IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LATINO FOOD MARKETERS, LLC,

OPINION AND ORDER

Plaintiff,

03-C-0190-C

v.

OLE MEXICAN FOODS, INC.,

Defendants.

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This civil action for recovery of sums due for purchases of cheese is before the court on defendant Ole Mexican Foods' motion to dismiss pursuant to Fed. R. Civ. P. 12(b). (Originally, defendant asserted both subsection (2) of Rule 12(b) (lack of personal jurisdiction) and (3) (improper venue) as grounds for dismissal, but it never pursued its assertion that the court lacked jurisdiction over its person. I conclude that defendant has waived this objection to jurisdiction.) In an opinion and order entered on August 20, 2003, I ruled that it would be necessary to hold an evidentiary hearing to determine whether venue lay in this district or in Fulton County, Georgia, because material facts bearing on that question were in dispute. The critical question was whether the parties had a contract for the sale of cheese. If they did, their dispute would have to be resolved in Fulton County,

Georgia, pursuant to the contract's forum selection clause. Although defendant maintained that the parties did execute a contract, it had to concede that it had no copy of a signed contract, making it difficult to show that its president had executed the final draft. However, defendant had an alternative argument, which was that the parties were bound by the contract, signed or unsigned, because they had demonstrated their intent to agree to the contract's terms. See, e.g., Ziege Distributing Co. v. All Kitchens, Inc., 63 F.3d 609, 612 (7th Cir. 1995) ("A written agreement may be effective even if both parties have not signed it if the parties otherwise demonstrate their intent to have a contract.").

Plaintiff denied that there was an agreement. It alleged that defendant's president, Veronica Moreno, called plaintiff in November 2001, to say that she was rejecting plaintiff's last proposal and that her refusal is borne out by the fact that defendant was unable to locate any copy of a contract signed by Moreno or anyone else on behalf of defendant. Moreover, plaintiff argued, defendant cannot demonstrate plaintiff's intent to enter into a contract by plaintiff's subsequent performance because plaintiff did not perform according to the terms of the purported contract.

Just before the scheduled evidentiary hearing, defendant advised plaintiff that it had discovered a copy of the contract that bore the signatures of both plaintiff's president, Miguel Leal, and defendant's president, Veronica Moreno. Plaintiff challenges the authenticity of this newly discovered document.

A number of threshold issues must be addressed before reaching the factual issues bearing on the existence of a contract. The first is determining the vehicle for raising improper venue on the basis of a forum selection clause in a contract.

Although the courts are is some disarray on this point, see, e.g., New Moon Shipping Co., Ltd. v. Man B & W Diesel AG, 121 F.3d 24 (2d Cir. 1997) ("somewhat misleading" to raise applicability of clause in context of motion to dismiss for lack of subject matter jurisdiction); LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp., 739 F.2d 4, 7 (1st Cir. 1984) (applicability of forum selection clause should be raised by motion to dismiss for failure to state claim under Rule 12(b)(6)); AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 152 (2d Cir. 1984) (applicability of clause should be raised on motion to dismiss for lack of subject matter jurisdiction), the majority hold that the proper way to raise the applicability of a forum selection clause is by motion to dismiss for improper venue under Rule 12(b)(3). Frietsch v. Refco, Inc., 56 F.3d 825, 830 (7th Cir. 1995) (minority of courts hold that issue should be raised on motion to dismiss for failure to state claim under Rule 12(b)(6)); see also Kukje Hwajae Insurance Co., Ltd. v. M/V Hyundai Liberty, 294 F.3d 1171 (9th Cir. 2002) (citing Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996) (preferable to consider motion as brought pursuant to Rule 12(b)(3), under which pleadings not accepted as true, than as brought pursuant to Rule 12(b)(6), under which pleadings must be accepted as true)); Riley v. Kingsley Underwriting

Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992). I conclude that defendant's motion is properly before the court on a motion to dismiss for improper venue under Rule 12(b)(3).

The second question is the allocation of the burden of proof on a venue challenge. This question was the subject of a motion to clarify that plaintiff filed just before the evidentiary hearing. I decided it by assigning the burden of proof to defendant to show that it had entered into a contract with plaintiff.

