IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

INTERCOAST CAPITAL COMPANY, Plaintiff, vs. WAILUKU RIVER HYDROELECTRIC LIMITED PARTNERSHIP, and UNION BANK OF CALIFORNIA, N.A., Defendants.	**No. 4:04-cv-40304** **ORDER ON DEFENDANTS' MOTION TO DISMISS OR TRANSFER AND PLAINTIFF'S MOTION TO AMEND**

Currently before the Court are motions to dismiss for improper venue brought by Defendants Wailuku River Hydroelectric Limited Partnership ("Wailuku") and Union Bank of California, N.A. ("Union Bank"), pursuant to Fed. R. Civ. P. 12(b)(3). Defendants alternatively move to transfer the case to the United States District Court for the District of Maryland pursuant to 28 U.S.C. 1404(a).[1] Plaintiff InterCoast Capital ("InterCoast") resists the motion, arguing venue is proper in the Southern District of Iowa.

Also before the Court is Plaintiff's motion to amend the complaint to add Bankers Trust as a Defendant and enlarge its prayer for relief to request a temporary restraining order, preliminary and permanent injunction.[2] Defendant Union Bank

[1] Although Wailuku and Union Bank filed separate motions, Union Bank incorporates by reference the memorandum filed by Defendant Wailuku. Accordingly, the separate motions are referred to collectively as one motion.

[2] In its motion, Plaintiff requests "expedited consideration of *this* motion in order that its *request* for temporary restraining order may also be promptly scheduled for consideration." It is unclear whether Plaintiff intended its motion to amend to also constitute a motion for temporary restraining order or preliminary injunction. Local

concedes that amendments are freely granted and does not resist the motion to amend. However, Defendant Wailuku resists the motion, arguing it is an attempt to correct

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Rule 65.1 ("LR 65.1") requires that a request for preliminary injunction or temporary restraining order must be filed as a separate motion. Furthermore, the current motion does not satisfy the pleading requirements of Federal Rule of Civil Procedure 65(b), which states in pertinent part,

> A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

If Plaintiff desires preliminary injunctive relief, it should be done in a separate pleading in compliance with both Federal Rule of Civil Procedure 65 and LR 65.1.

venue deficiencies and should be denied as futile since venue is improper with or without the presence of Bankers Trust. The parties have not requested a hearing. The matter is fully briefed and ready for disposition.

I. JURISDICTION AND VENUE

In its Complaint, InterCoast alleges federal jurisdiction based on diversity of citizenship. Plaintiff InterCoast is a Delaware corporation with its principal place of business currently located in Dakota Dunes, South Dakota. Defendant Wailuku is a limited partnership with its principal place of business in Honolulu, Hawaii. Defendant Union Bank is a California banking corporation with its principal place of business in San Francisco, California. The amount in controversy alleged is in excess of $75,000. The parties do not dispute these jurisdictional facts.

The Complaint next alleges venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) and (b) because this is a diversity action and the Southern District of Iowa is a district in which Defendants are subject to personal jurisdiction and it is where a substantial part of the events giving rise to the claim occurred. The Defendants dispute the accuracy of Plaintiff's venue allegations.

II. PERTINENT FACTS

Defendant Wailuku, through the State of Hawaii, issued $25-million in public bonds to fund a hydroelectric construction project (the "Facility") in Hilo, Hawaii. The bonds mature in 2021 and are supported by a letter of credit issued by Defendant Union Bank. Plaintiff InterCoast also loaned Wailuku approximately $8.1-million

toward the project, which is also due with interest in 2021. The InterCoast debt is subordinate to the Union Bank debt.

On December 1, 1991, InterCoast entered into a Debt Service and Working Capital Credit Agreement ("Credit Agreement") with Wailuku to loan up to $6-million to provide support for debt service and certain working capital.[3] As security for its obligation under the Credit Agreement, InterCoast obtained a letter of credit from Bankers Trust Company, N.A. ("Bankers Trust"), an Iowa banking corporation with its principal place of business in Des Moines, Iowa. To date, Wailuku has drawn approximately $944,000 on InterCoast's letter of credit.

The terms of the Credit Agreement require Wailuku to reimburse InterCoast for its advances, with interest, upon the earlier of either the maturity date of Wailuku's public bonds or redemption of the public bonds by Wailuku. Under section 7.1(b) of the Credit Agreement, default occurs upon breach of a covenant therein. Pertinent to this action is the covenant in Section 6.2 of the Credit Agreement ("Section 6.2"):

> [Wailuku] [w]ill give prompt notice in writing to InterCoast of the occurrence of any Event of Default or Unmatured Event of Default and of any other development, financial or otherwise, which might adversely effect [sic] its business, prospects, properties or affairs or the ability of Wailuku to pay, repay or otherwise perform the Obligations.

Subsequent to entering into the Credit Agreement, Wailuku encountered changes that affected its ability to perform the obligations within the covenant in section 6.2.

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[3] The Credit Agreement was amended on May 17, 1993, and January 10, 1994; those amendments do not affect the present motions.

These changes came to the attention of InterCoast by way of the February 4, 2004, audit report of Wailuku's 2002 and 2003 financial statements. The auditors noted substantial losses and expressed uncertainty about Wailuku's ability to continue the project. Wailuku did not provide InterCoast notice of these financial developments as required by Section 6.2.

On April 6, 2004, InterCoast sent Wailuku written notification that an event of default had occurred as a result of Wailuku's failure to provide InterCoast notice of these financial developments. Wailuku was further informed that as a result of this event of default, the total amount it borrowed from InterCoast became due and payable. The letter reminded Wailuku that the condition precedent to all advances was that "representations and warranties contained in Article V shall be true and correct as of the date such advance is requested." Representations and warranties in Article V include, "[n]o material adverse change in business, financial condition, prospect or results of operations of Wailuku has occurred since the date of its formation." Accordingly, the letter informed Wailuku that a material adverse change had occurred, and InterCoast would not allow any further advances to Wailuku for the benefit of either Wailuku or Union Bank from its letter of credit with Bankers Trust. The letter requested that within thirty days Wailuku provide InterCoast with adequate written assurance of its ability to meet its obligations as required by the Credit Agreement.

By June 4, 2004, Wailuku had not provided those assurances, so Intercoast brought this action, requesting contract remedies and declaratory relief (both affirmative

and defensive) from Wailuku, as well as injunctive relief against Wailuku, and against Union Bank acting on Wailuku's behalf. In the Complaint, InterCoast asserts venue is proper pursuant to 28 U.S.C. § 1391(a) and (b). Wailuku and Union Bank responded by filing motions to dismiss, arguing venue in the Southern District of Iowa is improper. Defendants alternatively moved to transfer venue to the District of Maryland, arguing the Southern District of Iowa is an inconvenient forum for all parties. Plaintiff resists these motions.

III. DEFENDANTS' MOTION TO DISMISS

Defendants argue InterCoast's allegation that venue is proper under 28 U.S.C. § 1391 is clearly in error. Defendants further argue venue is not proper in the Southern District of Iowa as there is no connection with this District since the Credit Agreement was between (1) a Hawaii limited partnership (Wailuku) which is managed and operated in Annapolis, Maryland, by Synergics, Inc., a non-party to this action; (2) a California Banking Corporation (Union Bank); and (3) a Delaware Corporation with its principal place of business in Dakota Dunes, South Dakota (InterCoast). Defendants' final argument is that the clause in the Credit Agreement that purports to be a forum selection clause is invalid and therefore not enforceable.

Plaintiff resists this motion, arguing that at the time the Credit Agreement was entered into, InterCoast's principal place of business was Davenport, Iowa. Plaintiff also asserts that in any proceeding brought under the terms of the Credit Agreement and accompanying Subordinate Note, Wailuku is expressly subject to Iowa law, and

has expressly waived any right to assert the doctrine of forum nonconveniens or to object to venue.

A. STANDARD FOR MOTION TO DISMISS PURSUANT TO RULE 12(b)(3)

Federal Rule of Civil Procedure 12(b)(3) allows a pre-answer challenge to venue. Fed. R. Civ. P. 12(b)(3). When venue is challenged, "[a] court is not obliged to determine the 'best' venue for a cause of action pending before it, but rather must determine only whether or not its venue is proper." Seariver Mar. Fin. Holdings, Inc. v. Pena, 952 F. Supp. 455, 459 (S.D. Tex. 1996).[4]

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[4] In their reply brief, Defendants assert that once venue is challenged, it is Plaintiff's burden to prove venue is proper; Defendants do not cite authority for this assertion. A search of Eighth Circuit law on the issue was unproductive; however, Wright and Miller's treatise and other jurisdictions provide some guidance.

> If a proper objection is made to venue, it is for the court to determine whether the objection is well taken. The court, rather than a jury, decides contested fact issues relating to the venue question. There are cases holding that the burden is on the objecting defendant to establish that venue is improper. But 'the better view,' and the clear weight of authority, is that, when objection has been raised, the burden is on the plaintiff to establish that the district he chose is a proper venue.

15 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3826 (3d ed. Supp. 2004) (footnotes omitted). Compare Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1138 (9th Cir. 2004) ("After reviewing the available authorities from outside of our circuit, we are persuaded that, in the context of a Rule 12(b)(3) motion based upon a forum selection clause, the trial court must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party . . ."), and Pacer Global Logistics, Inc. v. Nat'l Passenger R.R. Corp., 272 F. Supp. 2d 784, 788 (E.D. Wis. 2003) ("Venue is best treated as an affirmative defense, and the defendant has the burden of establishing that it is improper."), and Int'l Truck and Engine Corp. v. Quintana, 259 F. Supp. 2d 553, 558 (N.D. Tex. 2003) ("Defendants move to dismiss for lack of proper venue pursuant to Fed. R. Civ. P.

> To resolve such motions when genuine factual issues are raised, it may be appropriate for the district court to hold a Rule 12(b)(3) motion in abeyance until the district court holds an evidentiary hearing on the disputed facts. Whether to hold a hearing on disputed facts and the scope and method of the hearing is within the sound discretion of the district court. Alternatively, the district court may deny the Rule 12(b)(3) motion while granting leave to refile it if further development of the record eliminates any genuine factual issue. Upon holding an evidentiary hearing to resolve material disputed facts, the district court may weigh evidence, assess credibility, and make findings of fact that are dispositive on the Rule 12(b)(3) motion. These factual findings, when based upon an evidentiary hearing and findings on disputed material issues, will be entitled to deference.

Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1139-40 (9th Cir. 2004) (internal citations omitted). "To survive a motion to dismiss for improper venue when no evidentiary hearing is held, the plaintiff need only make a prima facie showing of venue." Mitrano v. Hawes, 377 F.3d 402, 405 (4th Cir. 2004) (citing Delong Equip. Co. v. Wash. Mills Abrasive Co., 840 F.2d 843, 845 (11th Cir. 1988)).

12(b)(3). In so doing, the burden is on Defendants to demonstrate affirmatively that Plaintiffs filed this lawsuit in an improper venue."), and Darby v. United States Dept. of Energy, 231 F. Supp. 2d 274, 277 (D.D.C. 2002) ("To prevail on a motion to dismiss for improper venue, the defendant must present facts that will defeat the plaintiff's assertion of venue."), with Beckley v. Auto Profit Masters, L.L.C., 266 F. Supp. 2d 1001, 1003 (S.D. Iowa 2003) ("Once a defendant raises the issue of proper venue by motion, the burden of proof is placed upon the plaintiff to sustain venue.") and Davis v. Am. Soc'y of Civil Eng'rs, 290 F. Supp. 2d 116, 121 (D.D.C. 2003) (citing the Fourth and Federal Circuits as well as district courts in the District of Columbia, Texas, Ohio, Michigan, Illinois, Connecticut, and Missouri and concluding, "[a]lthough the D.C. Circuit has not identified the party who bears the burden in a challenge to venue, the majority of courts appear to place the burden on the plaintiff").

B. DISCUSSION – MOTION TO DISMISS

As a preliminary matter, the Court finds an evidentiary hearing is unnecessary to resolve the issue of venue in the present case. Documentary evidence and arguments in support and resistance of venue are already part of the record. While the parties dispute the appropriateness of venue, they do not dispute facts that are material to the issue. Accordingly, the Court is able to resolve the issue on the current record. The Court now turns to Defendants' arguments.

1. 28 U.S.C. § 1391

Defendants attack InterCoast's allegation in the Complaint that venue is proper in this District pursuant to 28 U.S.C. § 1391(a) and (b). Defendants first point out that § 1391(b) applies to actions other than those based on diversity; therefore, an assertion of venue based on § 1391(b) is clearly in error.

Title 28 U.S.C. § 1391 states in pertinent part:

> (a) 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.
> (b) A civil action wherein jurisdiction is not founded solely 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 may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a), (b).

As a technical matter, the Court is persuaded Defendants are correct. Venue in an action based solely on diversity cannot be brought pursuant to § 1391(b). While InterCoast erroneously cited both § 1391(a) and (b), it has pleaded facts consistent with § 1391(a). InterCoast asserts that Defendants are subject to personal jurisdiction in this District, and a substantial part of the events giving rise to the claim occurred in this District. Section 1391(b) does not mention personal jurisdiction; therefore, InterCoast's assertions are consistent with § 1391(a) rather than § 1391(b). The Defendants have not asserted lack of personal jurisdiction as a basis for the present motion.

While under some circumstances naming the wrong subsection of a statute may be fatal, the Court will not so find in the present case. InterCoast erroneously named both subsections but pleaded facts that clearly identify which subsection it is relying upon. Under the circumstances, this appears to be a drafting oversight rather than an erroneous legal assertion.

2. InterCoast's Principal Place of Business

InterCoast first asserts the Credit Agreement has connection with this District since it was negotiated and entered into while InterCoast's principal place of business was in Davenport, Iowa. InterCoast did not move to Dakota Dunes, South Dakota, until 2003. InterCoast next asserts the letter of credit also has a connection with this

District, explaining that previous to the formation of the Credit Agreement, Wailuku and Union Bank entered into a Reimbursement and Low Flow Facility Agreement ("Facility Agreement"). Through the Facility Agreement, Union Bank supported the financing of Wailuku's hydroelectric project, providing a line of credit to support Wailuku's reimbursement and debt service obligations in the event of low water-flow. InterCoast asserts the Credit Agreement between Wailuku and InterCoast was entered into to support Wailuku's debt service obligations under the Facility Agreement in the event Wailuku exhausted the similar line of credit it held with Union Bank.

Pursuant to the Credit Agreement, InterCoast obtained a line of credit from Bankers Trust, an Iowa banking corporation with its principal place of business in Des Moines, Iowa. An Irrevocable Letter of Credit dated June 28, 1998, and applications for advances on the line of credit were made to Bankers Trust by Union Bank on behalf of Wailuku. In its application for the letter of credit and in requests on behalf of Wailuku for advances on that letter of credit, Union Bank certified that Wailuku's cash position was insufficient to pay for its debt service and working capital needs. Notifications of the Letter of Credit and advances were sent to an Intercoast representative in Des Moines, Iowa.[5] At the time this motion was filed, Wailuku had drawn

[5] InterCoast submits copies of the June 25, 1998, Bankers Trust Irrevocable Letter of Credit and the June 2, 2003, draw on the letter of credit, both of which are signed by Union Bank. The June 25, 1998, Irrevocable Letter of Credit ("Letter of Credit") states that it was established at the request of InterCoast in compliance with Section 8.1 of the Credit Agreement between InterCoast and Wailuku. The Letter of Credit states that advances would be made at the request of Union Bank.

approximately $944,000 on the Letter of Credit. InterCoast argues Venue is proper in this District as asserted in the Complaint since it seeks to enjoin Union Bank from acting on Wailuku's behalf by attempting to draw on the Bankers Trust line of credit.

The Defendants do not directly rebut this argument; rather, Defendants respond by arguing that on motions to dismiss pursuant to Rule 12(b)(3), the burden is on the Plaintiff to sustain venue, and Plaintiff may only rely on the language of the Complaint. According to Defendants, since Plaintiff did not include the Credit Agreement, Subordinate Note, or Letter of Credit with the Complaint, the language therein should not be relied upon to defeat this motion. Defendants point out that the basis of Plaintiff's Complaint is not the terms or the formation of the Credit Agreement, rather the assertion is that an event of default occurred but the Complaint does not assert that such an event occurred in Iowa. Defendants further allege that arguments and facts asserted in resistance to this motion are Plaintiff's attempt to informally amend the Complaint, and those facts cannot be considered on a Rule 12(b) motion, unless it is a Rule 12(b)(6) motion being treated as a motion for summary judgment.

Plaintiff responds to this argument by citing Wright & Miller, arguing it is proper for the Court to consider matters outside the Complaint to determine whether venue is proper.

> Practice on a motion under Rule 12(b)(3) is relatively straight-forward. All well-pleaded allegations in the complaint bearing on the venue question generally are taken as true, unless contradicted by the defendant's affidavits. A district court may examine facts outside the complaint to determine whether its venue is proper. And, as is consistent with practice in

> other contexts, such as construing the complaint, the court must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff.

5B Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 1352 (3d ed. 2004) [hereinafter Wright & Miller § 1352].

InterCoast asserts there are several reasons venue is proper in this District. First, its principal office was in this District at the time the Credit Agreement was negotiated and formed. Second, the bank it obtained the letter of credit from, Bankers Trust, is located in this District. Third, Union Bank, acting on behalf of Wailuku, sought advances from Bankers Trust in Iowa. Fourth, InterCoast argues it would suffer harm in this District if Union Bank were to attempt to use its authority to submit a borrowing request against the letter of credit from Bankers Trust; InterCoast argues that the suffering of harm in this District would make venue proper. See, e.g., Neufeld v. Neufeld, 910 F. Supp. 977, 986 (S.D.N.Y. 1996) (finding venue was proper since "[m]ost of the events in question in this case did take place in, or at least had their impact in, [this district]: i.e., almost all of the harm alleged to have been suffered by plaintiffs occurred within [this district].").

Defendants' response to this argument is that the negotiation of the Credit Agreement is not at issue in this case; therefore, where the Plaintiff was located at the time the Agreement was formed is of no consequence. At issue is an alleged event of default, and no parties were located in Iowa at that time. Rather, the control and data

centers for the Facility are located in Annapolis, Maryland, as are all officers and directors of Synergics, Inc., Wailuku's managing partner.

Although the formation of the Credit Agreement is not at issue, terms of the Agreement are at issue. Defendants do not dispute the fact that they applied for the letter of credit and made advances on that letter to Bankers Trust in Iowa. Since representations made by Union Bank regarding the financial status of Wailuku are related to the event of default, these transactions made in Iowa are directly related to the issues in this case. Furthermore, the change in the financial condition of Wailuku which precipitated the event of default occurred during 2002 and 2003 and was reported in the February 2004 audit report. InterCoast's principal place of business was located in Davenport, Iowa, in 2002 and part of 2003. Defendants' argument that the issues in this case have nothing to do with Iowa is not persuasive.

3. Forum Selection Clause

InterCoast next argues that any disputes arising under the Credit Agreement and/or Subordinate Note are expressly subject to Iowa law, and therein the Defendants waived any right to assert the doctrine of forum nonconveniens or to object to venue.[6]

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[6] Paragraph four of the Subordinate Note incorporates the Credit Agreement by reference and states,

> This Note is the "Note" of Wailuku referred to in, is issued pursuant to, is subject to the provisions of, and entitles its holder to the benefits of, the Agreement and the other Loan Documents (as they may be amended, supplemented or otherwise modified from time to time) to which reference is hereby made for a more complete statement of the terms, provisions and conditions under which this Note and the Advances evidenced hereby are governed and under which the Advances evidenced hereby are

Defendants reiterate that neither a copy of the Credit Agreement nor any language from the Credit Agreement can be found anywhere in the Complaint and should not be considered. However, Defendants propose that even if the Court were to consider the language of the Credit Agreement and other facts outside of the Complaint, Plaintiff still fails to meet its burden of proving venue is proper because the purported forum selection clause is permissive rather than mandatory, and therefore it is unenforceable.

Section 8.8 of the Credit Agreement contains a forum selection clause which states in pertinent part,

> Choice of Law; Jurisdiction; Waiver of Jury Trial.
> The loan documents shall be governed by and construed in accordance with the internal laws (and not the law of conflicts) of the State of Iowa. Wailuku and, by execution hereof, the managing general partner hereby irrevocably submit to the non-exclusive jurisdiction of any United States Federal or Iowa State Court sitting in Davenport, Iowa in any action or proceeding arising out of or relating to any loan documents and Wailuku irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in any such court. Wailuku and, by execution hereof, the managing general partner irrevocably waive all right to a trial by jury in any suit, action or other proceeding in respect of the transactions contemplated hereby.

The Subordinate Note dated December 18, 1991, was signed by Wailuku in conjunction with the Credit Agreement and states in pertinent part,

> This note shall be governed by and construed in accordance with the internal laws of the state of Iowa.

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made and are to be repaid. Capitalized terms used, and not otherwise defined, herein are used with and have the meanings ascribed to them in the Agreement.

> Wailuku waives trial by a jury and any right it may have to assert the doctrine of forum non conveniens or to object to venue to the extent any proceeding is brought hereunder or in accordance with the agreement. Service of process, sufficient for personal jurisdiction in any action against Wailuku, may be made by registered or certified mail, return receipt requested, to its address indicated in the agreement.

Defendants argue that the purported forum selection clause merely states Iowa is the choice of law and gives non-exclusive jurisdiction to courts in Iowa. Defendants cite Johnson Controls, Inc. v. City of Cedar Rapids, 713 F.2d 370, 374 (8th Cir. 1983), and assert that ambiguities should be resolved against InterCoast as drafter of the Credit Agreement. However, at issue in Johnson Controls were two contradictory clauses within the contract. The Eighth Circuit reasoned, "[i]f any ambiguity has been created by the incorporation of both of these clauses in the contract, that ambiguity must be resolved against the drafter of the contract . . . ." Id.

In the present case, Defendants are not pointing to competing clauses that create an ambiguity; rather, Defendants argue the use of the term "non-exclusive" makes the clause permissive. Arguably, ambiguous terms are not the same as permissive or mandatory terms; therefore, Johnson Controls is not on point for the case at bar.

Furthermore, Defendants acknowledge that the Eighth Circuit has not decided whether there is a distinction between mandatory and permissive forum selection clauses. Instead, Defendants cite Beckley v. Auto Profit Masters, LLC, 266 F. Supp. 2d 1001 (S.D. Iowa 2003), and urge the Court to adopt that position along with the position of circuit courts which have found that permissive forum selection clauses are unenforceable.

In Beckley, the district court relied on K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft, a Tenth Circuit case that examined forum selection clause language and its bearing upon a Rule 12(b)(3) motion to dismiss for lack of venue. Id. (citing K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 314 F.3d 494, 498-500 (10th Cir. 2002)).

In K & V Scientific Co., Inc., the plaintiff filed a breach of contract claim in Colorado state court, defendant removed to U.S. District Court of Colorado, and then filed a motion to dismiss for lack of venue, arguing there was a forum selection clause which required the case be brought in Munich, Germany. K & V Scientific Co., Inc., 314 F.3d at 497. The district court agreed, reasoning the forum selection clause was unambiguous and enforceable and demonstrated the parties' intent to locate jurisdiction solely in Munich. Id. The Tenth Circuit reversed, finding the forum selection clause contained permissive, not mandatory, language and addressed jurisdiction but not venue; therefore, it was not enforceable. Id. at 499.[7]

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[7] The Tenth Circuit cited several other circuits in arriving at its decision. K & V Scientific Co., Inc., 314 F.3d at 499 (citing John Boutari and Son, Wines and Spirits, S.A. v. Attiki Importers, 22 F.3d 51, 52 (2d Cir. 1994) (finding the district court clearly erred in dismissing a case for lack of jurisdiction based on a forum selection clause that designated that all disputes would come within the jurisdiction of the courts of Greece, reasoning "[t]he general rule in cases containing forum selection clauses is that '[w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive.'") (quoting Docksider, Ltd. v. Sea Tech., Ltd., 875 F.2d 762, 764 (9th Cir. 1989)); Paper Exp., Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992) ("The law is clear: where venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.").

Applying the reasoning set forth in K & V Scientific to the forum selection clause at issue in its own case, the Beckley court concluded that the venue provision was permissive rather than mandatory and was therefore unenforceable to support dismissal for lack of venue. Beckley, 266 F. Supp. 2d at 1004.

In the present case, Defendants' reliance on Beckley and the circuit opinions included therein is misplaced. In those cases, the moving parties attempted to have the cases dismissed by enforcing the forum selection clause. Beckley, 266 F. Supp. 2d at 1003-04. Here, Defendants argue the forum selection clause is unenforceable, and therefore Plaintiff cannot bring the case in this District. Defendants' argument ignores that venue may be proper in more than one district, Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995) (reasoning the general venue "statute does not posit a single appropriate district for venue; venue may be proper in any of a number of districts, provided only that a substantial part of the events giving rise to the claim occurred there"), and that courts afford considerable deference to a plaintiff's choice of forum, Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688, 695 (8th Cir. 1997). Therefore, the question in the case at bar is not whether the forum selection is enforceable, but whether Plaintiff's chosen venue is proper.

The Defendants do not dispute that Iowa law applies. Even if the forum selection clause is considered unenforceable, that would not *prevent* the Plaintiff from bringing the action in the forum designated in the clause if it is otherwise proper. Contrary to Defendants' assertions, the enforceability of the forum selection clause in the present case is not dispositive on the issue of venue.

As a final note, while it is unnecessary to rely on the language in the forum selection clause to determine whether venue is proper, the Court submits that the clause is not as ambiguous as Defendants suggest. Although it references non-exclusive jurisdiction, a fair reading of the clause still identifies courts in a specific area of the State of Iowa.

C. CONCLUSION – MOTION TO DISMISS FOR LACK OF VENUE

Defendants bring this as a motion to dismiss for lack of venue in an attempt to impermissibly shift the burden to InterCoast on what is, in essence, only a motion to transfer venue. The thrust of Defendants' argument for dismissal for improper venue is that Plaintiff cannot rely on facts not alleged in the Complaint on a Rule 12(b)(3) motion to dismiss for improper venue. Defendants remind the Court that unlike a Rule 12(b)(6) motion that can be treated as a motion for summary judgment, this is a Rule 12(b)(3) motion; therefore, the Credit Agreement and Subordinate Note which were not attached to the Complaint cannot be considered. Defendants do not cite authority for this proposition. On the other hand, the Court finds persuasive the insight of the Wright & Miller treatise which suggests the Court may look outside the complaint to determine venue. Wright & Miller § 1352; see also Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1138 (9th Cir. 2004) (considering, in a case of first impression, how the court should consider disputed facts on a motion to dismiss for improper venue under Rule 12(b)(3) and concluding that "[a]fter reviewing the available authorities from outside of our circuit, we are persuaded that, in the context of a Rule 12(b)(3) motion based upon a forum selection clause, the trial court must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of

the non-moving party . . .”). Defendants’ final argument regarding the forum selection clause is entirely beside the point. If an independent basis for venue exists, the allegation that the forum selection clause is unenforceable is irrelevant.

It appears that Plaintiff has alleged facts that support venue in Iowa. The Letter of Credit and advances upon it were made by the Defendants to Bankers Trust, which is located in this District. Since the claim in this case is the alleged event of default by Wailuku, representations made by Union Bank regarding the financial condition of Wailuku in securing the letter of credit and advances thereupon are related to the issues in the case. In addition, the financial status leading to the alleged event of default at issue in this case occurred, at least in part, while InterCoast’s principal place of business was in this District. Although venue may also be proper in another district, that is not the standard for dismissing an action pursuant to Rule 12(b)(3). For the foregoing reasons, Defendants’ motions to dismiss are **denied**.

IV. MOTION TO TRANSFER

Defendants alternatively request the Court transfer this case to the District of Maryland pursuant to 28 U.S.C. § 1404(a) (“§ 1404(a)”), which states in pertinent part, “[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.” 28 U.S.C. § 1404(a) (2000).

A. STANDARD FOR MOTION TO TRANSFER

The congressional intent behind § 1404(a) is to provide “the district court discretion to adjudicate motions to transfer according to an individualized, case-by-case

consideration of convenience and the interests of justice." TSE v. Ventana Med. Sys., Inc., 1997 WL 811566, at *4 (D. Del. Nov 25, 1997) (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988)).

The moving party has the burden of proving a transfer is warranted. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) (citing 1A James Wm. Moore et al., Moore's Federal Practice ¶ 0.345, at 4360 (2d ed. 1995)); Terra Int'l, Inc., 119 F.3d at 695. "In order to show that transfer is proper, the defendant must establish that (1) venue is proper in the transferor court; (2) venue is proper in the transferee court; and (3) the transfer is for the convenience of the parties and witnesses and promotes the interests of justice." Black & Decker Corp. v. Amirra, Inc., 909 F. Supp. 633, 635 (W.D. Ark. 1995) (citing Dugan v. M. & W. Dozing & Trucking, Inc., 727 F. Supp. 417, 418 (N.D. Ill. 1989)); see also Caleshu v. Wangelin, 549 F.2d 93, 96 n.4 (8th Cir. 1977) (reasoning that § 1404(a) does not dispense with the requirement that "venue must be proper in the transferee district").

If jurisdiction is proper in both the transferor and transferee districts, the Court will look at three factors in deciding a motion to transfer pursuant to § 1404(a): "(1) the convenience of the parties; (2) the convenience of witnesses; and (3) the interest of justice." Terra Int'l, Inc., 119 F.3d at 691 (citing 28 U.S.C. § 1404(a)); Stewart, 487 U.S. at 29 ("A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors."). The evaluation is not limited to these factors; rather, the Court should make "a case-by-case evaluation

of the particular circumstances at hand and a consideration of all relevant factors." Terra Int'l, Inc., 119 F.3d at 691 (citing Stewart, 487 U.S. at 29).

In considering these factors, however, the "plaintiff's choice of forum will not be disturbed unless the movant for transfer demonstrates that the balance of convenience and justice weighs heavily in favor of transfer." Kovatch Corp. v. Rockwood Systems Corp., 666 F. Supp. 707, 708 (M.D. Pa. 1986) (citing Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970) (stating "[i]t is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request"). Therefore, "'[m]erely shifting the inconvenience from one side to the other, however, obviously is not a permissible justification for a change of venue.'" Terra Int'l, Inc., 119 F.3d at 696-97.

B. DISCUSSION – MOTION TO TRANSFER

Defendants argue without qualification that venue should be transferred to the District of Maryland. Defendants suggest Maryland is proper because the Facility's management and operations are performed by Synergics, Inc., located in Annapolis, Maryland, and Toal, Raines, Davis and Simmons, the accounting firm that prepared the audit reports upon which InterCoast bases its claims, is also located in Annapolis, Maryland. From that assertion, Defendants proceed to argue for the convenience of the parties, the convenience of witnesses, and the interest of justice, this case should be transferred to the District of Maryland.

Defendants, as the movants, ignore their burden to demonstrate venue is proper, not merely desirable, in the transferee district. Caleshu, 549 F.2d at 96 n.4 ("The

change of venue statute does not dispense with the requirement that venue must be proper in the transferee district.") (citing Van Dusen v. Barrack, 376 U.S. 612, 619-20 (1964)). The Defendants do not present such an argument. Defendants move to dismiss for lack of venue, arguing Plaintiff's chosen venue is improper because the only connection to Iowa is the location of non-party Bankers Trust. Then, in support of transfer, they argue in favor of venue in the District of Maryland based on the location of two non-parties to the suit.

As Plaintiff points out, the interests of Defendant Union Bank differ from those of Defendant Wailuku. In fact, neither Defendant has argued that Union Bank has any connection with Maryland. Although venue can be waived, Union Bank has not expressly waived a challenge to venue in the District of Maryland; it has simply deferred to the arguments in Defendant Wailuku's brief on the motion to dismiss and alternate motion to transfer venue.

For these reasons, the Court finds the Defendants have not satisfied the second requirement of the change of venue statute, that is, that venue is proper in the transferee court. Nonetheless, even if Defendants had demonstrated venue was proper in the District of Maryland, the Court is unpersuaded that transfer would have been appropriate. For that reason, the Court briefly addresses Defendants' arguments.

1. Convenience of Parties

Defendants argue the convenience of the parties supports transfer since none of the parties, including the Plaintiff, are located in Iowa. Defendants dispute Plaintiff's attempt to tie this case to Iowa through the letter of credit, arguing that link is not

substantial and it is outweighed by all the other factors. However, Defendants only articulate reasons why Maryland is a more convenient for Defendant Wailuku, not Union Bank nor Plaintiff. On the other hand, Plaintiff argues Iowa is a convenient forum for itself, and the Plaintiff's choice of forum is entitled to great deference.

Transfer is not appropriate simply because Maryland is a more convenient forum for Wailuku. The Court finds Defendants' argument suggests no more than a shift of inconvenience from itself to Plaintiff, which is an impermissible justification for transfer. Terra Int'l, Inc., 119 F.3d at 695.

2. Convenience of Witnesses

Defendants' primary argument is that all evidence and witnesses involved in this case are located in Maryland and that the convenience of witnesses weighs in favor of transfer. The management firm, Synergics, Inc., is located in Annapolis, Maryland, as is the accounting firm of Toal, Raines, Davis and Simmons, which prepared the audit reports Plaintiff relied on in bringing this action. Defendants argue Plaintiff's chosen forum is therefore clearly inconvenient to all evidentiary matters.

Plaintiff rebuts this argument by pointing out that Defendants have not identified any disinterested witnesses that would be inconvenienced by the present forum. Nor have Defendants suggested that any witnesses would be unwilling or unavailable as a result of the chosen forum.

Defendants' argument in favor of transfer for the convenience of witnesses again merely demonstrates that the inconvenience would be shifted from the Defendants' witnesses to the Plaintiff's witnesses. Defendants have not suggested that an alternative method of presenting witnesses, such as videotaped deposition testimony, would be

insufficient in the present case. By failing to articulate more than a shift of the burden, Defendants have failed to demonstrate sufficient grounds for transfer. Cf. Rick ex rel. Rick, Estate of v. Stevens, 145 F. Supp. 2d 1026, 1038 (N.D. Iowa 2001) (denying defendant's motion to transfer, reasoning, inter alia, defendant had not demonstrated that "any inconvenience of this forum to witnesses can be substantially ameliorated by using the technological facilities of this courthouse to present videotaped depositions or 'real time' testimony via videoconferencing") (quoting Terra Int'l, Inc. v. Miss. Chem. Corp., 922 F. Supp. 1334, 1355 (N.D. Iowa 1996), aff'd Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688 (8th Cir. 1997)).

3. Interest of Justice

Defendants reiterate that the inconvenience caused by the present forum demonstrates that justice would be best served if this case were transferred to the District of Maryland. Plaintiffs argue that the forum selection clause provides that Iowa law governs the contract and that the inclusion of that provision cuts against transfer.

When determining whether transfer is in the interest of justice, the Court may consider the following factors:

> (1) judicial economy, (2) the plaintiff's choice of forum, (3) the comparative costs to the parties of litigating in each forum, (4) each party's ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law.

Terra Int'l, Inc., 119 F.3d at 696 (citing Terra Int'l, Inc., 922 F. Supp at 1962-63).[8]

[8] It is noteworthy that the district court in Terra International observed that the way the court categorizes these factors, i.e. under "convenience of witnesses/parties" or "interest of justice," is irrelevant; rather, what is important is that a case-by-case analysis is used to determine whether transfer is warranted in a particular case. Terra Int'l, Inc., 922 F. Supp at 1962-63.

The only factor that has any particular impact in the present case is Plaintiff's choice of forum, which weighs in favor of leaving the case in Iowa. The Court is not persuaded by Plaintiff's argument that a federal judge presiding over a diversity case in Iowa is any better suited to apply novel issues of Iowa state law[9] than is a federal judge in the District of Maryland. However, the Defendants, whose burden it is to demonstrate that transfer is justified, have not persuaded the Court that justice would be better served if the District of Maryland determined novel areas of Iowa law. Defendants have not asserted, nor does the Court find, that trial efficiency, the means of the parties, nor the interest of justice favor transfer. In fact, with the exception of the convenience of Wailuku's non-party witnesses, the Defendants have failed to set forth any argument that favors transfer. As previously stated, the convenience of witnesses would merely shift the burden to InterCoast, and therefore, without more, it is an impermissible basis upon which to transfer the case.

C. CONCLUSION – MOTION TO TRANSFER

Defendants have not met the initial burden of § 1404 by demonstrating that venue is proper in the transferee district. In addition, even when considering the other factors, Defendants have merely shown that the inconvenience would be shifted to the Plaintiff if the case were transferred. Without more, there is no basis upon which transfer of venue can be justified. Terra Int'l, Inc., 119 F.3d at 696-97. Accordingly, Defendants' motion to transfer venue must be **denied**.

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[9] Plaintiff claims it will assert the "doctrine of adequate assurance" as set forth in the Restatement (Second) of Contracts. Since the Iowa Supreme Court has not yet addressed whether it will adopt the Restatement rule, Plaintiffs argue a judge sitting in Iowa would be in a superior position to make the judgment.

V. PLAINTIFF'S MOTION TO AMEND

The final matter before the Court is Plaintiff's motion to amend the complaint to add Bankers Trust as a Defendant. Defendant Union Bank does not resist Plaintiff's motion. Defendant Wailuku reiterates the arguments made in support of the motion to dismiss, stating this case is improper in this District; therefore, allowing the amendment would be futile. In the alternative, should the Court determine transfer is the appropriate remedy, Wailuku requests that the Court refrain from ruling on the motion to amend and allow the transferee court to rule on the motion.

A. STANDARD FOR MOTION TO AMEND[10]

"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Unless there is a good reason for denial, 'such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the

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[10] Plaintiff asserts Bankers Trust is a proper party to be joined in this action pursuant to Rule of Civil Procedure 20, which states in pertinent part.

> All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Fed. R. Civ. P. 20. Although Defendant Wailuku resists the motion to amend, it does not argue that Bankers Trust is an improper party.

non-moving party, or futility of the amendment, leave to amend should be granted.'" Becker v. Univ. of Neb. at Omaha, 191 F.3d 904, 907-08 (8th Cir. 1999) (quoting Brown v. Wallace, 957 F.2d 564, 566 (8th Cir. 1992)).

B. DISCUSSION AND CONCLUSION – MOTION TO AMEND

In resistance to the motion to amend, Defendant Wailuku reiterates the arguments made in support of its own motion to dismiss and asserts that since venue is improper in this District, the motion to amend is futile. As previously stated, the Court finds venue is proper in this District. Since futility is the sole basis for Wailuku's resistance, the Court finds there is no good reason to deny Plaintiff's motion. Id. Accordingly, Plaintiff's motion to amend the complaint is **granted**.

VI. CONCLUSION – ALL PENDING MOTIONS

In summary, and for the reasons previously stated, the Court orders as follows:

Defendant Wailuku's Motion to Dismiss, or in the Alternative to Transfer (Clerk's No. 3), is **denied**. Defendant Union Bank's Motion to Dismiss, or in the Alternative to Transfer (Clerk's No. 10), is **denied**. Plaintiff InterCoast's Motion to Amend the Complaint (Clerk's No. 14) is **granted**.

IT IS SO ORDERED.

Dated this 19th day of January, 2005.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT