessment and there are circumstances that require additional review, include the information provided by the professional reference.

17. RECOMMENDATIONS: (Must be consistent with the information contained in the report.)

Placement with relative is recommended: ☐ Yes ☐ No

If the recommendation is that placement should not be made, the reason for this must be explained in detail.

Licensure is recommended:
(Licensing workers only) ☐ Yes ☐ No ☐ N/A

Licensure and preliminary approval for adoption:
(Licensing workers only) ☐ Yes ☐ No

Approved for adoption:
(Adoption workers only) ☐ Yes ☐ No

- Summary of strengths and areas of growth, attention.

- Issues to be considered in making placements

- Recommended placement specifications to include characteristics, age, sex, and number of children best served by home and types of children who may not be placed in the home.

Recommendation for License Denial:

- List all rules found to be in non-compliance.
- Summarize facts to support rule non-compliance.
- Reference all supporting documentation.

Recommendation for Adoption Denial:

- Basis for recommendation:
- Supporting documentation.

18. CLOSING:
Licensing/Adoption Assessment Submitted by:

Name:

Signature:
Agency:

Title:

Date:

I certify that I have been trained and am qualified to make this recommendation:
☐ Foster Care ☐ Adoption

19. SUPERVISOR'S REVIEW:
Application:
Clearances:
Medical Reports:
References:
Other documentation:
Is the report accurate, factually consistent, unbiased, support by adequate data/information? ☐ Yes ☐ No
Further Explanation:

Supervisor Name:

Signature:
Agency:

Title:

Date:

I certify that I have been trained and am qualified to make this recommendation.

EXHIBIT C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

AFFIDAVIT OF CATHERINE HOOVER

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Catherine Hoover, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (Department) as a State Administrative Manager, Adoption, Guardianship , Recruitment and Retention Program Manager, Office of Child Welfare Policy and Programs.

2. I have served the Department in this capacity for 8 years and make this affidavit based on my experience and knowledge of adoption policy, adoption contracts, recruitment and retention and state and federal laws related to adoption.

3. My job duties include development, modification and implementation of policies and programs regarding adoption, guardianship, recruitment and retention, analysis and development of state laws regarding adoption and guardianship, administration of adoption contracts with CPAs, and oversight of closed adoption records and the Central Adoption Registry.

4. CPAs provide foster and adoptive services, pursuant to contract, and within the parameters of Michigan law.

5. CPAs must evaluate all families that come to an orientation and complete an application.

6. Payments made by the Department to a CPA, including St. Vincent, for foster care services include the home study, recruitment and placement of foster children. The foster care administrative rate paid to St. Vincent supports the staff who conduct recruitment and licensing activities, including completion of home studies. See PAFC Contract 2.9 Additional Compliance Provisions: "The Contractor shall comply with the provisions of: e. 1973 Public Act 116, as amended, being MCL 722.111 et seq., Michigan Child Care Organization Act."

7. The Adoption Contract states, at § 2.10(b)(1), "The contractor shall develop and implement a plan for adoptive home recruitment, retention and support consistent with the MDHHS DCWL licensing standards specific to the contractors' license specified in section 2.4."

8. The completion of home studies by a CPA is one of the services that the CPA has agreed to complete under its contract with the Department and is an integral part of the foster care and adoption process for which the CPA is compensated. Rule 400.12308 requires an agency to act on a completed and signed foster home application. The completion of a home study by a CPA requires a CPA to evaluate prospective foster families and adoptive families based on criteria set forth under Act 116, administrative rules and Department policy at Rule 400.12310 (foster home), Rule 400.12605 (adoption), and Adoption Services Manual 510 (adoption).

9. Included in the services for which the Department contracts with CPAs is the evaluation of prospective foster families and adoptive families based on the criteria set forth under Act 116, administrative rules and Department policy at Rule 400.12310 (foster home), Rule 400.12605 (adoption), and Adoption Services Manual 510 (adoption). The Department requires CPAs to perform these services under its contract and the administrative rate paid to CPAs compensates them for these services.

10. Part of the adoption process includes the completion of a DHS-612 Adoptive Family Assessment Addendum. The completion of a family assessment by a CPA requires a CPA to evaluate prospective adoptive families based on the criteria set forth in Adoption Services Manual 510 (adoption). (DHS-612, Attachment 1.)

11. Also included in the services for which the Department contracts with CPAs is the recruitment of potential foster parents and adoptive families. Rule 400.12304 requires a CPA to have an ongoing foster home recruitment program to ensure an adequate number of suitable and qualified homes to meet the needs of children

served by the agency. Rule 400.12706 and Adoption Services Manual 400 require a CPA to have an ongoing recruitment program to ensure an adequate number of suitable adoptive parents for the timely placement of all children serviced by the agency who are legally free for adoption with a goal of adoption. The Department requires CPAs to perform these services under its contract and the administrative rate paid to CPAs compensates them for these services.

12. The Department values its relationships with all CPAs. At the same time, the Department is not aware of any information to support the assertion that faith-based or religiously affiliated CPAs are more effective than other CPAs at recruiting families who might otherwise not choose to foster or adopt.

13. The Department is aware of no evidence that St. Vincent recruits homes for children with disabilities at "nearly double the average rate across" Michigan. Nor is the Department aware of any evidence that St. Vincent "recruits more homes for sibling groups than the average agency, and recruits more homes overall than the average agency."

14. The Department is unaware of any evidence to support the assertion that "[i]In the last eighteen months, St. Vincent has recruited more new foster families total than all of the other private agencies in its tri-county foster area."

15. While St. Vincent met their overall licensing recruitment goal of 6 in FY 18, their performance does not support the claims being made. St. Vincent licensed 8 of the 63 unrelated foster homes licensed in Clinton, Eaton and Ingham counties in FY18, accounting for 13% of the unrelated foster homes licensed in this tri-county area. Similarly, St. Vincent licensed 16% of the total new homes for children with

disabilities and 11% of the total new homes for sibling groups. St. Vincent did not meet their recruitment and licensing goals for homes for teens, licensing none in FY18. Statewide, St. Vincent licensed only 0.6% of the 1,186 unrelated foster homes licensed in FY 18.

16. These trends are continuing in FY 19. St. Vincent has licensed 5 of the 30 unrelated homes licensed from October 1, 2018 to March 31, 2019 in the tri-county area. In the same time period, they have licensed 5 of the 24 homes that accept children with disabilities and 3 of the 38 homes that accept sibling groups.

17. Overall, St. Vincent has 49 foster homes licensed to accept placement of unrelated children. This accounts for only 0.9% of the statewide total of 4,989 unrelated foster homes and 17% of the tri-county total of 281 unrelated foster homes.

18. St. Vincent's claim, if true, that "in the last four fiscal years, St. Vincent has served an average of 74 children in its foster care program every year, and through its work over 100 adoptions for foster children were finalized" is unremarkable. St. Vincent finalized 18 out of 1,815 adoptions (0.9%) in FY15; 34 out of 2,109 adoptions (2%) in FY16; 30 out of 1,998 adoptions (1.5%) in FY17 and 11 out of 2,002 adoptions (0.5%) in FY18 for a total of 93 adoptions finalized out of 7,924 (1%).

19. The Department values its relationship with St. Vincent, but would not characterize it as "one of the best foster care and adoption agencies in" Michigan.

20. The Department recognizes that CPAs will vary and that not every agency is a good fit for every prospective foster or adoptive family. And the Department encourages families to look for a foster or adoption agency that is a good fit for them.

Foster Care Navigators are experienced foster parents who help guide families through the licensing process.

21. But this does not mean that the Department allows CPAs to turn away otherwise qualified foster applicants and prospective adoptive families on the basis of sexual orientation or same-sex marital status. Although many factors can go into determining which agency works best for foster applicants and prospective adoptive families, that is a decision for the families, not CPAs. And it certainly does not mean that the Department condones or allows a CPA to discriminate against foster applicants and potential adoptive families on the basis of sexual orientation, same-sex marital status or other characteristics.

22. Although some third parties, including the Human Rights Campaign, may acknowledge CPAs based on how well they work with LGBTQ individuals and families, the Department plays no role in such certification. And any such third-party acknowledgment does not mean that a CPA lacking such acknowledgment may discriminate against members of the LGBTQ community, including same-sex couples. All CPAs remain bound by the non-discrimination clause of their foster care and adoption contracts with the Department.

23. If the Human Rights Campaign believes that CPAs should not place children with families that would not be LGBTQ affirming, including for religious reasons, does not mean that CPAs may discriminate against members of the LGBTQ community, including same-sex couples. All CPAs remain bound by the non-discrimination clause of their foster care and adoption contracts with the Department.

24. After a family is licensed to provide foster care, they are on the CPAs roster of eligible families with whom children in foster care may be placed. Before, during and after the licensing process, the CPA remains bound by the non-discrimination clause of its foster care and adoption contracts with the Department

25. The Department may need to place a child very quickly and a CPA may have only one hour to find an appropriate initial placement. If a particular CPA lacks the capacity for an appropriate placement, the Department must find another CPA that is able to make the placement. A child may be placed with a relative or with another unrelated foster family to reunite with a sibling following an initial placement. CPAs, including St. Vincent, must assist and cooperate with the Department in order to find the most appropriate placement for a child.

26. Accordingly, if St. Vincent were to voluntarily cease providing foster or adoptive services under its contract with the Department, a family like the Bucks would still be able to apply to adopt the sibling of one of the children they've adopted. And they would be able to work with any CPA that has an adoption contract.

27. Families, including the Bucks, may also use the Michigan Adoption Resource Exchange (MARE) website to find information about children who are legally free for adoption without an identified adoptive family.

28. Although MARE encourages potential adoptive families to choose a CPA with which they are comfortable and compatible, the Department does not allow a CPA to discriminate against prospective adoptive families based on race, religion, sexual orientation or same-sex marital status.

Catherine Hoover

Catherine Hoover

Subscribed and sworn to before me
this 23 day of May 2019

Katherine McClain

Notary Public, Eaton County.
My comm'n expires:

Katherine L. McClain
Notary Public - Michigan
Eaton County
My Commission Expires Dec. 31, 2019
Acting in the County of Ingham

ATTACHMENT 1

ADOPTIVE FAMILY ASSESSMENT ADDENDUM

Michigan Department of Health and Human Services

"Click here to enter agency name and address"

Prospective Adoptive Parent:	Cell Phone Number:
Prospective Adoptive Parent:	Cell Phone Number:
Address:	Home Phone Number:

Adoption Worker:	Agency:	Report Date:

DATES OF CONTACT

Dates "Click here and type"	With whom (include role/position)	Type and reason

Current Household Members:
Any Changes In Living Arrangements Or Financial Status:
Current Health Report (include date of exam, any new physical or mental conditions):
Current References (within12 months or if family has adopted a child since last assessment):
Current Record Clearances:
Other Significant Factors:
Type of Child Desired:

1. What are the applicant's expectations of adoption?

2. What are the extended families' attitudes toward adoption?

3. What are the family's plans to discuss adoption with the adopted child(ren)?

4. How will the applicant(s) assist the child(ren) in maintaining relationships with siblings or other significant persons (if appropriate)?

5. For relative adoptions: How has the prospective adoptive family demonstrated the willingness and ability to keep the child safe from continuing physical or emotional harm from the birth parents?

6. If any of the following apply document the family's ability to care for a large sibling group (see ADM 510 for requirements):
   - The total number of children who will be placed in the home will result in more than four adopted children in the home.
   - Placement of a child will result in more than three children under the age of 3 in the home.
   - Placement of a child will result in a total of 6 or more children in the home.

7. What are the alternate care plans for the permanent care of the child(ren)? Include more extensive details if the applicant(s) age and/or health status are assessed to be a concern. (See ADM 510 for requirements.)

8. If applicable, summarize the professional references (DHS-610) received for the adoptive family.

9. If applicable, summarize any Adult Child References (DHS-611) received for the adoptive family.

10. The following specific child(ren) are identified for adoption by the adoptive family:

11. The following training or support needs have been identified for the adoptive family:

Recommendation:

Adoption Worker Signature:	Date
Adoption Supervisor Signature:	Date

I have received a copy of the Adoptive Family Assessment Addendum.

Prospective Adoptive Parent Signature	Date	Prospective Adoptive Parent Signature	Date

EXHIBIT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,

Plaintiffs,

v

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

AFFIDAVIT OF STACIE BLADEN

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Stacie Bladen, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (Department) as a Deputy Director within the Children's Services Agency.

2. I have served the Department in this capacity for 5 years and make this affidavit based on my experience and knowledge of child welfare policies and programs.

3. My job duties include oversight of the development of child welfare policies, protocols, and programs, approval of contract development, implementation of applicable state and federal laws and approval of federally required child welfare program and funding plans.

4. The Department was not aware that St. Vincent may have violated the non-discrimination provision in its foster care and adoption contracts with the Department until the filing of the Dumont lawsuit, which alleged that St. Vincent discriminated against Kristy and Dana Dumont on the basis of their sexual preference and same-sex marital status.

5. The Dumont lawsuit contained allegations that St. Vincent, Bethany Christian Services Madison Heights and Bethany Christian Services East Lansing had violated the non-discrimination clause of their contracts by refusing to consider same-sex married couples for foster care or adoption. After the Dumont suit was filed, the Department initiated investigation of the allegations in the same manner it responds to other complaints and opened investigations of St. Vincent, Bethany Christian Services Madison Heights and Bethany Christian Services East Lansing.

6. I did not initiate these investigations based on the religious beliefs of St. Vincent, Bethany Christian Services Madison Heights and Bethany Christian Services East Lansing. I referred the September 2017 complaint allegations to the Division of Child Welfare Licensing (DCWL) for licensing and contractual investigation. Upon receipt of the complaints and determination that they met the

criteria for special investigation, the Department opened each of these investigations. This same process and response applies to any complaint received.

7. Earlier, the Department opened an investigation of Catholic Charities of West Michigan Investigation #2017C0208001. Subsequently, in March 2018, the department opened, Investigation # 2018C0223029. In the first case, the department established violations of rule based on the agency's refusal to complete a child's adoption in the placement that the agency determined met the child's best interest. In the second case, the agency failed to place siblings together because the siblings resided with a same sex couple.

8. The Dumont settlement did not announce a new policy. It reaffirmed the Department's practice of enforcing provisions of the contract, including the non-discrimination clause, which has been in place for several years. St. Vincent signed an amended adoption contract on September 8, 2015, which included the non-discrimination clause and the contract took effect on October 1, 2015. St. Vincent signed it's foster care contract on July 8, 2016; it took effect the same day. The Dumont settlement is consistent with the Department's investigation of Catholic Charities West Michigan back in 2017 and subsequent findings in response to the 2018 complaint. It is also consistent with the Department's investigations of St. Vincent, Bethany Christian Services of Madison Heights and Bethany Christian Services of East Lansing.

9. Due to the then-pending Dumont lawsuit, the Department did not finalize its investigations of St. Vincent, Bethany Christian Services Madison

Heights and Bethany Christian Services East Lansing. Since the Dumont case has ended, Bethany Christian Services has agreed that it will comply with its legal contract requirements, including the non-discrimination clause. Because of the present lawsuit, the Department has not been able to finalize its investigation of St. Vincent and has taken no adverse action against St. Vincent.

10. The Department does not seek to end its relationship with St. Vincent in so far as the agency is willing and able to fulfill the contractual obligations it has voluntarily agreed to, including following the non-discrimination clause, which has been included in St. Vincent's adoption contract since September 8, 2015 and its foster contracts since July 8, 2016.

11. In 2015, Steve Yager, former executive director of the Children's Services Agency, stated "...I would emphasize that we work with agencies based on a contract, not on their belief system, stated or otherwise. We do not compel agencies to accept referrals—never have; rather, we create through contracts a vast array of providers to meet the very diverse needs of the children and families we serve." Mr. Yager's statement pertained to an agency's decision to accept a referral to provide FC case management or adoption services to a child. In this context, when the Department uses the term "make a referral" this means the referral of a child's foster care or adoption case to the agency for the provision of foster care case management or adoption services. Mr. Yager's statement that we "create through contract a vast array of providers" pertains to agency's development of foster homes to meet diverse needs of youth.

12. The public/private partnership between the state and private CPAs is not the result of the state's inability to meet an acute need on its own. Rather, the number of appropriated FTEs would not allow for current caseload restrictions by the ISEP to be met with caseload populations across the state without private agency assistance. For example, the Department was only provided ten FTEs for Adoption.

13. It benefits the Department and Michigan's children who require temporary foster care or adoption services to have as many qualified foster and adoptive parents as possible that can meet the diverse needs of children. It also benefits the Department to work with CPAs that comply with statute, rule, and contract when performing responsibilities as a CPA.

14. The Department can revoke a CPA's license and can terminate its contract(s) with the state. However, it cannot force a non-profit organization to close. Prior to taking adverse action against an agency's license or contract, the Department must investigate complaints that it receives and determine whether a CPA has violated its contract with the Department or has violated a statute, administrative rule or Department policy.

15. The Department rarely encounters circumstances in which an agency would refer a prospective foster or adoptive parent to another child placing agency and there are no typical circumstances in which this occurs. Agencies are rarely inclined to turn away a prospective or adoptive parent because they need those homes in order to take cases and serve children and collect the administrative rate.

The Department does not allow CPAs to refuse to evaluate, license or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation or marital status.

16. CPAs may have a specialized focus, however, all have the same contractual and licensing requirements and all must comply with terms of the contract and license. CPAs performing such work under contract with the department are prohibited from refusing to serve, assess, recommend licensure, or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation or marital status.

17. CPAs cannot refuse to serve a prospective foster or adoptive parents by referring them to other CPAs based on race, religion, sexual orientation or marital status.

18. Plaintiffs list several institutions, some of which are not CPAs:

a. The Sault Tribe Binogii Placement Agency is a CPA and it has the same contract as any other CPA and is bound by same licensing rules, contract, and policies, including the non-discrimination provision.

b. Homes for Black Children is a CPA and it has the same contract as any other CPA and is bound by same licensing rules, contract, and policies, including the non-discrimination provision.

c. Wayne Center is a CPA and it has the same contract as any other CPA and is bound by same licensing rules, contract, and policies, including the non-discrimination provision.

d. Guiding Harbor is a CPA and it has the same contract as any other CPA and is bound by same licensing rules, contract, and policies, including the non-discrimination provision.

e. Boys to Men Group Home is a child caring institution, not a CPA.

f. Ruth Ellis Center is a child caring institution, not a CPA.

g. AdoptUsKids is not a CPA.

h. MARE is not a CPA.

19. Although an agency may focus on providing foster care case management or adoption services to children with certain needs, like those with disabilities, agencies do not exclusively serve those children, nor do they exclude prospective foster and adoptive parents based on race, religion, sexual orientation or marital status.

20. Plaintiffs incorrectly claim that the Department disregards the non-discrimination clause in its foster care and adoption contracts by "contract[ing] with private organizations that specialize in serving" certain children. Plaintiffs incorrectly assert that Homes for Black Children only serves African American children, that the Sault Ste. Marie Tribe of Chippewa Indians only serves Native American children, that Wayne Center only serves children with disabilities.

21. Regardless of any specialization to provide foster care case management or adoption services to children with certain needs, CPAs are required to follow the non-discrimination clause of their contract with the Department. When providing foster care case management and adoption services to any child, including a child with special needs, a CPA may not discriminate against prospective resource parents who identify as members of the LGBTQ community, same-sex couples, or unmarried cohabitating individuals. For instance, St. Vincent

could plausibly specialize in placing children whose parents identify as Catholic, but that specialization would not allow the agency to discriminate against prospective foster and adoptive parents who are members of other faiths. In another scenario, an agency could specialize in serving children from minority populations, but the agency could not discriminate against prospective foster and adoptive parents who are not within the minority population.

22. The non-discrimination clause in St. Vincent's foster care and adoption contracts prohibit discrimination.

23. The Private Agency Foster Care (PAFC) Contract, at § 2.9(b), states:

> "The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.
>
> The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency."

24. The Adoption Contract Section, at § 2.9(c), states:

> "The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.
>
> The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or

> relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency."

25. The Department enforces its non-discrimination clause uniformly. After accepting a referral to provide foster care case management or adoption services, CPAs cannot transfer the child's case to another agency. This is prohibited. And, the agency may not transfer the child's case to the department except in exceptional circumstances and with high level department approval. The Department does not consider or track the religious affiliation of CPAs – an agency's religious affiliation is immaterial to their contract responsibilities.

26. Although CPAs may decline to accept a referral to provide foster care case management or adoption services to a child, once they accept the referral and sign the 3600 Agreement, the CPA must fulfill all of the terms of its contract and cannot discriminate in the provision of services. This means that a CPA cannot refuse to evaluate, recommend for licensure or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation or opposite sex or marital status.

27. Plaintiffs' claim that the Department grants individualized exceptions to its policy with the following language: "upon the written approval of the County Director, the Children's Services Agency Director, or the Deputy Director." This out-of-context claim does not provide the full passage, which states:

28. The full passage quoted by Plaintiffs states:

> 1.1. Client Eligibility Criteria
>
> a. Eligible Clients
>
> Children for whom the family court has issued an order which makes the Michigan Department of Health and Human Services responsible for the child's placement, care and supervision.
>
> OR
>
> Children for whom the family court has authorized a placement in the parental home in a Trial Reunification living arrangement.
>
> The period of time eligible for a Trial Reunification shall not exceed 180 days from the date of the child(ren)'s placement in a parental home. Child(ren) must enter Trial Reunification directly from foster care and the family court must retain jurisdiction with care and custody continuing with MDHHS.
>
> b. Determination of Eligibility
>
> If MDHHS makes a referral to a child placing agency for foster care case management services pursuant to a contract with the child placing agency, the child placing agency must accept or decline the referral within one hour of receipt of the referral. If a need for placement is imminent, MDHHS may make referrals for placement concurrently to other contracted providers. Contractor may not transfer a foster care case to another child placing agency. After acceptance of a foster care referral, the Contractor may not refer the case back to the Department except for the reasons outlined in the Children's Foster Care Manual (FOM) or upon the written approval of the County Director, the Children's Services Agency Director, or the Deputy Director.

Emphasis added.

29. This exception does not allow CPAs to discriminate for any reason and does not permit an agency to assert a religious objection to continue serving a child, whose case it already accepted. Rather, this provision allows for unexpected

circumstances, whether it be a natural disaster that disallows an agency from providing services, a mass exodus of child placing agency staff, or some other rare and unforeseen circumstance. The language was inserted to enable the Department to assure that all children under its care and supervision receive services they are entitled to and must be provided without harm, delay, or interruption.

30. It is in a child's best interest to maintain stability in care and receive continuity of foster care case management and adoption services. Unnecessary interruption or change of case management responsibility impacts outcomes for the child and the child's family.

31. The quoted language does not enable an agency to return a child's case to the department so that it may discriminate or refuse to serve the child in accordance with applicable policies. Rather, the language assures that in rare unforeseen circumstances, such as a natural disaster or a mass exodus of staff, the Department has a mechanism to prevent harm to the children involved.

32. The Department and its staff are responsible for enforcing the Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 et seq., administrative rules, Department policy and its contracts. The Department's uniform enforcement of the provision of statute, rule, and contract preceded the election of the current AG and were in place after her election and assumption of office. Although Attorney General Nessel and the Michigan Department of Attorney General serve as the Department's legal counsel, they do not have decision-making

33. I have reviewed discovery responses obtained during the Dumont lawsuit and there is evidence that St. Vincent discriminated against Kristy and Dana Dumont on the basis of their sexual preference and same-sex marriage. (Pl. Resp. & Obj. to St. Vincent Interrogatories, No. 12.) St. Vincent appears to rely on PA 53, PA 54 and PA 55 in justifying its discrimination against same-sex couples.

Stacie Bladen

Subscribed and sworn to by Stacie Bladen before me on the 28th day of May, 2019.

Signature Katherine L McClain

Printed name Katherine L. McClain
Notary public, State of Michigan, County of Eaton
My commission expires 12/31/19
Acting in the County of: Ingham

Katherine L. McClain
Notary Public - Michigan
Eaton County
My Commission Expires Dec. 31, 2019
Acting in the County of Ingham

EXHIBIT E

2007 WL 2336383
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Omar HARHARA and Raweya Harhara, Plaintiffs,
v.
Hormidas NORVILLE and 127529 Ontario, Inc., Defendants.

No. 07-CV-12650.
|
Aug. 15, 2007.

Attorneys and Law Firms

David B. Timmis, Timothy J. Connaughton, Vandeveer Garzia, Troy, MI, for Plaintiffs.

Mark E. Shreve, Garan Lucow, Troy, MI, for Defendants.

OPINION AND ORDER DENYING DEFENDANTS' "MOTION TO CHANGE VENUE"

ROBERT H. CLELAND, United States District Judge.

***1** Pending before the court is a "Motion to Change Venue," filed by Defendants Hormidas Norville and 127529 Ontario, Inc. ("Ontario") on July 3, 2007. This motion has been fully briefed and the court concludes that a hearing is unnecessary. *See* E.D. Mich. LR 7.1(e)(2). For the reasons stated below, the court will deny Defendants' motion.

I. BACKGROUND

On March 29, 2007, Plaintiffs Omar Harhara ("Plaintiff")[1] and Raweya Harhara filed suit against Defendants in Wayne County Circuit Court alleging negligence/gross negligence on the part of Norville (Count I), ownership liability/respondeat superior/negligent hiring by Ontario (Count II) and a consortium claim by Raweya Harhara (Count III). (Pls.' Compl. at 3-7.) Plaintiffs' claims arise from an August 23, 2006, motor vehicle accident in Calhoun County wherein a tractor-trailer driven by Norville collided with Plaintiff's vehicle after Plaintiff pulled onto I-94 from the shoulder. (Pls.' Compl. at 2-3.) The tractor-trailer driven by Norville was owned by Norville's employer Ontario. (*Id.* at 2.)

On June 21, 2007, Defendants removed the action to this court on the basis of diversity jurisdiction in accordance with 28 U.S.C. § 1446(b). (Notice of Removal at 1-3.) Plaintiffs are, and have been at all relevant times, citizens of Wayne County, Michigan. (Pls.' Compl. at 2.) Defendant Norville is and was at all relevant times a citizen of Ontario, Canada. (Notice of Removal at 3.) Defendant Ontario is a Canadian trucking company, with its principal place of business in Oakville, Canada. (Defs.' Mot. at 3.)

On July 3, 2007, Defendants filed their "Motion to Change Venue." Defendants asserted that most of the unbiased witnesses to the accident and sources of proof are in Calhoun County, in the Western District of Michigan. (*Id.* at 4-12.) Defendants further argue that venue was improper in Wayne County and that fact should serve to bolster the appropriateness of a transfer. (*Id.* at 8-12.)

II. STANDARD

Because this case was removed from a Michigan state court, the court looks to 28 U.S.C. § 1441 for the rule governing proper venue. "Venue in removed cases is governed solely by § 1441(a)." *Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531, 534 (6th Cir.2002) (citing *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665, 73 S.Ct. 900, 97 L.Ed. 1331 (1953)). Under § 1441(a), the only proper federal venue is the "district and division embracing the place where [the state court] action is pending." *Id.*; 28 U.S.C. § 1441(a).

Transfer of venue is governed by 28 U.S.C. § 1404(a), which provides 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." This provision is

"intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' " *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 622, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)). "A district court 'has broad discretion to grant or deny a motion to transfer [a] case.' " *Phelps v. McClellan*, 30 F.3d 658, 663 (6th Cir.1994) (citing *Cote v. Wadel*, 796 F.2d 981, 985 (7th Cir.1986)). The party seeking transfer of venue typically has the burden to establish that the new forum is more convenient. *Viron Inter. Corp. v. David Boland Inc.*, 237 F.Supp.2d 812, 815 (W.D.Mich.2002). Furthermore, "[m]erely shifting the burden [of inconvenience] from one party to another is impermissible." *Grand Kensington, LLC v. Burger King Corp.*, 81 F.Supp.2d 834, 837 (E.D.Mich.2000). Unless the balance is strongly in favor of the defendant, venue should not be disturbed. *Raymond E. Danto, Assocs., Inc. v. Arthur D. Little, Inc.*, 316 F.Supp. 1350, 1357 (W.D.Mich.1970) (citing *Nicol v. Koscinski*, 188 F.2d 537 (6th Cir.1951)).

III. DISCUSSION

A. Propriety of Venue in Wayne County

***2** Defendants argue that Wayne County was an improper venue in which to file suit. (Defs.' Mot. at 8-12.) As an initial matter, the court will discuss the propriety of venue in Wayne County Circuit Court. Mich. Comp. Laws § 600.1629 is the venue statute applicable in tort actions and provides:

> (1) [I]n an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:
>
> (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (i) The defendant resides, has a place of business, or conducts business in that county.
>
> (ii) The corporate registered office of a defendant is located in that county.
>
> (b) If a county does not satisfy the criteria under subdivision (a), the county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (i) The plaintiff resides, has a place of business, or conducts business in that county.
>
> (ii) The corporate registered office of a plaintiff is located in that county.
>
> (c) If a county does not satisfy the criteria under subdivision (a) or (b), a county in which both of the following apply is a county in which to file and try the action:
>
> (i) The plaintiff resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.
>
> (ii) The defendant resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.
>
> (d) If a county does not satisfy the criteria under subdivision (a), (b), or (c), a county that satisfies the criteria under section 1621 or 1627 is a county in which to file and try an action.

The court's analysis begins under subsection (1)(a), which provides that venue is proper in the county where the original injury occurred, provided that "the" defendant resides, has a place of business, or conducts business in that county or "a" defendant has its corporate registered office in that county. The original injury occurred in Calhoun County, and Ontario conducts business in that county.[2] Thus, Ontario would satisfy subsection (1)(a)(i) if it were the sole defendant in this case. However, the Michigan Supreme Court has explained that, in the context of the venue statute, the legislature intended a different meaning between the terms "the defendant" and "a defendant." *Massey v. Mandell*, 462 Mich. 375, 614 N.W.2d 70, 73 (Mich.2000). "The defendant" applies in cases in which there is only one defendant; "a defendant" applies in cases where there are more than one defendant. *Id.; see* also *Shiroka v. Farm Bureau General Ins. Co.*, --- N.W.2d ----, 2007 WL 1765005 (Mich.Ct.App. June 19, 2007). Thus, because this case has two defendants, subsection (1)(a)(i) cannot establish venue.

***3** Because the criteria of subsections (a), (b) or (c) are likewise not fulfilled, none of those subsections provide venue in Wayne County. Subsection (d) provides that "[i]f a county does not satisfy the criteria under subdivision (a), (b), or (c), a county that satisfies the

criteria under section 1621 or 1627 is a county in which to file and try an action." Mich. Comp. Laws § 600.1629(1)(d).

Section 600.1621 provides that "[t]he county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action." Because Ontario conducts business in Calhoun County, venue is proper in Calhoun County.

However, this determination does not end the inquiry concerning whether venue was proper in Wayne County because, under the broad language of the venue statutes, "it is quite possible for venue to exist in more than one forum." *Audi AG & Volkswagen of Amer., Inc. v. Izumi*, 204 F.Supp.2d 1014, 1022 (E.D.Mich.2002). In the event that Ontario conducts business in Wayne County, venue would have been proper in Wayne County pursuant to § 600.1621(a).[3] It is not clear whether Ontario also conducts business in Wayne County. Apparently, this prospect was not considered by either party because, according to the venue provisions that each party erroneously asserted was applicable, such a determination was not necessary.

Significantly, even assuming that Ontario does not conduct business in Wayne County, thus rendering venue in Calhoun County proper and in Wayne County improper, this fact alone would not necessitate a finding that venue is not proper in the Eastern District of Michigan. As noted above, "[v]enue in removed cases is governed solely by § 1441(a)," the removal statute. *Kerobo*, 285 F.3d 534 (where an action is removed in accordance with § 1441(a), a district court may not dismiss the action for improper venue). Section 1441(a) provides that the proper venue of a removed action is "the district court of the United States for the district and division embracing the place where such action is pending." Here, the action was removed to the district court in the Eastern District of Michigan from a state court within the area embraced by the Eastern District of Michigan. Hence, the action was removed in accordance with section 1441(a) and venue is proper in the Eastern District. *See Polizzi*, 345 U.S. 665-66.

To further reinforce that point, 28 U.S.C. § 1441(f) provides that "[t]he court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." Where, as here, a defendant removes a case in accordance with section 1441(a), then seeks a transfer of venue, the proper vehicle by which to do so is to seek a discretionary transfer based upon section 1404(a).[4] *Kerobo*, 285 F.3d at 535-36.

B. Discretionary Transfer of Venue under Section 1404(a)

***4** To transfer an action under section 1404(a), the following three requirements must be met: "(1) the action could have been brought in the transferee district court; (2) a transfer serves the interest of justice; and (3) a transfer is in the convenience of the witnesses and parties." *Kepler v. ITT Sheraton Corp.*, 860 F.Supp. 393, 398 (E.D.Mich.1994). Factors to consider in determining whether to transfer venue include:

> (1) the convenience of witnesses;
>
> (2) the location of relevant documents and relative ease of access to sources of proof;
>
> (3) the convenience of the parties;
>
> (4) the locus of the operative facts;
>
> (5) the availability of process to compel the attendance of unwilling witnesses;
>
> (6) the relative means of the parties;
>
> (7) the forum's familiarity with the governing law;
>
> (8) the weight accorded the plaintiff's choice of forum; and
>
> (9) trial efficiency and the interests of justice, based on the totality of the circumstances.

Overland, Inc. v. Taylor, 79 F.Supp.2d 809, 811 (E.D.Mich.2000).

First, this action could have been brought in the U.S. District Court for the Western District of Michigan. *See* 28 U.S.C. § 1391(a); Mich. Comp. Laws § 600.1621. With respect to the interest of justice and the convenience of witnesses, Defendants assert that the unbiased witnesses to the accident and most of the sources of proof are in the Western District. (Defs.' Mot. at 4-8.) Among the main contested issues in this case are the negligence of the parties involved in the accident and the extent of Plaintiff's injuries. Defendants maintain that the most important witnesses to this case, "the police, MDOT, medical, towing and independent accident witnesses"

work or reside in Calhoun County.[5] The court is not convinced of the accuracy of this assertion. First, it is not at all clear that the witnesses listed by Defendants are the "most important" witnesses to this case. Second, the number of witnesses and parties for whom the Eastern District is more convenient tips the convenience scale in favor of Plaintiffs. As Plaintiffs point out in their response motion, it is significantly more convenient, distance-wise, for the following witnesses and parties if venue was in the Eastern District: Plaintiffs, Gamal Ervin (a passenger in Plaintiff's vehicle at the time of the accident), Plaintiff's treating physicians, Plaintiff's family members, who could potentially testify concerning Plaintiff's injuries, Defendants and defense counsel. (Pls.' Resp. at 3-4.) Plaintiff's treating physicians, who are located in the metro-Detroit area, are particularly critical witnesses on the issue of Plaintiff's injuries. (*Id.*) Although Plaintiff was briefly treated at a hospital in Calhoun County after the accident, the remainder of his treatment, as provided by multiple doctors and medical facilities, took place in the metro-Detroit area. As compared to the necessity for securing key witnesses such as Plaintiffs, Defendant Norville, Ervin and Plaintiff's treating physicians, the necessity for witnesses like MDOT and the towing company is less strong.[6]

***5** Moreover, although the situs of the injury is in Calhoun County, Defendants have not established that the Western District contains relevant documents or sources of proof that would be unduly burdensome for Defendants to obtain if this action proceeded in the Eastern District. At the very least, Defendants cannot demonstrate that it would be more difficult for them to obtain necessary evidence if trial proceeded in the Eastern District than it would be for Plaintiffs to obtain necessary evidence if trial proceeded in the Western District. As noted above, the burden is on the moving party to establish that the new forum is more convenient, and a transfer merely shifting the burden of inconvenience from one party to another is impermissible. *Viron Inter. Corp.,* 237 F.Supp.2d at 815; *Grand Kensington, LLC,* 81 F.Supp.2d at 837. With respect to the additional considerations of public policy, the forum's familiarity with governing law, or the means of the parties, the court does not find that one district is favored over another.

The court is mindful of the factors favoring venue in the Western District, namely, the situs of the injury is in the Western District and the Western District is more convenient for certain witnesses, including the police officer on the scene and the medical personnel who treated Plaintiff immediately after the accident. Nevertheless, Plaintiffs present equally, if not more, compelling reasons to leave venue undisturbed. The decision to transfer is within the discretion of the district court and the court is not persuaded that the relevant considerations are tipped so in favor of the Western District that a transfer of venue is warranted.

IV. CONCLUSION

For the reasons stated above, IT IS ORDERED that Defendants' "Motion to Change Venue" is DENIED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2336383

Footnotes

1 All references to "Plaintiff" refer to Omar Harhara, while references to "Plaintiffs" refer to Omar and Raweya collectively.

2 Defendants have asserted that Ontario conducts business in Calhoun County via its regular transportation of loads through and into Battle Creek, Michigan. (Defs.' Mot. at 3.) Plaintiffs present no evidence to dispute this. A company conducts business in a county for venue purposes if the company has some real presence such as might be shown by systematic or continuous business dealings inside that county. *Schultz v. Silver Lake Transport,* 207 Mich.App. 267, 523 N.W.2d 895, 897 (Mich.Ct.App.1994). A trucking company conducts business in a county if, in addition to regularly driving through the county, it makes stops in the county because it has customers there. *Id.* Because Ontario regularly transports loads not only through Battle Creek, but stops to make deliveries *in* Battle Creek, it conducts business for venue purposes in Calhoun County.

3 Section 600.1627 does not confer venue in Wayne County as it requires venue to be in "the county in which all or a part of the cause of action arose."

4 Defendants concede as much in their motion when they cite to multiple cases standing for the proposition that removal in accordance with section 1441(a) precludes a challenge to venue as improper, but allows a defendant to attack venue as

inconvenient. (Defs.' Mot. at 9-10.) Defendants do just that. Although they do argue that venue was improper in Wayne County, the core of their argument is that the court should exercise its discretion to transfer venue to a more convenient forum. (*See generally* Defs.' Mot.)

5 Apparently an MDOT employee was called to the scene of the accident to remove a damaged control device, and a towing company was called to tow Plaintiff's vehicle. (Defs.' Mot. at 2.)

6 Defendants argue that because there are unbiased witnesses living within the Western District who are outside of this court's subpoena power pursuant to Federal Rule of Civil Procedure 45, Plaintiff's paid experts are more likely to appear at trial than Defendants' witnesses. (Defs.' Mot. at 8.) First, there is no evidence to suggest that the witnesses living within the Western District will be unwilling to travel to the Eastern District to testify. Second, Defendants acknowledge in their motion that the said witnesses may be compelled to attend court via Federal Rule of Civil Procedure 45(c)(3)(B)(iii). (*Id.*) In any event, although Defendants' difficulty in securing witnesses at trial is a factor to consider in the venue transfer analysis, it is not by itself a sufficient basis to transfer venue.

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EXHIBIT F

2007 WL 2963378
Only the Westlaw citation is currently available.
United States District Court,
W.D. Michigan,
Southern Division.

CONTINENTAL IDENTIFICATION PRODUCTS, INC., a Michigan corporation and Spartan Graphics, Inc., a Michigan corporation, Plaintiffs,
v.
ENTERMARKET, CORP., a New York corporation, and Goodren Products Services Corporation, a New Jersey corporation, Defendants.

No. 1:07-CV-402.
|
Oct. 9, 2007.

Attorneys and Law Firms

Yvette Kquiana Bradley, Kevin G. Dougherty, Warner Norcross & Judd LLP, Grand Rapids, MI, for Plaintiffs.

Joshua Matthew Wallish, Varnum Riddering Schmidt & Howlett LLP, Grand Rapids, MI, for Defendants.

OPINION

ROBERT HOLMES BELL, Chief United States District Judge.

***1** This matter comes before the Court on a motion to dismiss or to transfer venue filed by Defendants EnterMarket Corp. ("EnterMarket") and Goodren Products Services Corporation ("Goodren"). For the reasons that follow the motion will be denied in part and held in abeyance as to two issues pending further briefing.

I.

Plaintiffs Continental Identification Products Inc. ("Continental") and Spartan Graphics Inc. ("Spartan") filed this breach of contract action in the Kent County Circuit Court against Defendants EnterMarket and Goodren. Defendants removed the action to federal court on the basis of diversity of citizenship and then filed a motion to dismiss or to transfer venue. Plaintiffs oppose the motion, relying in part on their amended complaint filed on the same date as their response to the motion. In reply, Defendants contend that Plaintiffs are precluded from amending their complaint, or, in the alternative, that the complaint, even as amended, is still subject to dismissal for failure to state a claim, for lack of personal jurisdiction, and for improper venue, or, in the alternative, that it should be transferred to the Southern District of New York.

A. Amended Complaint

Plaintiffs' original complaint for breach of contract and account stated sought damages in the amount of $351,210.72, based upon an agreement dated November 16, 2000, that was in full force and effect in 2005. (Docket # 1, Compl. ¶¶ 14, 15, 19, 23, 28.) Attached to Plaintiffs' original complaint is an affidavit from Judy O'Rourke, Plaintiffs' Controller, stating that the total outstanding balance on the account is $351,210.72. (O'Rourke Aff. ¶ 4.) Plaintiffs' amended complaint for breach of contract and promissory estoppel seeks damages in the amount of $134,695.72, based upon an August 2003 agreement that superseded the November 16, 2000, agreement. (Docket # 9, Am. Compl. ¶¶ 21, 24, 29, 30.)

Plaintiffs' first amended complaint supersedes their original complaint. *Parry v. Mohawk Motors of Mich. Inc.*, 236 F.3d 299, 306-07 (6th Cir.2000). Defendants do not suggest that a plaintiff should generally be precluded from introducing a new or even a contradictory legal theory of recovery in an amended complaint. However, Defendants contend that the amended complaint in this case contains allegations that are "fundamentally inconsistent" with statements previously made under oath in judicial pleadings, and that Plaintiffs are precluded from amending their complaint in a manner that would contradict those prior judicial admissions. In support of this argument Defendants rely on *Crump v. Darling*, No. 1:06-CV-20, 2007 WL 851750 (W.D.Mich. Mar.21, 2007) (Bell, C.J.). In *Crump* this Court held that where the plaintiff had previously filed a verified complaint setting forth facts showing that he had not exhausted his

administrative remedies, he could not thereafter introduce evidence contrary to those judicial admissions in order to survive a Rule 12(b)(6) motion in a second case. *Id.* at *4 n. 4 (citing *Murrey v. United States,* 73 F.3d 1448, 1455 (7th Cir.1996) (holding that judicial admissions of liability are normally conclusive)).

***2** Plaintiffs' assertion that the November 2000 Agreement was still in force in 2005 is found in Plaintiffs' original complaint. The complaint was not verified and this statement does not appear in O'Rourke's affidavit. Accordingly, it is not a judicial admission. O'Rourke's affidavit alleges that Plaintiffs sold their products to Goodren on an open account and that the total outstanding balance on the account is $351,210.72. (O'Rourke Aff. ¶¶ 2, 4.) Assuming O'Rourke's statements are judicial admissions, the Court nevertheless disagrees with Defendants' assertion that the statements are fundamentally inconsistent with the allegations in Plaintiffs' amended complaint. Plaintiffs' amended complaint still alleges that Goodren purchased Plaintiffs' product on open account and that the parties entered into an agreement in November 2000. (Am.Compl.¶¶ 14, 16.) However, in their amended complaint Plaintiffs no longer seek damages under the November 2000 Agreement. Instead, they seek a smaller amount of damages under the August 2003 Agreement that allegedly superseded the November 2000 Agreement. O'Rourke's factual assertion as to the amount owed under the November 2000 Agreement is not fundamentally inconsistent with Plaintiffs' new theory of recovery for a different amount under a different agreement. Accordingly, the Court rejects Defendants' assertion that Plaintiffs are precluded from amending their complaint on the basis that it is inconsistent with Plaintiffs' previous judicial admissions.

B. Improper Venue

Defendants move to dismiss the complaint pursuant to 12(b)(3) on the basis that venue in this court is improper under 28 U.S.C. § 1391(a).

"Venue in removed cases is governed solely by § 1441(a)." *Kerobo v. Southwestern Clean Fuels, Corp.,* 285 F.3d 531, 534 (6th Cir.2002). Section 1441(a) provides that defendants may remove a civil action brought in a state court of which the federal district courts have original jurisdiction, "to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). This action was removed to the United States District Court for the Western District of Michigan from the Kent County Circuit Court, a state court within the area embraced by the Western District. This district is the only venue permitted by § 1441(a). *See Kerobo,* 285 F.3d at 534 ("Here, the action was removed to the district court in the Eastern District of Michigan from state court within the area embraced by the Eastern District of Michigan. Hence, the action was removed to the only venue permitted by § 1441(a)."). Venue in this Court is proper, and Defendants' motion to dismiss for improper venue will accordingly be denied.

C. Transfer

Even if venue is proper, Defendants have moved in the alternative for the transfer of this case to the Southern District of New York pursuant to the Court's authority under 28 U.S.C. § 1404. Section 1404(a) permits a court to transfer a civil action to another district where it might have been brought if the transfer would serve the interests of justice and convenience to the parties and witnesses. 28 U.S.C. § 1404(a).

***3** Plaintiffs contend that a transfer of venue is not appropriate because if Defendants are correct in their contention that Goodren is a New Jersey corporation, then all of the Defendants do not reside in the same state and this case could not have been brought in New York.

In a diversity action, venue is proper: 1) in a judicial district where any defendant resides, if all defendants reside in the same state; 2) the judicial district in which a substantial part of the events or omissions giving rise to the claim occurred; or, if there is no district in which the action may otherwise be brought, a judicial district in which any defendant is subject to personal jurisdiction. 28 U.S.C. § 1391(a). For purposes of venue, a defendant that is a corporation is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. 28 U.S.C. § 1391(c).

Defendants contend, without supporting evidence, that Goodren is subject to personal jurisdiction in the Southern District of New York. Defendants accordingly assert that Goodren is deemed to reside in the Southern District of New York and that venue is proper there.

For purposes of this motion the Court will assume that this case could have been brought in the Southern District of New York. The Court nevertheless declines to transfer the case there. In ruling on a motion to transfer under § 1404(a), the Court considers "the private interests of the parties, including their convenience and the convenience

of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.' " *Moore v. Rohm & Haas Co.*, 446 F.3d 643, 647 n. 1 (6th Cir.2006) (quoting *Moses v. Business Card Exp., Inc.*, 929 F.2d 1131, 1137 (6th Cir .1991)). *See also Steelcase, Inc. v. Smart Technologies, Inc.*, 336 F.Supp.2d 714, 719-20 (W.D.Mich.2004) (Quist, J.) (providing a non-exhaustive list of private and public interest concerns). The burden is on the moving party to establish that a change of venue is appropriate. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879-80 (3rd Cir.1995); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1515 (10th Cir.1991). "There is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).

Defendants contend that the following four factors weigh in favor of transfer to the Southern District of New York: 1) enforceability of any judgment, 2) the public's interest in having local controversies adjudicated locally, 3) familiarity of the trial judge with applicable state law, and 4) the docket congestion of this Court.

The Court is not convinced that these factors warrant a transfer. Defendants' argument in favor of transfer is largely premised on its assertion that the primary issue in this case is whether EnterMarket and Goodren have merged, a matter that would likely be governed by New York law and over which the courts of New York would have a stronger local interest. Merger is not, however, the only issue nor the primary issue raised by Plaintiffs' complaint. The liability of Goodren under a 2003 Agreement with Plaintiffs, who are both Michigan corporations, is at issue, as well as Plaintiffs' claims that EnterMarket is liable to them based upon ratification and detrimental reliance. In contrast to the issue of merger, these issues are matters of local interest and impact the Michigan public's interest in having local controversies adjudicated locally. Although this Court's docket congestion was an issue when Defendants filed their brief, that congestion has fortunately been relieved by the confirmation of three district court judges. On balance, the Court concludes that the factors cited by Defendants in favor of transfer are not sufficient to overcome the presumption in favor of Plaintiffs' choice of forum. Accordingly, Defendants' motion to transfer venue will be denied.

D. Personal Jurisdiction

***4** Defendants have moved to dismiss the claims against EnterMarket for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b) (2).

A district court's exercise of personal jurisdiction in a diversity of citizenship case must be (1) authorized by the law of the state in which it sits, and (2) in accordance with the Due Process Clause of the Fourteenth Amendment. *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 888 (6th Cir.2002). "[I]n the face of a properly supported motion for dismissal, the 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 plaintiff has the burden of establishing the court's personal jurisdiction over the defendant. *Neogen*, 282 F.3d at 887. If the court does not conduct an evidentiary hearing on the issue of personal jurisdiction, the plaintiff need only make a *prima facie* showing of jurisdiction. *Id.* The plaintiff can meet this burden by establishing with reasonable particularity sufficient contacts between the defendant and the state to support jurisdiction. *Id.* Under this standard of review the court construes the facts in the light most favorable to the plaintiff and does not consider facts proffered by the defendant that conflict with those offered by the plaintiff. *Id.*

The Michigan long-arm statute extends limited personal jurisdiction over a nonresident corporation in claims "arising out of the act or acts which create any of the following relationships," including "the transaction of any business within the state." M.C.L. § 600.715(1). The use of the word "any" to define the amount of business that must be transacted "establishes that even the slightest transaction is sufficient to bring a corporation within Michigan's long-arm jurisdiction." *Electrolines, Inc. v. Prudential Assur. Co.*, 260 Mich.App. 144, 168, 677 N.W.2d 874 (2003). The due process analysis requires the court to consider whether the defendant has sufficient "minimum contacts" with Michigan so that the exercise of jurisdiction over it would not offend "traditional notions of fair play and substantial justice." *Int'l Shoe v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The court also considers whether the defendant's contacts with the forum state "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (emphasis in original), and whether the defendant's conduct and connection with the forum are such that he " 'should reasonably anticipate being haled into court there.' " *Id.* at 474 (quoting *World-Wide*

Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)).

In their amended complaint Plaintiffs have alleged that EnterMarket regularly conducts business in Michigan, that EnterMarket is the successor by merger to Goodren, and that EnterMarket commenced doing business with Plaintiffs in 2005. (Am.Compl.¶¶ 6, 27.)

***5** In support of their contention that the Court cannot exercise personal jurisdiction over EnterMarket Defendants have submitted the affidavits of Jeff Kahn and Andrew Serby as well as state corporate database records indicating that EnterMarket and Goodren have not merged. (Def.Ex. A-D.) Defendants also contend that personal jurisdiction cannot be premised on Serby's visits to Michigan because the visits occurred after the conduct giving rise to Plaintiffs' claims and were made in order to try to resolve the dispute.

In response to Defendants' motion Plaintiffs have submitted the affidavit of David Clay, Plaintiffs' Operations Manager. According to Mr. Clay, in early 2005 EnterMarket's owner, Andrew Serby, visited Plaintiffs in Michigan to discuss how EnterMarket would do business with Plaintiffs and how EnterMarket would satisfy Goodren's debt. (Clay Aff. ¶ 5.) Based upon Serby's representations regarding its anticipated merger with Goodren and the sales it would generate for Plaintiffs, Plaintiffs began to conduct business with EnterMarket. (Clay Aff. ¶¶ 6-9.) Plaintiffs have also submitted a February 27, 2006, confidentiality agreement between Defendant EnterMarket and Plaintiff Continental, (Pl.Ex. D), emails between Plaintiffs and EnterMarket regarding EnterMarket's payments on the Goodren debt, (Pl.Ex. E), Plaintiffs' accounts receivables report regarding EnterMarket/Goodren from March 17, 2005, through September 19, 2006, (Pl.Ex. F), and a copy of several pages from EnterMarket's website referencing its merger with Goodren. (Pl.Ex. G.)

Because the Court is relying solely on the parties' written submissions, the facts must be construed in the light most favorable to the plaintiff and facts proffered by Defendants that conflict with those offered by Plaintiffs cannot be considered. *Neogen*, 282 F.3d 888. The evidence submitted by Plaintiffs, when viewed under this evidentiary framework, is sufficient to make a prima facie showing that EnterMarket purposefully availed itself of the privilege of conducting business in Michigan and that this action arises out of EnterMarket's transaction of business within this state. Plaintiff has made a prima facie showing that the exercise of jurisdiction over EnterMarket is authorized under the Michigan long-arm statute and is consistent with due process. Defendants' motion to dismiss EnterMarket for lack of personal jurisdiction will accordingly be denied.

E. Failure to State a Claim

Defendants have also moved to dismiss the claims against EnterMarket for failure to state a claim on which relief can be granted.[1] Fed.R.Civ.P. 12(b)(6). Defendants have raised three arguments in support of this motion. Defendants' first contention is that Plaintiffs cannot base their breach of contract claim against EnterMarket on an allegation that EnterMarket and Goodren have merged because the evidence they have submitted with their motion conclusively establishes that there was no merger.

***6** A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. In evaluating a Rule 12(b)(6) motion to dismiss "all well-pleaded allegations in the complaint are treated as true." *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 562 (6th Cir.2003). When matters outside the pleadings are presented in support of a Rule 12(b)(6) motion, the Court may convert the motion to a motion for summary judgment under Rule 56. Fed.R.Civ.P. 12(b). If the court intends to consider materials outside the pleadings, the plaintiff must be provided with notice and a reasonable opportunity to respond in order to prevent the risk of prejudicial surprise. *Id. See also Helwig v. Vencor, Inc.*, 251 F.3d 540, 552 (6th Cir.2001) ("Rule 12 authorizes such a conversion but mandates that parties be given an opportunity to submit materials to support or oppose summary judgment. We have underscored this requirement of 'unequivocal notice' on numerous occasions."); *Harrington v. Painter*, No. 03-5675, 2003 WL 23156645 (6th Cir. Dec.18, 2003) (reversing dismissal where court gave no notice of its intention to treat a Rule 12(b)(6) motion as Rule 56 motion); *Armengau v. Cline*, 7 F. Appx. 336, 343-44 (6th Cir.2001) (same). Defendants did not file a motion for summary judgment under Rule 56, nor did they request that their Rule 12(b) (6) motion be converted to a motion under Rule 56. The Court declines to convert this motion to a motion under Rule 56 and the Court will not consider the evidence submitted by Defendants for purposes of their Rule 12(b)(6) motion.

Defendants contend that the Supreme Court's recent opinion in *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), set forth a new, more rigorous pleading standard, requiring a complaint to allege facts showing that the plaintiff's entitlement to relief is plausible, rather than merely possible. *Id.* at

1964-65.

Bell Atlantic focused on pleading requirements rather than evidentiary requirements: "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965. *Bell Atlantic* did not suggest that an inquiry into the truth of the factual allegations would be appropriate under Rule 12(b)(6). On the contrary, the Supreme Court specifically noted that "Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations," and that "a well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely.' " *Id.* (quoting *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

For purposes of Defendants' Rule 12(b)(6) motion the Court will accept as true Plaintiffs' allegation that EnterMarket and Goodren have merged. Of course, the denial of Defendants' motion to dismiss for failure to state a claim on this ground would not preclude a later summary judgment motion arguing that the plaintiff in fact cannot show evidence to support the claim. *Stemler v. Florence*, 350 F.3d 578, 590 (6th Cir.2003).

***7** Defendants have raised two additional arguments in support of their motion to dismiss for failure to state a claim. They contend that Plaintiffs' claim that EnterMarket is liable for breach of contract based upon its president's promise to pay Goodren's debt is barred by the statute of frauds. *See* M.C.L. § 566.132; *Shurlow Tile & Carpet Co. v. Farhat*, 60 Mich.App. 486, 231 N.W.2d 384 (1975). They also contend that Plaintiffs' promissory estoppel claim against EnterMarket fails because Plaintiffs have not adequately alleged that they made any detrimental change in their position in reliance on EnterMarket's statement that it would be responsible for Goodren's debt. *See Charter Twp. of Ypsilanti v. Gen. 'l Motors Corp.*, 201 Mich.App. 128, 133, 506 N.W.2d 556 (1993).

Plaintiffs' claims based upon an oral promise and promissory estoppel were raised for the first time in their amended complaint, which was not filed until after Defendants filed their motion to dismiss. Accordingly, Defendants' contention that Plaintiffs have failed to state a claim upon which relief can be granted under these theories was, by necessity, raised for the first time in Defendants' reply brief. The local court rules do not anticipate additional briefing without leave of court, W.D. Mich. LCivR 7.2(c), and the Court is reluctant to consider arguments that have not been fully briefed. Accordingly, the Court will permit Plaintiffs 10 days from the date of this opinion to file a response to Defendants' Rule 12(b)(6) motion to dismiss Plaintiffs' claims against EnterMarket that are based upon an oral promise and promissory estoppel.

II.

For the reasons stated above, Defendants' motion to dismiss will be denied as to all issues, with the exception that Defendants' Rule 12(b)(6) motion to dismiss Plaintiffs' claims against EnterMarket based upon an oral promise and promissory estoppel will be held in abeyance pending a response from Plaintiffs.

An order consistent with this opinion will be entered.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2963378

Footnotes

1 Defendants original motion alleged that Plaintiffs' complaint failed to state a claim against either Defendant based upon the terms of the November 2000 Agreement and the applicable statute of limitations. Those issues have been mooted by Plaintiffs' amended complaint.

End of Document

EXHIBIT G

2011 WL 691242
Only the Westlaw citation is currently available.
United States District Court,
W.D. Michigan,
Southern Division.

Thomas RINKS, Plaintiff,
v.
Brent HOCKING, Defendant.

No. 1:10–cv–1102.
|
Feb. 16, 2011.

Attorneys and Law Firms

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MEMORANDUM OPINION

JOSEPH G. SCOVILLE, United States Magistrate Judge.

***1** This is a breach of contract action falling within this court's diversity jurisdiction. 28 U.S.C. § 1332(a). Plaintiff's complaint, originally filed in the Kent County Circuit Court, seeks judgment in the approximate amount of $490,000.00, arising from defendant's alleged breach of a partnership agreement and failure to pay on a related promissory note. In brief summary, plaintiff and defendant entered into a partnership for the purpose of owing and holding a parcel of real estate in Baja California, Mexico. Plaintiff invested $400,000.00 in the property and later loaned defendant $400,000.00 under a promissory note. (Compl. and Ans. ¶¶ 5–8). Plaintiff alleges that defendant defaulted in payments on the promissory note and unilaterally sold the property in Mexico, paying plaintiff nothing, in violation of plaintiff's rights under the partnership agreement. By notice of removal filed November 8, 2010, defendant removed the action to this court under 28 U.S.C. § 1441(a), alleging complete diversity of citizenship and requisite amount in controversy. It is undisputed that plaintiff is a citizen of the State of Michigan and that defendant is a citizen of the State of California. (Notice of Removal, ¶ 3).

Presently pending before the court is defendant's motion for transfer of this action to the United States District Court for the Central District of California, filed under 28 U.S.C. § 1404(a). Defendant asserts that the transfer is justified by the convenience of the parties and witnesses and would be in the interest of justice. Attached to defendant's supporting brief are copies of both the partnership agreement and the promissory note that form the basis for this litigation. Relevant to the motion for transfer, the promissory note provides that the note will be governed by and interpreted according to the laws of the State of Michigan and that defendant "irrevocably agrees and consents that any action against [defendant] for collection or enforcement of this Note may be brought in any state or federal court that has subject matter jurisdiction and is located in, or whose district includes, Kent County, Michigan, and that any such court shall have personal jurisdiction over [defendant] for purposes of the action." (Promissory Note ¶ 13, ID# s 157–58). Chief Judge Paul Maloney has referred the motion for transfer to me for decision pursuant to 28 U .S.C. § 636(b)(1)(A). The matter has now been fully briefed by the parties. For the reasons set forth below, I conclude that the motion for transfer lacks merit and must be denied.

Discussion

Defendant's motion is governed by 28 U.S.C. § 1404(a), which provides as follows:

> For 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). The decision whether to transfer a

civil action under section 1404(a) falls within the district court's discretion. *See Reese v. CNH Am., LLC,* 574 F.3d 315, 320 (6th Cir.2009); *Phelps v. McClellan,* 30 F.3d 658, 663 (6th Cir.1994). The court must afford some deference to the plaintiff's choice of forum, which is not to be disturbed "unless the balance is strongly in favor of the defendant." *Stewart v. Dow Chem. Co.,* 865 F.2d 103, 106 (6th Cir.1989) (citing *Gulf Oil Co. v. Gilbert,* 330 U.S. 501, 508–09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). The moving party bears the burden of showing, by a preponderance of the evidence, that a change of venue is warranted. *Amphion, Inc. v. Buckeye Elec. Co.,* 285 F.Supp.2d 943, 946 (E.D.Mich.2003).

***2** I note at the outset that defendant has not and cannot challenge the propriety of venue in this court. Plaintiff filed this action in Kent County Circuit Court, and defendant chose to remove it to federal court pursuant to 28 U.S.C. § 1441(a). Under that statute, venue for a removed action is in the "district court of the United States for the district and division embracing the place where such action is pending." Venue in removed cases is governed solely by section 1441(a). *Pollizzi v. Cowles Magazines, Inc.,* 345 U.S. 663, 665, 73 S.Ct. 900, 97 L.Ed. 1331 (1953). The Sixth Circuit has made it clear that there is only one federal venue into which a state court action may be removed, and that a removing defendant's only possible source of relief is a motion to transfer to a more convenient district under section 1404(a). *Kerobo v. Southwestern Clean Fuels Corp.,* 285 F.3d 531, 535 (6th Cir.2002).

Analysis under section 1404(a) involves the weighing of a number of specific factors. These include factors touching on the private interests of the parties (such as their convenience and the convenience of potential witnesses) as well as public-interest concerns, "such as systemic integrity and fairness, which come under the rubric of 'interests of justice.' " *Moses v. Business Card Express, Inc.,* 929 F.2d 1131, 1137 (6th Cir.1991). A forum selection clause, such as the one contained in paragraph 13 of the promissory note herein, is one of the factors to consider in this calculus, but it is not dispositive. *See Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S. 22, 31, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988). In addition to the existence of a forum selection clause, the federal courts have identified a number of non-exclusive factors for consideration in determining whether transfer is warranted under section 1404(a). These include (1) the convenience of the parties, (2) the convenience of the witnesses, (3) the relative ease of access to sources of proof, (4) the availability of process to compel attendance of unwilling witnesses, (5) the cost of obtaining willing witnesses, (6) practical problems indicating where the case can be tried more expeditiously and inexpensively, and (7) the interests of justice, a term broad enough to cover the particular circumstances of each case. *Cincinnati Ins. Co. v. O'Leary Paint Co.,* 676 F.Supp.2d 623, 632–33 (W.D.Mich.2009) (citing *Steelcase Inc. v. Smart Techs., Inc.,* 336 F.Supp.2d 714, 719–20 (W.D.Mich.2004)). The balance of these factors weighs heavily against a transfer of this case to California.

Convenience of the Parties. It is obvious that a Michigan forum is more convenient for plaintiff, while a forum in his home state would be more convenient for defendant. The federal courts, however, give greater consideration to plaintiff's choice of forum, especially where, as here, plaintiff resides in the chosen forum. *See Zions First Nat'l Bank v. Moto Diesel Mexicana,* No. 09–1704, —— F.3d ——, 2010 WL 5094061, at * 1 (6th Cir. Dec.15, 2010). This is sometimes expressed as a "strong presumption" in favor of plaintiff's selected forum. *Id.* In such circumstances, transfer is not appropriate where it will only serve to shift the balance of inconvenience from one party to another. *See Production Group Int'l, Inc. v. Goldman,* 337 F.Supp.2d 788, 799 (E.D.Va.2004). The first factor therefore favors the Western District of Michigan as the appropriate forum.

***3** *Convenience of the Witnesses.* The convenience of witnesses is often the most important factor in transfer analysis. *See Cincinnati Ins. Co.,* 676 F.Supp.2d at 634–35. To sustain a finding on this factor, however, the party asserting witness inconvenience "has the burden to proffer, by affidavit or otherwise, sufficient details respecting the witnesses and their potential testimony to enable the court to assess the materiality of evidence and the degree of inconvenience." *Koh v. Microtek Int'l, Inc.,* 250 F.Supp.2d 627, 636 (E.D.Va.2003). Particularized information is necessary to enable a court to ascertain how much weight to give a claim of inconvenience. *Id.* Inconvenience to a witness whose testimony is cumulative or tangential is not entitled to great weight. By contrast, greater weight must be accorded inconvenience to witnesses whose testimony is central to the claim or whose credibility is likely to be an important issue. *See Lycos, Inc. v. Ti Vo, Inc.,* 499 F.Supp.2d 685, 693 (E.D.Va.2007). Consequently, the materiality and importance of the testimony of prospective witnesses, and not merely the number of witnesses, is crucial to this inquiry. *See Viron Int'l Corp. v. David Boland, Inc.,* 237 F.Supp.2d 812, 816 (W.D.Mich.2002).

Defendant has done virtually nothing to sustain his burden of proof on this key issue. Relying on his Rule 26(a) disclosure, defendant lists eleven non-party witnesses, each of whom lives in California, and one witness who

lives in Mexico. Defendant makes no effort, however, to explain why these witnesses are important to the resolution of this case. Some of the witnesses appear to be virtually irrelevant to the question whether defendant has failed to pay on the promissory note or has any legal justification for selling the property without sharing the proceeds with his partner. Witness Kathy Katz, for example, allegedly arranged the original purchase contract for the property. It is extremely unclear how Ms. Katz would add anything to this case. Witnesses Perra and Wood were involved in construction and upkeep of the property. Again, defendant makes no effort to explain the importance or materiality of this testimony.[1]

"A party moving for transfer for the convenience of the witnesses must demonstrate, through affidavits or declarations containing admissible evidence, who the key witnesses will be and what their testimony will generally include." *Adoma v. Univ. of Phoenix, Inc.*, 711 F.Supp.2d 1142, 1151 (E.D.Cal.2010). Defendant has not sustained his burden of demonstrating to the court that the California witnesses identified in his Rule 26(a)(1) disclosure are "key" to resolution of this case. This factor therefore does not weigh in favor of transfer.

Access to Sources of Proof. This factor relates to the location of relevant documentary evidence. *See Cincinnati Ins. Co.* ., 676 F.Supp.2d at 635. The advent of modern technology, including photocopying, scanning, and electronic document production, has deprived this factor of most of its practical or legal weight. *Id.*

***4** *Availability of Process to Compel Attendance of Unwilling Witnesses and Cost of Obtaining Willing Witnesses.* The next two factors can be considered together. They are closely tied to the convenience of witness factor, because the weight to be given to cost of procuring witnesses (whether willing or unwilling) depends on how important those witnesses are to the resolution of the case. Clearly, if the witnesses listed in defendant's Rule 26(a) disclosure are critical to the outcome of this matter, this factor weighs in favor of the defendant. A federal court sitting in Los Angeles would be able to compel the presence of witnesses within its district or within 100 miles of the courthouse. *See* FED. R. CIV. P. 45(b)(2). If the case is pending in the Western District of Michigan, by contrast, those witnesses would not be subject to the subpoena power for trial, but only for deposition in their home districts. Consequently, the presentation of their testimony to the trier of fact would not be live and could therefore be less persuasive. As noted previously, however, the listed California non-party witnesses appear to relate to the setoff claim, which at this point is amorphous in amount and uncertain in importance. To the extent that this factor is relevant, it weighs in favor of transfer, but not heavily.

Practical Problems Involving Expense and Delay in the Competing Districts. Defendant does not address this issue, which is a public interest factor relating to docket congestion and other practical considerations in the districts involved. *See Cincinnati Ins. Co.*, 676 F.2d at 637–38. Essentially, this factor asks which court can dispose of the case more quickly and expeditiously. This case has already been through the scheduling process in this court and has firm dates for close of discovery, motion practice, final pretrial and trial. It is impossible to believe that a transfer to Los Angeles, California, where the case will essentially start over, will result in a more expeditious resolution of the matter.

Also subsumed in this practical factor is the question of familiarity by the court with the governing law. The promissory note (¶ 13) adopts Michigan law to govern the parties' transaction. Obviously, this factor weighs against a transfer.

Contractual Choice of Forum. Finally, the contractual forum selection clause is a "significant but not dispositive factor in deciding a motion to transfer." *Parker Hannifin Corp. v. Dayco Prods., LLC*, 137 F. App'x 757, 759 (6th Cir.2005) (citing *Stewart Org., Inc.*, 487 U.S. at 29). In fact, Justice Kennedy has remarked that a valid forum selection clause should be given controlling weight in all but the most exceptional circumstances. *Stewart Org., Inc.*, 487 U.S. at 33. Presumably, such clauses are the product of negotiation between the parties at the time of the transaction, when no dispute exists and all parties are acting in good faith. The presence of such a clause adds to the already substantial burden that a moving party faces, as he must show not only that the balance of convenience is strongly in his favor but also that litigation of the case in the contractually selected forum will be "so manifestly and gravely inconvenient" that the party will effectively be deprived of a meaningful day in court. *MoneyGram Payment Sys., Inc. v. Consorcio Oriental, S.A.*, 65 F. App'x 844, 848 (3d Cir.2003).

***5** As the balance of the other relevant factors does not support a transfer, the existence of the forum selection clause provides one more reason to accede to plaintiff's choice of forum in the present case. Although the presence of such a forum selection clause is not itself dispositive, in the present case, the clause reinforces a conclusion against transfer. Defendant nevertheless raises two arguments in an effort to avoid the forum selection clause, neither of which is persuasive. First, defendant argues that the clause is not mandatory, but only

permissive. He does this by relying on the word "may," taken completely out of context. The forum selection clause, read as a whole, leaves no room for escape. It is clearly mandatory. The clause provides that defendant "irrevocably agrees and consents" to a collection or enforcement action on the note in any state or federal court embracing Kent County, Michigan. Second, defendant points out that the forum selection clause appears only in the promissory note and not in the partnership agreement. Defendant presents no authority or argument in favor of discounting the effect of a forum selection clause in these circumstances, especially when the claim under the note and the claim under the partnership agreement are alleged to be intertwined.

Conclusion

The balance of factors relevant under 28 U.S.C. § 1404(a) tips decidedly against a transfer of this action. The presence of a forum selection clause only reinforces this conclusion. Defendant has not met his burden of showing that the private and public factors relevant under section 1404(a) strongly suggest a transfer. Defendant's motion will therefore be denied.

All Citations

Not Reported in F.Supp.2d, 2011 WL 691242

Footnotes

1 Review of the pleadings and the joint status report, as well as the Rule 26(a) disclosure submitted by defendant, fails to unearth any defense to plaintiff's claim. At least, no obvious defense appears. Defendant does seek an offset for monies invested in the property and its maintenance. (Def. Rule 26(a) Disclosure, ID# s 169–70). Presumably, the listed witnesses have some bearing on the offset issue. At this point, however, it is unclear whether plaintiff intends to contest the offset, whether substantial litigation will be devoted to this aspect of the case, or the amount of the offset claimed.

EXHIBIT H

1994 WL 584550
United States District Court, S.D. New York.

PURCELL GRAHAM, INCORPORATED, a New York Corporation, Plaintiff,
v.
NATIONAL BANK OF DETROIT, a/k/a NBD Bank, N.A., a national bank association, Defendant.

No. 93 Civ. 8786 (MBM).
|
Oct. 24, 1994.

Attorneys and Law Firms

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OPINION AND ORDER

MUKASEY, District Judge.

***1** Plaintiff Purcell Graham, Inc. alleges it was defrauded by defendant National Bank of Detroit ("NBD" or "Bank") in connection with securities trading activities by several NBD customers. Plaintiff presses both primary and aiding and abetting violations of § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), Rule 10b–5, 17 C.F.R. § 240.10b–5 (1989), and pendent state law claims based on fraud, negligence and bad faith. Defendant moves for summary judgment on the federal law claims in plaintiff's amended complaint on the ground that they are time-barred. Defendant moves also to dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2) and for improper venue pursuant to 28 U.S.C. § 1391, or in the alternative for change of venue to the Eastern District of Michigan pursuant to 28 U.S.C. § 1404(a). For the reasons set forth below, defendant's motion to transfer is granted. The remaining motions need not be decided here.

I.

Purcell Graham, a stock brokerage house, is a New York corporation with its principal place of business in New York, and defendant NBD is a national banking association with its principal place of business in Michigan. (Compl. ¶¶ 1, 2) The alleged wrongdoing arose from defendant's conduct as custodian of four accounts controlled by Mark Sendo ("Sendo") between November 1990 and January 1991. (Compl. ¶ 8) Sendo used these accounts to perpetrate a "free-ride" trading fraud whereby he and his associates Scott Burman ("Burman") and Richard Tringale ("Tringale") speculated in the market with insufficient capital, ultimately shifting the loss to executing brokers such as plaintiff. Specifically, Sendo and his cohort ordered securities in brokerage cash accounts without the ability to pay for them, and arranged offsetting sales of the phantom stock, gambling that the price would decline so they could buy stock in the open market and cover the transactions. (Compl. ¶¶ 18–20) Rising prices exposed the fraud and extinguished their prospective profits, and plaintiff, as the executing broker, was left to cover the trades at a loss of $750,000. (Compl. ¶¶ 21–22) Sendo allegedly used the NBD custodian accounts to avoid margin rules which protect brokers from this type of loss by requiring traders to proffer a substantial deposit. (Compl. ¶ 17)

The Sendo team allegedly employed the same technique to swindle other broker-dealers. (Ortiz Aff. ¶ 9) In February 1991, Paine Webber, Inc. filed suit against Sendo, Burman, Tringale and NBD in the United States District Court for the Eastern District of Michigan, alleging, *inter alia*, common law fraud, negligence, aiding and abetting securities fraud and bad faith. (Def. Ex. I) Almost one year later, in December 1991, Dean Witter Reynolds, Inc. initiated a similar suit, also in the Eastern District of Michigan, presided over by the Honorable Paul V. Gadola. Both cases settled. (Pl.Mem.Opp'n at 7; Def.Memo.Supp. at 5–6)

***2** In February 1991, the Securities and Exchange Commission ("SEC") commenced its own investigation into the trading activities of Sendo and his accomplices, which culminated in a complaint filed against Sendo, Burman and Tringale on June 27, 1991 in the United States District Court for the Southern District of New

York. (Ortiz Aff. ¶ 8) A final judgment was entered against all defendants consisting of injunctions, penalties and disgorgement. *SEC v. Sendo, Burman and Tringale et al.*, No. 91 Civ. 4408, 1991 WL 208515 (S.D.N.Y. July 18, 1991). On December 17, 1993, the SEC filed a complaint against three banks, including NBD, alleging violations of Federal Reserve Board Regulation U, 12 C.F.R. § 221 *et seq.*, for extending improper credit to the Sendo group and thereby fueling their free-ride trading scheme. *SEC v. Comerica Bank, NBD Bank, N.A. and Michigan National Bank*, No. 93–8699 (S.D.N.Y. filed Dec. 17, 1993). The Bank entered into a consent decree with the SEC, agreeing to accept a permanent injunction against future violations of Regulation U, pay a fine, disgorge fees collected on the Sendo accounts, and implement procedural safeguards to prevent future transgressions. (Pl.Mem.Opp'n to Count IV, Ex. A at 2)

In the instant case, plaintiff contends NBD knew or should have known there were insufficient funds and shares in the custodian accounts to settle the trades, but failed to disclose the deficiency. (Compl. ¶ 19) This failure anchors the five claims in plaintiff's amended complaint: Claim I alleges common law fraud, misrepresentation, concealment and deceit; Claim II avers negligence and gross negligence; Claim III charges bad faith and lack of reasonable commercial standards under the New York Uniform Commercial Code; Claim IV asserts aiding and abetting violations of § 10(b) and Rule 10b–5; and Claim V alleges principal liability for violations of these federal securities laws.

Plaintiff's original complaint, filed on December 21, 1993, contained only the aiding and abetting claim, not the primary violation allegation added in Claim V. The amendment was prompted by an interim Supreme Court decision that barred private actions for aiding and abetting violations under § 10(b). *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S.Ct. 1439, 1455 (1994). Rather than withdrawing Claim IV, plaintiff added Claim V alleging a primary violation, explaining that it was omitted from the original complaint in order to avoid the allegedly more onerous burden of proof accompanying principal liability, and "not because plaintiff considered the evidence did not support a primary violation claim." (Letter from Kivett to Court of 6/24/94 at 1) Plaintiff inadvisably elected to retain Claim IV against the possibility that Congress some day will decide to create or restore such a cause of action. *Id.* Because neither this court nor any other is empowered to hallucinate a non-existent federal claim, or to preserve such a claim cryogenically, as it were, until a cure is found for its fatal defects, the facially invalid aiding and abetting claim is dismissed.

***3** The amended complaint differs also in naming only NBD as a defendant, whereas the prior complaint included the holding company, NBD Bancorp, Inc., as a co-defendant. Because of this modification, the court need not consider the holding company's motion for summary judgment on the ground it is an improper party.

Plaintiff filed a substantially identical action against the Bank in the Eastern District of Michigan on January 24, 1994 in order to avoid a potential time-bar problem should this court decide it lacks jurisdiction. (Pl.Memo.Opp'n at 1) The Michigan action has been assigned to Judge Gadola, who presided over Dean Witter's suit against the Bank. Judge Gadola stayed the Michigan proceeding pending resolution of the motions before this court. *Purcell Graham, Inc. v. National Bank of Detroit*, No. 94–70274 (E.D.Mich. filed Jan. 24, 1994).

Defendant NBD presents two motions which challenge the court's jurisdiction. First, defendant asserts plaintiff's federal securities law claims are time-barred by the one-and-three year statute of limitations applicable to § 10(b). *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). With federal question jurisdiction allegedly absent, defendant next chisels at the proposed diversity jurisdiction by claiming that New York's long-arm statute, CPLR § 302, cannot confer personal jurisdiction over defendant. Finally, defendant raises venue objections, arguing the complaint should be dismissed for improper venue, or transferred to the Eastern District of Michigan. Because the operative facts occurred in Michigan, important non-party witnesses residing in Michigan can be compelled to testify in that jurisdiction, and because some judicial economy will be achieved by litigating the case before a judge who is already familiar with the factual background, defendant's motion to transfer is granted, and the remaining motions need not be considered.[1]

II.

Defendant's motion for change of venue to the Eastern District of Michigan is governed by 28 U.S.C. § 1404(a) which provides:

> For the convenience of parties and witnesses, in the interests of justice,

> a district court may transfer any civil action to any other district or division where it might have been brought.

This section gives federal district courts discretion to determine when transfer is warranted "according to an individualized case-by-case consideration of convenience and fairness." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quotation omitted). The burden of proof lies with the moving party to establish that a forum change is appropriate. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir.1978), *cert. denied*, 440 U.S. 908 (1979); *Weiss v. Columbia Pictures Television, Inc.*, 801 F.Supp. 1276, 1278 (S.D.N.Y.1992); *Arrow Electronics, Inc. v. Ducommun Inc.*, 724 F.Supp. 264, 265 (S.D.N.Y.1989).

The threshold question in a § 1404(a) inquiry is whether venue is proper in the proposed transferee forum. *IBJ Schroder Bank & Trust Co. v. Mellon Bank, N.A.*, 730 F.Supp. 1278, 1280 (S.D.N.Y.1990). Federal judicial power over this action is rooted in either federal question or diversity jurisdiction, depending on whether plaintiff can withstand defendant's time bar challenge to the alleged violations of § 10(b). If the federal claims survive, venue will be governed by § 27 of the 1934 Act which provides for venue in either "the district wherein the defendant is found or is an inhabitant or transacts business," or "the district wherein any act or transaction constituting the violation occurred." 15 U.S.C. § 78aa. If jurisdiction is predicated on diversity, 28 U.S.C. § 1391(a) lays venue in (1) "a judicial district where any defendant resides, if all defendants reside in the same State," (2) "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred," or (3) "a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." Venue lies in Michigan under both statutes, as the defendant's principal place of business is in Detroit, and the alleged misrepresentations and omissions were made in various places throughout Michigan. (Tomshack Aff. ¶¶ 4, 11–14; Compl. ¶¶ 2, 8, 15)

***4** The court must next determine whether the convenience of the parties and the interests of justice warrant a transfer under § 1404(a). The factors considered in making this determination include: (1) the place where the operative events occurred; (2) the convenience of the parties; (3) the convenience of the witnesses; (4) the availability of process to compel the attendance of unwilling witnesses; (5) the cost of obtaining witnesses' presence; (6) the location of records and documents; (7) a forum's familiarity with the governing law; (8) trial efficiency; and (9) the interests of justice. *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 508 (1947); *Don King Productions, Inc. v. Douglas*, 735 F.Supp. 522, 533 (S.D.N.Y.1990). Transfer is appropriate when the balance of these factors weighs collectively in favor of the movant's proposed forum.

In general, plaintiff's forum selection is entitled to "substantial consideration." *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 444 (2d Cir.1966); *Intercontinental Monetary Corp. v. Performance Guarantees, Inc.*, 705 F.Supp. 144, 151 (S.D.N.Y.1989). However, where as here, the events underlying the claim have no material connection to the transferor forum, the weight accorded to plaintiff's selection is substantially diminished. *Fontana v. E.A.R., a Division of Cabot Corp., Inc.*, 849 F.Supp. 212, 215 (S.D.N.Y.1994); *St. Regis Mohawk Tribe v. State of New York*, 774 F.Supp. 185, 188–89 (S.D.N.Y.1991); *Firestone v. Galbreath*, 722 F.Supp. 1020, 1030 (S.D.N.Y.1989). The material acts and omissions underlying plaintiff's complaint occurred in Michigan. That is where the Bank conducted business with Sendo, handled the custodian services accounts, and allegedly made representations or failed to disclose information regarding the status of those accounts. Misrepresentations and omissions are deemed to "occur" in the district where they are transmitted or withheld, not where they are received. *IBJ Schroder Bank & Trust Co.*, 730 F.Supp. at 1281 (transfer appropriate when misleading statements were made in transferee forum); *State Teachers Retirement Bd. et al. v. Fluor Corp.*, 500 F.Supp. 278, 290 (S.D.N.Y.1980) (misrepresentations or omissions in violation of § 10(b) occur where they were or should have been made), *rev'd in part on other grounds*, 654 F.2d 843 (2d Cir.1981). Plaintiff contends "many relevant acts" occurred in New York; specifically, several telephone calls to NBD were initiated in this district, and the Sendo trades which failed to settle should have been effected in New York. (Pl.Memo.Opp'n at 19; Graham Aff. ¶ 7) However, these activities do not constitute operative facts sufficient to render New York the most convenient situs for this case. Accordingly, although defendant must demonstrate transfer is appropriate, that burden is easily carried when, as here, plaintiff can show no viable connection between the litigation and the chosen forum.

***5** The convenience of parties and witnesses is a significant consideration in determining the propriety of transfer. *National Utility Service, Inc. v. Queens Group, Inc.*, 857 F.Supp. 237 (E.D.N.Y.1994);

Electronics, Inc., 724 F.Supp. at 265 (citing *Nieves v. American Airlines*, 700 F.Supp. 769 (S.D.N.Y.1988). Plaintiff, a New York corporation, argues the action should remain in its district, whereas defendant, a Michigan-based bank, urges transfer to its own neighborhood. Where the inconvenience to the parties is equivalent, plaintiff's forum selection should not be disturbed. *Time Products v. J. Tiras Classic Handbags, Inc.*, No. 93 Civ. 7856, 1994 WL 363930 (S.D.N.Y. July 13, 1994). However, the balance of conveniences tips in favor of transfer when the number of proposed party witnesses is taken into consideration. Defendant alleges that prior litigation arising out of the Sendo trades demonstrates the majority of relevant witnesses reside in Michigan, not in New York. For example, in pursuing its civil action against the Sendo traders, the SEC deposed six of defendant's officers and employees in Detroit, and 11 officers and employees of Michigan National Bank and Comerica Bank, also in the Detroit area. Only two witnesses employed by plaintiff were deposed in connection with that investigation. (Def.Mem.Supp. at 35) Defendant claims at least eight Bank officers and employees will be witnesses, all of whom reside in Michigan. (Tomshack Suppl.Aff. ¶¶ 3–10) Plaintiff did not disclose which of its employees, if any, would serve as witnesses in its case against the Bank.

Although the convenience of parties and party witnesses is important, the availability of process to require non-party witnesses to testify is the most compelling consideration. *Aquatic Amusement Associates, Ltd. v. Walt Disney World Co.*, 734 F.Supp. 54, 57 (N.D.N.Y.1990) (citation omitted) (convenience of non-party witnesses more important than comfort of party witnesses); *Arrow Electronics, Inc.*, 724 F.Supp at 266 (convenience of third party witnesses "alone weighs heavily in favor of transfer"). Defendant asserts several non-party witnesses will provide important testimony for the defense, including a former NBD employee who was involved in the decision to close the Sendo accounts, employees of Michigan National Bank and Comerica Bank who also provided custodian services accounts to the Sendo traders, and the primary defrauders themselves, Sendo, Burman and Tringale. (Tomshack Suppl.Aff. ¶¶ 11–13) All of these non-party witnesses reside in Michigan and are not subject to service of process in the Southern District of New York. *Id.* Similarly, plaintiff argues other non-party witnesses are necessary to shore up its claims against the Bank, including a former employee who handled the Sendo trades, representatives of the Depository Trust Company ("DTC"), and plaintiff's clearing agent, Murphy Marseilles Smith and Nammack. (Graham Aff. ¶¶ 4–5; Pl.Mem.Opp'n at 20) Because plaintiff neglected to disclose where these third party witnesses reside, the court cannot determine where they can be compelled to testify and whether a venue change would irreparably damage plaintiff's case.

***6** In determining proper venue, courts look not to the length of the proposed non-party witness list, but rather, to the nature and quality of the anticipated testimony. *IBJ Schroder Bank & Trust Co.*, 730 F.Supp. at 1281 (transfer granted to forum with fewer, but more significant witnesses); *Catalano v. BRI, Inc.*, 724 F.Supp. 1580, 1584 (E.D.Mich.1989) (citation omitted) (materiality of testimony is determinative). Transfer based upon the convenience and availability of non-party witnesses cannot be granted unless the movant identifies the witnesses and provides a brief description of the substance of their testimony so the court can ascertain its significance. *Factors Etc., Inc.*, 579 F.2d at 218; *Barr Laboratories, Inc. v. Quantum Pharmics, Inc.*, 827 F.Supp. 111, 114 (E.D.N.Y.1993). With one exception, defendant identified the desired third-party witnesses and provided the requisite "general indication of their role in the transaction at issue." *Arrow Electronics, Inc.*, 724 F.Supp. at 267 n. 1. Defendant did not name the specific Michigan National Bank and Comerica Bank employees it intends to call, but its brief identifies the representatives of those institutions deposed in connection with the SEC investigation, and argues their testimony is relevant in this action to expose Sendo's *modis operandi.* (Def.Mem.Supp. at 6, 35) Plaintiff, in contrast, failed to identify which "representatives" of DTC and the clearing agent will testify, or explain why their testimony is necessary. Moreover, many of the conversations between defendant and clearing agent representatives were taped pursuant to the Bank's customary business practice; thus, the testimony of these witnesses appears to be only marginally necessary. (Tomshack Aff. ¶¶ 16–17)

It is most important in my view, however, to call as witnesses the primary wrongdoers, Sendo, Burman and Tringale, to the stand, none of whom can be compelled to testify in the Southern District of New York. Plaintiff must prove scienter to substantiate its § 10(b), Rule 10b–5, and common law fraud claims; defendant will be exculpated if it acted without the requisite intent. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (scienter is a necessary element of § 10(b) claim); *Century 21, Inc. v. F.W. Woolworth Co.*, 582 N.Y.S.2d 101, 104 (N.Y.App.Div.1992) (claim for fraudulent misrepresentation under New York law requires proof of scienter). The testimony of the Sendo schemers is critical to determining whether defendant knowingly acted as a perpetrator of a fraud or blindly reacted as a victim of manipulation. A jury should have the opportunity to observe these witnesses, evaluate their demeanor, and

determine how they were capable of influencing defendant's conduct. The Eastern District of Michigan agrees that "[j]ustice is best served ... when the jury is permitted to view the most material witnesses." *Catalano,* 724 F.Supp. at 1584.

While the amenability of material witnesses to process alone justifies a change in venue, other less significant factors also favor transfer. Shortly after filing its complaint, plaintiff filed a substantially similar complaint in the Eastern District of Michigan. The Michigan action, which has been stayed, was assigned to Judge Gadola, who also presided over Dean Witter's suit against the Bank for essentially identical violations arising out of the same operative facts. Transferring the controversy to his courtroom promotes judicial economy, as Judge Gadola presumably acquired some familiarity with the factual background and relevant law applicable to the instant action. *Steinhardt Partners v. Smith Barney, Harris Upham & Co., Inc.,* 716 F.Supp. 93, 95 (S.D.N.Y.1989) (transfer is appropriate where related class action is pending in transferee forum); *Savin v. CSX Corp.,* 657 F.Supp. 1210, 1214 (S.D.N.Y.1987) (interests of justice served by transfer to federal judge with considerable experience in related litigation). Change of venue under these circumstances advances the goals of § 1404(a) to "prevent waste of time, energy and money [and] to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Continental Grain Co. v. THE Barge F.B.L.–585,* 364 U.S. 19, 26–27 (1960).

***7** The survey of convenience and fairness accompanying a § 1404(a) motion requires courts to consider the desirability of trying a case in a forum familiar with the substantive law to be applied. If federal law remains the gravamen of plaintiff's case, this issue is moot; however, if jurisdiction is grounded in diversity, the transferee forum must apply the law of the transferor court when venue is changed pursuant to § 1404(a). *Ferens v. John Deere Co.,* 494 U.S. 516, 523 (1990). Consequently, the Eastern District of Michigan will be required to apply New York law to plaintiff's state law claims of fraud, negligence, and lack of reasonable commercial standards. The balance of conveniences remains tilted toward the defendant despite the imposition of foreign law on the Michigan federal forum because the elements of these claims are virtually identical in both states. In New York and Michigan, the same components comprise fraudulent misrepresentation, *compare Century 21, Inc.,* 582 N.Y.S.2d at 104 *with Kassab v. Michigan Basic Property Ins. Ass'n,* 441 Mich. 433, 442 (Mich.1992), the elements of negligence are the same, *compare Prager v. City of New York Housing Authority,* 447 N.Y.S.2d 1013, 1036 (N.Y.Civ.Ct.1982) *with Lorencz v. Ford Motor Co.,* 439 Mich. 370, 375 (Mich.1992), and the two states have adopted identical provisions of the Uniform Commercial Code governing good faith and reasonable commercial standards, *compare* N.Y.U.C.C. Law §§ 1–203, 2–103 (McKinney 1993) *with* Mich.Comp.Laws §§ 440.1203, 440.2103 (1967). Thus, if required to do so, the Eastern District of Michigan will apply New York rules identical to the Michigan standards it frequently encounters in the course of exercising diversity jurisdiction.

Plaintiff argues transfer is inappropriate because the cost of litigating in a distant district is "vastly more burdensome" for the brokerage house than it would be for the Bank. (Pl.Mem.Opp'n at 22) Plaintiff claims its assets are below $10 million dollars, whereas defendant is a multi-billion dollar corporation. (Pl.Mem.Opp'n at 21–22) The Bank is a much larger entity, but plaintiff has made no showing that litigating the action in Michigan would be unduly burdensome. Indeed, if that were the case, plaintiff would never have filed a companion complaint in that jurisdiction. Moreover, while relative financial hardship may be considered in weighing the balance of conveniences, "this factor is usually only applicable to situations where an individual is suing a large corporation," and therefore is not relevant here. *Aquatic Amusement Associates, Ltd.,* 734 F.Supp. at 59.

III.

Claim IV is dismissed. Defendant's motion to transfer this action to the Eastern District of Michigan pursuant to 28 U.S.C. § 1404(a) is granted because the operative facts underlying the complaint occurred in Michigan, important non-party witnesses are subject to process there, and a virtually identical action brought by plaintiff is pending in that District before a judge who presided over a similar suit against this defendant. Accordingly, the Clerk is directed to transfer this action to the Eastern District of Michigan.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1994 WL 584550, Fed. Sec. L. Rep. P 98,458

Footnotes

1 The court has power to transfer this action regardless of the existence of personal jurisdiction or proper venue, as long as transfer furthers the interests of justice. *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 466 (1962); *Corke v. Sameiet M.S. Song of Norway,* 572 F.2d 77, 80 (2d Cir.1978) (citing *Volk Corp. v. Art–Pak Clip Art Service,* 432 F.Supp 1179, 1181 & nn. 4–5 (S.D.N.Y.1977)).