Many courts view motions to dismiss for improper venue in a different light from motions to dismiss for lack of subject matter jurisdiction or lack of jurisdiction over the person of the defendant. Myers v. American Dental Ass'n, 695 F.2d 716, 724 (3d Cir. 1982) ("a motion to dismiss for improper venue is not an attack on jurisdiction but only an affirmative dilatory defense"). Because venue is considered a personal privilege of the defendant and not a question of the court's power to exercise jurisdiction over the case or over the defendant, the district courts are split in their decisions allocating the burden of proof. See 15 Charles Alan Wright, Arthur R. Miller & Edward Cooper, Federal Practice and Procedure § 3826 (2d ed. 1986 & Supp. 2003) (listing cases). Even the two leading authorities on federal practice disagree. See 17 Moore's Federal Practice § 110.01[5][c] (3d ed. 1999) ("correct" view is that defendants have burden of showing that venue is improper), and 15 Wright, Miller & Cooper, Federal Practice § 3826 (2d ed. 1986) ("'better view', and the clear weight of authority" is that plaintiff should bear same burden in proving venue as

it does in proving jurisdiction) (citing Pfeiffer v. International Academy of Biomagnetic Medicine, 521 F. Supp. 1331, 1336 (E.D. Mo. 1981)).

In this case, however, there is another wrinkle. Neither side denies that the forum selection clause would require trial in Fulton County, Georgia. The question is not the validity of the clause, but the validity of the contract. Under the laws of both Wisconsin and Georgia, a party seeking to rely on a contract must prove the existence of the contract. See, e.g., Bantz v. Montgomery Estates, Inc., 163 Wis. 2d 974, 984, 473 N.W.2d 506, 510 (1991) (employee asserting existence of employment contract bears burden of proof); Household Utilities, Inc. v. Andrews Co., Inc., 71 Wis. 2d 17, 28-29, 236 N.W.2d 663, 669 (1976) (burden of establishing existence of contract on person attempting to recover for breach); Zurich American Ins. Co. v. General Car & Truck Leasing System, Inc., 258 Ga. App. 733, 735, 574 S.E.2d 914, 916 (2002) (party asserting existence of contract has burden of proving its existence and terms); Foreman v. Eastern Foods, Inc., 195 Ga. App. 332, 333, 393 S.E.2d 695, 697 (1990) (same). I remain convinced that it was proper to require defendant to bear the burden of proving the existence of the contract.

Only one issue remains before I can turn to the merits of the controversy: the standard to apply to the determination of the disputed issues of fact. The issue arises because the question of venue is intertwined with the merits of the case. In such a circumstance, applying a preponderance of the evidence standard to a preliminary

determination runs the risk of overstepping the jury's role in deciding issues of fact. Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 677 (1st Cir. 1992) (deciding issue of personal jurisdiction and observing that troubling issues of issue preclusion or "law of the case" may arise if court makes factual findings at pretrial hearing by preponderance of evidence). This does not mean, however, that the inquiry should not be undertaken. Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676-77 (7th Cir. 2001) (holding that judge cannot ignore presence of contested facts and rely simply on parties' allegations; "[w]hen jurisdiction or venue depends on contested facts — even facts closely linked to the merits of the claim — the district judge is free to hold a hearing and resolve the dispute before allowing the case to proceed").

In Boit, 967 F.2d at 675, the court noted that although many motions to dismiss brought under Rule 12(b)(2) or (3) can be resolved on a prima facie standard, reserving the final jurisdictional determination for the jury, there will be times when deferring the determination will impose an unfair burden on the defendant. At those times, the court suggested, the district court may take an intermediate course between requiring the plaintiff to show a prima facie case and requiring it to prove jurisdiction by a preponderance of the evidence: making the plaintiff show the likelihood of the existence of each fact necessary to support personal jurisdiction. Id. at 677. Although Boit was addressing a question of personal jurisdiction, the procedure is equally well suited to questions of venue raised on a

motion to dismiss.

Defendant argues that it is unnecessary to give the jurisdictional facts any special treatment because the merits are not really intertwined with motion to dismiss. I do not share that view. The central question for both venue and liability is whether the parties entered into a contract. If defendant's president signed it, the parties are bound by its terms. Those terms include the provision that disputes must be tried in Georgia and additional provisions that require plaintiff to sell exclusively to defendant at the lowest prices that plaintiff charges for similar products in the southeast United States. It is true, as defendant points out, that in the suit in this court, plaintiff is seeking nothing more than full payment from defendant for all outstanding invoices. It is only in the companion suit that defendant has filed in Georgia that the contract terms are at issue. However, defendant has not yet filed an answer. Presumably, if its motion to dismiss is denied, defendant will amend its answer to assert as affirmative defenses in this court the same claims it is alleging in the Georgia suit: that plaintiff breached the contract with defendant both by selling to competitors of defendant and by not giving defendant the bargained for prices. Thus, there is a real danger that the findings that must be made to determine venue will have a preclusive effect that will deprive the parties of their right to have a jury decide the facts of their dispute. To avoid this danger, I will frame the findings as conditional or tentative and will consider the *likelihood* that defendant will be able to prevail on its contention that venue is

not proper in this court.

I turn then to a determination of the facts. From the evidence adduced at the evidentiary hearing, I make the following conditional findings of fact. (In a number of instances, I have summarized the testimony of the witnesses, without making a finding as to the content of the testimony, so as to show the factual disputes that exist.) Defendant moved before trial to exclude evidence of the parties' post-contract behavior. I denied the motion on the ground that the way the parties behaved after the contract negotiations ended was highly material in determining the existence of a contract.

CONDITIONAL FINDINGS OF FACT

Plaintiff Latino Food Marketers, LLC, is a Wisconsin corporation with its principal place of business in Monroe, Wisconsin. It is a distributor of dairy food products. Its members are Fred Yoder, Martina Leal and Miguel Leal, all of whom are citizens of Wisconsin, and Albert Garcia, who is a citizen of Florida. Martina and Miguel Leal and David Webster own Mexican Cheese Producers, a producer of Latino cheese, which plaintiff distributes. (The parties use the term "Latino cheese" to refer to cheeses that have their origin in Latin countries or that appeal to people who enjoy Hispanic or Latino food.) Defendant Ole Mexican Foods, Inc., is a Georgia corporation with its principal place of business in Norcross, Georgia. Its president is Veronica Moreno. It is in the business of

manufacturing tortillas and distributing Latino food products, including cheese.

Defendant was formed in 1988. Since then, its employee force has grown from three to 450 and its sales have increased from $10,000 annually to $52,000,000. It distributes Latino cheeses under its own private label and began buying from plaintiff for that purpose in the fall of 2001. Before then, defendant had been buying cheese produced by Mexican Cheese Producers through a distributor known as CheeseAmerica. Defendant never had a written contract with CheeseAmerica. Sometime before the fall of 2001, Veronica Moreno learned from Miguel and Martina Leal that plaintiff was going to be the sole distributer of the Mexican Cheese Producers cheese that defendant had been buying through CheeseAmerica.

Knowing that defendant was interested in buying large quantities of cheese, plaintiff anticipated having to upgrade and add to its production facilities and equipment. To protect the investment it expected to make, it wanted a written agreement with defendant for a term of years. To that end, the Leals engaged in negotiations with Moreno in October and November 2001. Miguel Leal did most of the negotiating; Fred Yoder drafted the written communications because Miguel Leal is not comfortable with the English language. (Leal and Moreno never met face-to-face during this negotiation period.) Plaintiff's goal was security; defendant's goal was exclusivity and preferential pricing, which it thought would give it an edge in the rapidly growing market for Latino products.

Plaintiff began the contract negotiations by sending a draft contract to defendant, which defendant rejected. On October 11, 2001, plaintiff responded to defendant's rejection of the first draft by a letter signed by Miguel Leal, in which Leal told Moreno that plaintiff would not agree to a non-exclusive license to manufacture, that it would guarantee defendant the lowest prices offered to any of its customers only with respect to its customers in the southeast United States and that it wanted an initial contract term of five years. On October 18, 2001, defendant wrote to plaintiff, saying that it could not authorize an exclusive license because it had existing agreements in place that it would have to breach if it agreed to plaintiff's exclusivity request, that it would agree to a three-year contract term and that it was replacing the option of terminating on 90 days' notice with a termination for cause provision.

On October 22, 2001, Miguel Leal wrote Moreno to suggest that they handle the exclusivity issue by limiting it to specified cheese products that would be listed in an Exhibit A that would be attached to the parties' agreement and made a part thereof. According to Leal, the parties would agree that defendant could amend the exhibit from time to time to eliminate a specific product if it stopped marketing it or to add new products. Leal proposed that the agreement address preferential pricing by saying that plaintiff would agree to sell to defendant at the lowest prices plaintiff offered for the same products in the southeast United States, which would include Virginia and Tennessee and south and Arkansas and Louisiana

and east.

On or around November 9, 2001, Moreno sent Miguel Leal a fax transmission, sending a copy of a revised contract that did not include the exclusivity and pricing provisions that Leal had proposed in his October 22 letter. On November 12, 2001, Yoder prepared and sent defendant a fax transmission that included a letter from Leal and a marked up version of the contract defendant had sent plaintiff on November 9. (Yoder handwrote the revisions; Leal initialed them and signed the agreement on the signature line as plaintiff's "precident.") In the cover letter to defendant, Leal identified each of the revisions that plaintiff was seeking and asked Moreno to initial each of the changes, sign the agreement and fax a copy of it back to plaintiff. Defendant never faxed a copy to plaintiff.

Moreno testified that when she received the November 12 letter from plaintiff, she believed she was getting exactly the contract terms she wanted, which were protective pricing in the southeast and exclusive production of private label cheese, and that she was willing to give plaintiff the exclusive manufacturing rights for all private label cheese in return for these terms. Moreno testified that on November 16, 2001, when she received the November 12 letter and revised agreement from plaintiff, she signed it immediately, made copies and put her own copy into a folder, took it to the receptionist to mail and distributed copies of the signed contract to various people in the company, including her assistant, Kimberly Greenway, who is also defendant's controller. Moreno testified that she told the assistant

controller, Joseph Ashong, and her husband, Edwardo, that she had signed the contract and had sent it to plaintiff by Federal Express. She testified that she had felt pressure to sign the contract because Miguel Leal had written her on October 16 to say that plaintiff would not be selling any cheese to her after October 19, 2001, unless she sent in an order to plaintiff and agreed on the contract.

Greenway testified that she had reviewed the November 12 version of the agreement with Moreno on October 16 and that Moreno had found the proposed changes acceptable, but wanted to review it with her husband before signing it. (As controller, Greenway oversees defendant's accounting and financial functions, contracts, legal matters and other administrative tasks that Moreno asks her to take on. Moreno does not draft her own correspondence in English; she is not fluent in that language. When she needs to send a letter, either Greenway or another employee will draft it.) Greenway testified that Moreno told her later that she had signed the contract but Greenway is not certain whether Moreno gave her a copy of the contract. Greenway was unable to find a copy of the signed contract in her Latino Foods file, which is where she would have put it had she received it. When she checked the file, she found only a copy of the contract signed by Leal, which is the same copy she sent to outside counsel for insurance purposes.

From Monday morning, November 19, 2001, through Wednesday afternoon, November 21, 2001, Fred Yoder was in Monroe, Wisconsin, working out of plaintiff's

Monroe office, while Miguel and Martina Leal were in Mexico for the Thanksgiving holiday. Yoder testified that he was the only employee authorized to open the mail and that plaintiff did not receive a signed contract from defendant on November 19, 2001. He testified that he would have remembered receiving a contract because he had been looking for it and that if he had received it, he would have sent it back to defendant to initial the changes. He testified that he received a check from defendant sometime during the week beginning November 19 and that he assumes that the check was sent in response to telephone calls that plaintiff's clerical employee had made to defendant, warning it that if plaintiff did not receive payment for the two past due invoices, it would stop shipping cheese to defendant.

Moreno testified that defendant sent a check to plaintiff, but it was dated November 19 and would not have been generated before then unless it had been removed from defendant's automated check writing system and prepared by hand. Yoder was unable to explain what would have been in the package that the Federal Express records show was delivered to plaintiff on November 19, if it was not a check, although he thinks it might have been art work for labels sent by defendant.

Miguel Leal testified that during Thanksgiving week, Moreno called him in Mexico, where he and his family were visiting relatives, and told him she was angry because plaintiff had raised its prices and stopped shipping cheese to defendant and that she would never agree to his contract proposals. Defendant's telephone records show a call to Leal's cell

phone number on November 20, 2001, for 24 minutes. Plaintiff's records show a call from Leal's cell phone to Norcross, Georgia, on November 21, 2001, lasting 15 minutes. Defendant's headquarters are in Norcross.

After November 2001, plaintiff stopped trying to negotiate a contract with defendant and proceeded to act as if no contract existed. Plaintiff filled defendant's purchase orders and defendant paid for the product. Plaintiff sought out competing customers in defendant's market area and made no effort to insure that it gave defendant the lowest prices in the southeast. Plaintiff never received any written communication from defendant that referred to a signed agreement between the parties. Defendant never wrote to plaintiff about amending Exhibit A to the contract, although during the period November 2001 through February 2003, defendant ordered more than 30 other products from plaintiff. Defendant never made a formal request for a Certificate of Insurance and plaintiff never provided one. Plaintiff never gave a copy of a contract or a proposed draft of a contract to Albert Garcia, its vice president of sales and marketing, after he started working for plaintiff in April 2002. The Leals and Fred Yoder never told Garcia that defendant had never entered into a long-term contract with plaintiff.

Moreno never told Melanie Battista, defendant's purchasing agent, about the existence of any contract with plaintiff until February 2003. No employee of plaintiff ever mentioned a contract to her.

On April 11, 2002, an agent for Fireman's Fund insurance wrote defendant, asking for a copy of its contract "with cheese manuf" and a copy of the Certificate of Insurance naming defendant as an additional insured. Fireman's Fund had asked for the copy of the contract for renewal information. Defendant supplied the copy of the contract in the form that plaintiff had sent it, with only Miguel Leal's signature on it.

In February 2003, fifteen months after the contract negotiations had ended, Moreno came to Wisconsin to discuss with the Leals the fact that plaintiff had given lower prices to one of defendant's competitors in the southeast. She told the Leals, "Don't forget you have a contract with Ole." Martina Leal responded, "What contract?" The three discussed plaintiff's plans to eliminate all private label marketing in favor of selling only its own brand, but the Leals assured Moreno that they would keep manufacturing cheese for defendant to sell under its private label because defendant was such a big client. Miguel never said anything to Moreno at this meeting about her having called him in Mexico to say she would not enter into a contract with plaintiff.

When Moreno returned from her visit to Wisconsin, she sent plaintiff a copy of the contract in the form Miguel Leal had sent it to her on November 12, 2001, with plaintiff's handwritten revisions and no signature on behalf of defendant or any initials by Moreno on the changes plaintiff had proposed.

Defendant was unable to find any copy of a signed contract until September 8, 2003,

when Gabriela Harper, one of defendant's employees, found a signed contract in a box labeled 2001 financial records stored in a room used by defendant's assistant controller, Joseph Ashong. Ashong testified that he remembered getting the copy of the contract directly from Moreno in November 2001. He testified that when he noticed that the purchases from plaintiff had spiked sharply, he had asked Moreno for a copy of the contract so that he could be sure defendant was paying the right customer at the right "mode of payment" and that Moreno had reached into her desk, pulled out a green folder containing a copy of the contract and given the folder to Ashong to keep, without asking him to make a copy and return the original to her. Although Moreno had asked the employees in May or June of 2003 to look for a copy of the signed contract and Ashong had complied with this request, he did not think to look in his 2001 records before September 8. Defendant did not list Ashong as a witness until after September 8.

Defendant's employees did not have keys to their own offices, although they were generally locked at the end of the work day. Moreno and her husband had keys to all the offices.

Defendant moved its corporate headquarters during the time the parties were negotiating their agreement. In the moving process, it misplaced many documents.

During the period September 2001 through November 6, 2001, defendant ordered $482,187.36 worth of product from plaintiff. Defendant's purchases continued at a similar

rate for the next year and a half.

TENTATIVE CONCLUSIONS

Both parties maintain their positions vigorously. Both have pointed out inconsistencies in the other's stories that raise questions in my mind about the accuracy of their witnesses' testimony. However, on balance, I conclude that defendant has failed to show a likelihood that it can prevail on its contention that venue is not proper in this court because the parties entered into a contract with a forum selection clause.

It is difficult to give credence to defendant's story that Moreno signed a three-year, multi-million dollar contract with plaintiff without checking the signed copy with Greenway, if only to confirm that Moreno had an accurate understanding of the legal effect of plaintiff's proposed changes. It is not likely that Moreno returned the contract to plaintiff on the same day that she received it despite having told Greenway that she wanted to check it over with her husband and with Joseph Ashong before she mailed it, that she made her own copies of the contract and that she took the contract to the receptionist to mail without even preparing a cover letter or asking Greenway, the receptionist or another native English-speaker to prepare one. Such a response would have been unusually casual in light of the protracted negotiations between the parties over the exact wording of the key provisions of

the contract and slightly bizarre for the president of a company doing $52,000,000 worth of business.

It seems more than a coincidence that neither Moreno nor Greenway could find a copy of the signed contract, if in fact it was signed in November 2001. Although the company moved its headquarters and misplaced documents in the process, it is unlikely that both Greenway and Moreno would have lost their copies of the same document in the move. It is particularly unlikely that Greenway would have "lost" her copy, since it was her practice to file all signed contracts in their appropriate files and she did not lose the Latino Foods file in the move.

Joseph Ashong's story does not hang together. He testified that he had asked Moreno for a copy of the contract with plaintiff after he noticed that the purchases from this vendor were rising rapidly, that the reason he had done so was to be sure that defendant was paying the right customer in the right manner and that he remembered Moreno handing him the contract in a green folder. Setting aside the dubious proposition that Ashong would retain a clear memory of any specific file almost two years later, why would Moreno have given him her only copy without asking him to make his own copy and return it to her? Why would Ashong not have kept a copy of the contract at hand for the duration of the parties' relationship rather than packing it away with his accounting files for 2001 if he considered the contract so important that he needed his own copy of it? And why would he have

known about the contract when the purchasing agent did not and she had the hands-on responsibility for the purchase of cheese from plaintiff? And finally, why would defendant not have listed Ashong as a witness until September 8, when he was the one Moreno allegedly told about signing the contract and he had an allegedly clear memory of having received a copy of the signed version?

On the other hand, plaintiff's story stumbles over the disputed November 19 package from Federal Express. Fred Yoder maintains that the package contained a check; Moreno testified that the automated accounting system could not have produced the check in time to send it to plaintiff on November 16. The fact is that Yoder has no clear memory of what the package contained when plaintiff received it on November 19. Despite this discrepancy, I am not persuaded that the package contained a signed copy of the contract. The parties had been exchanging drafts by fax throughout the fall; they had never used Federal Express for this purpose. The directions from plaintiff on the November 12 fax were explicit: initial the revisions, sign the contract and fax it back to us. Why would Moreno have disregarded the directions if she was as pleased with the proposed final draft as she says she was? If, as she testified, she felt pressure from plaintiff to sign the contract by October 16 so that plaintiff would continue to ship cheese, why would she not have sent the signed contract by fax, as directed? Isn't it more likely that what she sent by Federal Express to plaintiff on November 16 was a check to bring defendant's account up to date so that plaintiff would not

stop its cheese deliveries?

Finally, if defendant executed the contract that plaintiff worked so hard to achieve, it makes no sense for plaintiff to have ignored it as soon as it was signed. Yet that it was it did. Certainly, the Leals would have known that defendant would find out about their efforts to solicit new accounts in the southeast, giving defendant cause to rescind the contract immediately. Why would plaintiff jeopardize the security it had achieved in a written contract by deliberately breaching its provisions?

There is an additional question raised by the correspondence with defendant's insurance agent concerning a cheese manufacturing contract, which suggests that Kimberly Greenway believed that defendant had a contract with plaintiff in the form signed by Miguel Leal. The basis for her belief is unclear. She did not have a copy of a contract signed by Moreno. I am not persuaded that this piece of evidence is sufficient for defendant to prove the existence of a contract, even when considered with the oddity of the Fed Ex package.

The evidence is not one-sided. A jury might come to a different conclusion from mine after hearing the witnesses at trial and reviewing the evidence. Nevertheless, I am convinced at this stage that the likelihood is that defendant will be unable to prove to a jury that Moreno signed the November 12, 2001 version of the contract in November 2001.

For the same reason that I think it unlikely that defendant will be able to prove the existence of a valid contract, it is unlikely that defendant will be unable to prove that the

parties are bound by the contract even if Moreno never signed it. The more persuasive evidence is that Moreno did not agree to the terms proposed by plaintiff. Without evidence showing that the parties intended to be bound by the terms of the contract, no less formal contract can be said to exist. Therefore, I find that the forum selection clause does not come into play and that venue is proper in this court.

ORDER

IT IS ORDERED that the motion to dismiss for improper venue filed by defendant Ole Mexican Foods, Inc. is DENIED.

Entered this 24th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge