IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CARNES COMPANY, INC.,

Plaintiff,

v.

STONE CREEK MECHANICAL, INC.
and RICHARD WORTH, individually,

Defendants.

OPINION AND ORDER

02-C-0208-C

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This is a civil action for monetary relief in which plaintiff is suing defendants Stone Creek Mechanical, Inc. and Richard Worth for breach of contract, promissory estoppel, unjust enrichment and intentional misrepresentation. Plaintiff alleges that defendant Stone Creek breached its performance obligations under the contract by failing to pay for the purchase of energy recovery units. Diversity jurisdiction is present in this case; the parties are of diverse citizenship and the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332(a)(1).

Presently before the court is defendants' motion to dismiss pursuant to Rule 12(b)(2) and 12(b)(3), in which they argue that this court lacks personal jurisdiction over the

defendants and that venue is improper. Alternatively, defendants request that this court transfer venue of this matter to the U.S. District Court for the Eastern District of Pennsylvania.

Because plaintiff has met its burden of showing personal jurisdiction exists over defendant Stone Creek, but not over defendant Worth, I will grant defendants' motion to dismiss for lack of personal jurisdiction only as to defendant Worth. Because plaintiff has met its burden of showing proper venue in this court, defendants' motion to dismiss for improper venue will be denied. Because defendants have failed to meet their burden of establishing that the balance of conveniences and the interests of justice strongly favor a transfer of venue, defendants' alternative motion to transfer will also be denied.

The court properly decides jurisdictional disputes before trial. O'Hare International Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971). On a motion to dismiss for lack of personal jurisdiction, the burden of proof rests on the party asserting jurisdiction. See Nelson v. Park Industries, Inc., 717 F.2d 1120, 1123 (7th Cir. 1983). That party must make a prima facie showing that personal jurisdiction exists. See id. In deciding whether the asserting party has made the necessary showing, the court may rely on the allegations of the complaint and also may receive and weigh affidavits submitted by the parties. See id. The court resolves all disputes concerning the relevant facts in favor of the party asserting personal jurisdiction. See id. This standard applies to a motion to dismiss for improper

venue as well. Grantham v. Challenge-Cook Bros., Inc., 420 F.2d 1182, 1184 (7th Cir. 1969).

The affidavits filed by plaintiff and defendants presented this court with contradictory factual allegations from which to decide the jurisdictional and venue issues. Because there were conflicting statements, for the purpose of deciding defendants' motions, I must assume the facts related in the plaintiff's affidavits and complaint to be true.

## ALLEGATIONS OF FACT

Plaintiff Carnes Company, Inc. is a Wisconsin corporation with its principal place of business in Verona, Wisconsin. Plaintiff is an air movement component manufacturing company. Defendant Stone Creek Mechanical, Inc. is a Pennsylvania corporation with its principal place of business in Doylestown, Pennsylvania. Defendant Stone Creek is a mechanical contractor that performs work on construction projects. Defendant Richard Worth is an adult resident of Doylestown, Pennsylvania, and president of defendant Stone Creek.

Chase and Associates, Inc. is a Pennsylvania corporation with its principal place of business in Jamison, Pennsylvania. Chase is an independent manufacturer's representative and sales company in the heating, ventilation and air conditioning industry. Jay J. Surkin Company is a Pennsylvania company with its principal place of business in Huntingdon

Valley, Pennsylvania. Surkin is plaintiff's authorized manufacturer's representative.

The first contact between plaintiff and defendant Stone Creek was initiated on January 31, 2001, in a phone call made by defendant Worth to Charles Callender, plaintiff's sales and marketing manager, who was located in Wisconsin. Defendant Worth called to solicit plaintiff to manufacture energy recovery units for use in one of defendant Stone Creek's projects. (Defendant Stone Creek had been awarded a construction contract recently to upgrade the HVAC systems at three schools in Newtown, Pennsylvania).

Over the course of the next several months, plaintiff and defendant Stone Creek had extensive telephone and written communications regarding possible terms for a final agreement. In June 2001, plaintiff expressed its unwillingness to negotiate further unless defendant Stone Creek agreed to an assignment. Plaintiff was able to provide only a portion of the units ordered and needed to assign the rest to third-party companies. On July 9, 2001, defendant Stone Creek sent a letter directly to plaintiff indicating that it would not accept the assignment. After plaintiff indicated that it would cease negotiations, defendant Stone Creek acquiesced and executed and delivered to plaintiff the assignment document.

Between January 31 and August 8, 2001 (the date that the parties agreed to the final terms of the contract), plaintiff and defendant Stone Creek had engaged in 17 written communications and approximately seven telephone calls negotiating the terms of the contract. After manufacturing 27 units in Wisconsin, plaintiff delivered them to a carrier

at plaintiff's place of business for shipment to defendant Stone Creek. Under the agreement, delivery to a carrier at seller's plant constitutes delivery to buyer. Defendant Stone Creek sent plaintiff a payment of approximately $55,000 for the 27 units delivered during approximately August or September 2001. Sometime in September 2001, defendant Stone Creek stopped paying plaintiff.

Several contacts took place between plaintiff and defendant Stone Creek to resolve the issue of nonpayment. On or about October 15, 2001, defendant Worth contacted plaintiff to ask for delivery of one more unit. The parties agreed that the only economical way to transport units was to ship four at a time. On October 25, 2001, defendant Worth promised in writing to pay $35,000 immediately and pay all past due amounts by November 17, 2001, if plaintiff would ship the additional units. Plaintiff shipped four units to defendant Stone Creek and received $35,000 as promised. Defendant Stone Creek later refused to pay any of the outstanding amounts due plaintiff.

After months of failed negotiations to collect payment and resume delivery of the remaining units, plaintiff filed a lawsuit in the Circuit Court for Dane County, Wisconsin on February 22, 2002. On April 8, 2002, defendants removed the matter to this court pursuant to 28 U.S.C. § 1332(a)(1) and filed suit against plaintiff contemporaneously in the Eastern District of Pennsylvania, seeking monetary damages for plaintiff's failure to provide the required equipment.

## OPINION

### A. Motion to Dismiss for Lack of Personal Jurisdiction

In a case based on diversity of citizenship, a federal court has personal jurisdiction over a non-consenting, nonresident defendant to the extent authorized by the law of the state in which that court sits. See Heritage House Restaurants, Inc. v. Continental Funding Group, Inc., 906 F.2d 276, 279 (7th Cir. 1990). In Wisconsin, the requirements of both the Wisconsin long-arm statute, Wis. Stat. § 801.05, and due process must be satisfied before jurisdiction can be established. See Marsh v. Farm Bureau Mutual Insurance Co., 179 Wis. 2d 42, 52, 505 N.W.2d 162, 165 (Ct. App. 1993). Plaintiff must show that defendants come within the grasp of the Wisconsin long-arm statute, which is to be liberally construed in favor of jurisdiction. See id.

#### 1. Wisconsin long-arm statute

First, I must consider whether Wisconsin's long-arm statute subjects defendants to personal jurisdiction. Plaintiff cites several provisions of the long-arm statute to support its contention that exercising jurisdiction over defendants is appropriate. Wis. Stat. § 801.05(1)(d) states that a court has personal jurisdiction "[i]n any action whether arising within or without this state, against a defendant who when the action is commenced . . . is engaged in substantial and not isolated activities within this state, whether such activities

are wholly interstate, intrastate, or otherwise." To determine whether defendant has been engaged in "substantial and not isolated" activities within Wisconsin, the court asks whether defendant has "solicit[ed], creat[ed], nurture[d] or maintain[ed], whether through personal contacts or long-distance communications, a continuing business relationship with anyone in the state." Stauffacher v. Bennett, 969 F.2d 455, 457 (7th Cir. 1992). Moreover, setting foot in Wisconsin is not a necessary element in establishing personal jurisdiction. See id. at 458.

In addition, five factors are relevant to the question whether defendants' Wisconsin contacts meet the criteria of Wis. Stat. § 801.05(1)(d): (1) the quantity of contacts, (2) the nature and quality of the contacts, (3) the source of the contacts and their connection with the cause of action, (4) the interests of the State of Wisconsin and (5) the convenience of the parties. Nagel v. Crain Cutter Co., 50 Wis. 2d 638, 648-50, 184 N.W.2d 876 (1971).

Plaintiff must prove that this court has personal jurisdiction over each defendant. There are no allegations that defendant Worth engaged in any conduct other than actions undertaken on behalf of his employer, defendant Stone Creek. Personal jurisdiction over a corporation cannot be the sole basis for personal jurisdiction over an officer of that corporation. See Pavlic v. Woodrum, 169 Wis. 2d 585, 590, 486 N.W.2d 533, 534 (Ct. App. 1992). However, a corporate agent is not "shielded from personal jurisdiction if he, as agent of the corporation, commits a tortious act in the forum." Oxman's Erwin Meat Co.

v. Blacketer, 86 Wis. 2d 683, 692, 273 N.W.2d 285, 289 (1979). Count IV of plaintiff's complaint alleges intentional misrepresentation, but it does not allege that defendant Worth made the misrepresentation. See Cpt., dkt. #8, ¶¶36-40. Therefore, defendant Worth will be dismissed from this case for lack of personal jurisdiction.

However, this court does have personal jurisdiction over defendant Stone Creek. The facts alleged by plaintiff show that defendant Stone Creek engaged in "substantial and not isolated" activities in Wisconsin. First, defendant Stone Creek allegedly solicited a continuing business relationship with plaintiff in its phone call on January 31, 2001. Conversely, defendants argue that defendant Stone Creek was solicited by Chase before this date. Nevertheless, this court is required to resolve all factual disputes in favor of the party asserting jurisdiction. See Nelson, 717 F.2d at 1123. Defendant Stone Creek ordered 51 units from plaintiff that would be manufactured in Wisconsin and delivered in installments over time. This alleged solicitation and continuing business relationship clearly falls under the conduct prescribed in Stauffacher, 969 F.2d at 457.

Second, plaintiff has alleged sufficient contacts to meet the requirements under Nagel, 50 Wis. 2d at 648-50, 184 N.W.2d 876. Plaintiff alleges that between January 31 and August 8, 2001, it and defendant Stone Creek had 17 written communications and approximately seven telephone calls negotiating the terms of the contract. In addition, plaintiff's lawsuit arises directly from the agreement reached by the parties as a result of

these communications. Last, Wisconsin has an interest in protecting its residents from breach of contract, and the convenience of the parties does not weigh heavily against this forum. Although defendants argue that defending a lawsuit in Wisconsin would be burdensome, plaintiff makes the same argument regarding change of venue.

Defendants argue that plaintiff's affidavits should be stricken to the extent that they are rebutted by plaintiff's own records. However, such internal inconsistencies are not supported by the record. The only factual disputes in the record are between the parties. Defendants cite differences between plaintiff's telephone records and the averments made in the Cichon affidavit (submitted by plaintiff). However, the telephone records defendants cite are records attached to the Kraemer affidavit, which was submitted in support of defendants' own motion to dismiss, and not part of plaintiff's record.

Defendants also argue that plaintiff's own documentation proves that it was involved in soliciting the business of defendant Stone Creek long before what it alleges was defendant Stone Creek's solicitation on January 31, 2001. Once again, defendants are referring to phone records they submitted on their own behalf as part of the Kraemer affidavit. Even if the phone records had been part of plaintiff's record, they merely show contact between plaintiff and Chase or Surkin. The subject matter of those phone calls has not been addressed by plaintiff. Therefore, there are no internal factual discrepancies, only disputes between plaintiff and defendants.

Liberally construing Wisconsin's long-arm statute in favor of jurisdiction and resolving all factual disputes in favor of plaintiff, I find that the long-arm statute applies to defendant Stone Creek. Nevertheless, both the long-arm statute and due process must be met for personal jurisdiction. Therefore, I turn to due process.

2. Due process

If jurisdiction is appropriate under the long-arm statute, the burden shifts to defendant to show that the exercise of personal jurisdiction would not comport with the due process requirements of the Fourteenth Amendment. See Steel Warehouse of Wisconsin, Inc. v. Leach, 154 F.3d 712, 714 (7th Cir. 1998). However, compliance with the statute is presumed to be compliance with due process. See id. The presumption may be rebutted by defendant using the five Nagel factors discussed earlier or by looking to federal law. PKWARE, Inc. v. Meade, 79 F. Supp. 2d 1007, 1014 (E.D. Wis. 2000); see also Nagel, 50 Wis. 2d at 648-50, 184 N.W.2d 876. Whether there are sufficient minimum contacts to comport with due process cannot be determined by any set formula or rule of thumb, but must rest on a consideration of what is fair and reasonable in the circumstances of each particular case. Hutter Northern Trust v. Door County Chamber of Commerce, 403 F.2d 481, 484 (7th Cir. 1968). "In applying this flexible test, the relevant inquiry is whether a nonresident has engaged in some act or conduct by which he may be said to have invoked

the benefits and protection of the laws of the forum." Id.

Defendants argue that the facts of this case do not satisfy the due process requirements for personal jurisdiction. The basis for defendants' arguments continue to be that defendant Stone Creek was solicited by Chase and mainly dealt with Chase or Surkin during negotiations. However, as stated earlier, all factual disputes are to be resolved in favor of the party asserting jurisdiction. Plaintiff alleges that defendant Stone Creek solicited it on January 31, 2001. This alleged affirmative act on the part of defendant Stone Creek "purposefully availed" itself of this forum in a way that defendant Stone Creek could reasonably anticipate being sued here. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985). "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens place on the alien defendant." Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987).

Defendants attempt to analogize this case to Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 597 F.2d 596 (7th Cir. 1979), and Jadair, Inc. v. Walt Keeler Co., Inc., 679 F.2d 131 (7th Cir. 1982), but once again, the argument relies on facts alleged by defendants only. In Lakeside, the defendant ordered goods from the plaintiff, a Wisconsin company, with the knowledge that the goods would likely be manufactured in Wisconsin. Lakeside, 597 F.2d at 598, 603. After the initial solicitation, the only

communication between the parties was by mail or telephone. Lakeside, 597 F.2d at 597-98. The Court of Appeals for the Seventh Circuit held that the contacts were not sufficient to confer jurisdiction over the defendant. See id. at 603. Nevertheless, I agree with plaintiff that the case is distinguishable on the facts. One glaring difference between Lakeside and this case is that the plaintiff in Lakeside went to West Virginia (the defendant's place of business) to solicit the contract from the defendant. According to plaintiff, the opposite occurred in this case. In other words, plaintiff alleges that defendant Stone Creek solicited it with a phone call to Wisconsin, not the other way around.

In Jadair, the court of appeals held that the defendant "whose sole contact with a state is that his seller's place of business is located there" was not subject to jurisdiction in Wisconsin. Jadair, 679 F.2d at 134. Relying on Jadair, defendants argue that this court does not have personal jurisdiction over them in this case. However, plaintiff's allegations show that the circumstances in this case are different from those in Jadair. Again, plaintiff has alleged facts showing initial solicitation by defendant Stone Creek and numerous examples of direct communication among it and defendants before the contract dispute began.

In its reply brief, defendants argue that the forum selection clause in the project specifications, agreed to by both parties, led to an "expectation" that any lawsuit would take place in Pennsylvania. Because this argument was not made in its original brief in support, I will not consider it. See James v. Sheahan, 137 F.3d 1003, 1008 (7th Cir. 1998)

(arguments raised for the first time in a reply brief are waived). I find that defendant Stone Creek had sufficient minimum contacts with this state to satisfy the requirements of due process.

Because defendant Stone Creek meets the requirements of the Wisconsin long-arm statute and due process, personal jurisdiction has been established. Defendants' motion to dismiss for lack of personal jurisdiction as to defendant Stone Creek will be denied.

B. Motion to Dismiss for Improper Venue

Defendants argue that venue is improper in this judicial district. Venue for plaintiff's state law claims is governed by the general venue statute, 28 U.S.C. § 1391. Section 1391(a) provides:

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only 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 a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

As discussed earlier, the standard is the same as with a motion to dismiss for lack of personal jurisdiction; the plaintiff has the burden of showing proper venue but all disputed facts are resolved in favor of the party asserting proper venue. Grantham, 420 F.2d at 1184.

Plaintiff asserts that the solicitation by defendants, the various written and telephonic communications between the parties and the manufacturing of the units in Wisconsin are proof that venue is proper in this district. On the other hand, defendants argue that the majority of the events relating to this transaction occurred in Pennsylvania and, therefore, venue in this district is improper. Even if defendants' assertions were true, the "argument ignores the fact that a 'substantial part' of the events or omissions can occur in more than one place, and thus, that venue can be proper in more than one district." Harley-Davidson Motor Company v. Motor Sport, Inc., 960 F. Supp. 1386, 1393 (E.D. Wis 1997).

For the same reasons discussed earlier, it is clear that a substantial part of the activities that gave rise to this action occurred in Wisconsin. First, as stated numerous times already, defendant Stone Creek allegedly phoned plaintiff at its place of business in Verona, Wisconsin, for the purpose of soliciting plaintiff's business. Second, several long-distance communications took place between plaintiff in Wisconsin and defendant Stone Creek in Pennsylvania. One of these communications involved a promise made by defendant Stone Creek to plaintiff for payment of past due amounts in the event of shipment of four additional units. Third, partial payment from defendant Stone Creek was sent to plaintiff in Wisconsin. Although defendants may be correct when they argue that nonpayment occurred in Pennsylvania, these other significant contacts in Wisconsin demonstrate proper venue in this state. Therefore, defendants' motion to dismiss for improper venue will be

denied.

C. Motion for a Transfer of Venue

Defendants alternatively request that, pursuant to 28 U.S.C. § 1404(a), venue be transferred to the Eastern District of Pennsylvania. Section 1404(a) says, "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." The decision to transfer a case is committed to the sound discretion of the trial judge. Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 (7th Cir. 1986). However, before a court can transfer a case, it must conclude that (1) venue is proper in the transferor district and (2) the transferee district is one in which the action might have been brought. Id. at 219 & n.3.

I have determined that venue is proper in this district. Venue also would have been proper in the Eastern District of Pennsylvania because defendant Stone Creek is a Pennsylvania corporation and defendant Worth is a citizen of Pennsylvania. See 28 U. S.C. § 1391(a)(1). Neither party argues that venue would have been improper in the Eastern District of Pennsylvania. Therefore, it is appropriate to consider whether to transfer the case.

In a motion to transfer brought pursuant to 28 U.S.C. § 1404(a), the moving party bears the burden of establishing that the transferee forum is "clearly more convenient."

Coffey, 796 F.2d at 219-20. In weighing the motion, a court must decide whether the transfer serves the convenience of the parties and witnesses and will promote the interests of justice. See 28 U.S.C. 1404(a); Coffey, 796 F.2d at 219-20; see also Roberts & Schaefer Co. v. Merit Contracting, Inc., 99 F.3d 248, 254 (7th Cir. 1996) (question is whether plaintiff's interest in choosing forum is outweighed by either convenience concerns of parties and witnesses or interests of justice). The court should view these factors as placeholders among a broader set of considerations and evaluate them in light of all the circumstances of the case. See Coffey, 796 F.2d at 219 n.3. Such broader considerations include the situs of material events, ease of access to sources of proof, location of documents and records likely to be involved and expense of the parties. Platt v. Minnesota Mining & Manufacturing, 376 U.S. 240, 244 (1964).

1. Plaintiff's choice of forum

Plaintiff's choice of forum is entitled to great deference; its choice should not be set aside lightly. See Piper Aircraft v. Reyno, 454 U.S. 235, 255 (1981); see also Chicago, Rock Island & Pacific R.R. v. Igoe, 220 F.2d 299, 302 (7th Cir. 1955). Plaintiff chose to bring this case in the Western District of Wisconsin. That choice will not be disregarded without convincing reason.

2. Convenience of the parties

Defendants have not shown that it would be clearly more convenient for the parties to try the case in Pennsylvania. Defendants argue that it would be very inconvenient for employees of defendant Stone Creek to travel to Wisconsin to testify. However, plaintiff makes the same argument regarding its employees. Shifting the inconvenience from one party to the other does not justify a transfer. See Heller Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1293 (7th Cir. 1989). Thus, I find that any inconvenience defendants may suffer in litigating this matter in the Western District of Wisconsin are insufficient to warrant transfer of venue. This factor weighs against transferring the case.

3. Convenience of the witnesses

Defendants have not shown that it would be clearly more convenient for the prospective witnesses if the case were tried in Pennsylvania. Defendants assert a need to call many witnesses, mostly from Pennsylvania. Plaintiff asserts a need to call 11 witnesses, all employees who live in Wisconsin. Even if all of defendants' witnesses must travel to Wisconsin for trial, the additional travel burden is not enough to upset plaintiff's choice of forum.

Defendants argue that the case should be transferred to the Eastern District of Pennsylvania because that court has subpoena power over its non-party witnesses who

cannot be compelled to testify at trial in Wisconsin. In addition, defendants assert that plaintiff's employee witnesses are "friendly" and would be more willing to travel to Pennsylvania to testify. However, the difficulty of bringing potential witnesses to Wisconsin does not justify a transfer of venue. This factor weighs against transferring the case.

4. The interests of justice

The factors considered in an "interests of justice" analysis relate to "the efficient administration of the court system." Coffey, 796 F.2d at 221. Consequently, the interests of justice are served when a trial is held in a district court where the litigants are most likely to receive a speedy trial. See id. According to the latest Federal Court Management Statistics prepared by the Administrative Office of the U.S. Courts, the docket in the Western District of Wisconsin is less congested than the docket in the Eastern District of Pennsylvania. For the period ending September 30, 2001, civil litigants in the Western District of Wisconsin could expect to go to trial in eight months, whereas in the Eastern District of Pennsylvania the median time from filing to trial was 15 months.

Defendants argue that judicial economy requires this case to be consolidated with the pending lawsuit filed in Pennsylvania. However, in Federal Electric Products Co. v. Frank Adam Electric Co., 100 F. Supp. 8 (S.D.N.Y. 1951), the district court held that where the plaintiff's action in the original forum predates the defendant's action in the transferee court,

the suits may be consolidated only if there are other grounds for transfer. I am persuaded by the analysis in Federal Electric.

In a federal lawsuit based upon diversity of citizenship, the court will apply the choice-of-law principles of the jurisdiction in which it sits to determine the substantive law that will apply. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). But after a diversity case has been transferred, "the law of the transferor district is applied as if there had been no more than 'a change of courtrooms.'" Soo Line Railroad Co. v. Overton, 992 F.2d 640, 643 (7th Cir. 1993) (quoting Van Dusen v. Barrack, 376 U.S. 612, 634 (1964) (defendants may not use § 1404(a) "to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue")). In other words, if venue were transferred, the Pennsylvania court would apply Wisconsin's choice-of-law rules in determining whether Pennsylvania or Wisconsin substantive law will apply. Therefore, the interests of justice factor weigh against transferring the case.

5. Other considerations

Although a court must consider the three factors listed in § 1404(a), the court is not limited to those factors alone. See Coffey, 796 F.2d at 219 n. 3; see also Platt, 376 U.S. at 244. First, material events took place in both districts. For example, the most significant long-distance communications allegedly took place between the parties in Wisconsin and

Pennsylvania. Second, although plaintiff argues that it will have to transport at least three boxes of documentary evidence to Pennsylvania if the case were transferred, this is not a difficult task nor an expensive one. Finally, plaintiff argues that its business operations would suffer if the case were transferred because key employees would be unable to perform their duties during trial. However, the same can be said of defendant Stone Creek; at a minimum, defendant Worth will likely testify at trial. Therefore, this factor is in balance.

I conclude that defendants have failed to meet their burden of establishing that the balance of conveniences and the interests of justice strongly favor a transfer of venue under 28 U.S.C. § 1404(a). Therefore defendants' alternative motion to transfer will be denied.

ORDER

IT IS ORDERED that

1. Defendants' motion to dismiss for lack of personal jurisdiction is GRANTED as to defendant Worth only;

2. Defendants' motion to dismiss for lack of personal jurisdiction is DENIED as to defendant Stone Creek;

3. Defendants' motion to dismiss for improper venue is DENIED; and

4. Defendants' alternative motion to transfer venue is DENIED.

Entered this 6th day of June, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge