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

D. KENT SISSEL, *et al.*, Plaintiffs, vs. LAURA KLIMLEY, *et al*, Defendants.	No. 3:08-cv-00062-JAJ **ORDER**

This matter comes before the court pursuant to defendant Laura Klimley's ("Klimley") December 19, 2008 Motion to Transfer Pursuant to 28 U.S.C. § 1404(a) (Dkt. No. 21). Plaintiffs resisted Klimley's motion on January 9, 2009 (Dkt. No. 24). On January 21, 2009, Klimley filed a reply brief in further support of her motion to transfer venue (Dkt. No. 27). For the reasons set forth below, Klimley's motion to transfer is granted.

I. PROCEDURAL HISTORY

On June 2, 2008, the plaintiffs, D. Kent Sissel, Timothy Sissel, Holly Vroman, Amanda White, Theo M. Siering, Lila G. Siering, Chelsea A. Oeter, Darlene Oeter, Darin L. Oeter, Herman C. Baker, Renee Baker, James E. Arrowood, Regeana K. Arrowood, Jay D. Tiecke, Margaret A. Tiecke, Beth R. King Mason, Lori J. Ulch, Kenneth C. Leimkuehler, Constance Leimkuehler, and Sally Black ("Plaintiffs"), filed this action in the Southern District of Iowa against the defendants, Laura Klimley, Maxine Eimicke, John Palmero, Hereford Collection and Credit Agency, Inc., and the Victor W. and Maxine Eimicke Foundation ("Defendants") (Dkt. No. 1). Each of the plaintiffs purchased securities from VWE Group, Inc. d/b/a V.W. Eimicke Associates, Inc. ("VWE") after being solicited by mail and telephone. Plaintiffs allege that defendants "engaged in a pattern of corrupt activities including aiding and abetting theft, money laundering and maliciously making false and misleading statements in connection with the performance

and assets of [VWE]; knowingly and maliciously failing to disclose material facts in connection with the performance of the Company, the number of other investors and size of the Company's securities offerings; knowingly and maliciously failing to register the subject securities and provide the required disclosures in accordance with Federal law and Iowa law; engaging in a ponzi scheme; paying themselves and Eimicke family members and associates excessive salaries, dividends and other compensation, and otherwise seeking to unlawfully enrich themselves and the Eimicke family at the expense of Plaintiffs and the other note holders" (Dkt. No. 1, ¶ 1). To remedy this alleged conduct, plaintiffs seek compensatory damages, punitive damages, costs, and attorneys' fees.

On October 27, 2008, defendant Maxine Eimicke ("Maxine Eimicke") filed her answer to the complaint (Dkt. No. 11). On December 9, 2008, defendant John Palmero ("Palmero") requested an extension of time to file his answer (Dkt. No. 19). On December 19, 2008, Klimley filed her answer to the complaint (Dkt. No. 20) and also filed a motion to transfer this litigation to the Southern District of New York pursuant to 28 U.S.C. § 1404(a) (Dkt. No. 21). On January 5, 2009, Palmero filed an affidavit in support of Klimley's motion to transfer (Dkt. No. 22).

Klimley moves, pursuant to 28 U.S.C. § 1404(a), to transfer venue of this matter to the United States District Court for the Southern District of New York. Klimley argues that a transfer is warranted because plaintiffs' counsel represents other individuals in a matter in the transferee district filed on the same day that is nearly identical to this action. Klimley asserts that transfer would further judicial economy and prevent defendants from incurring duplicative litigation costs. Klimley further argues that the balance of convenience weighs in favor of transfer because litigating in Iowa would be burdensome to defendants, nearly all the significant non-party witnesses and material documents are located in the transferee district, and the events underpinning plaintiffs' allegations occurred in the transferee district.

Plaintiffs resist Klimley's motion to transfer, arguing that: (1) plaintiffs intend to call at least eight non-party witnesses that are located in Iowa; (2) it would be more inconvenient for the 19 plaintiffs to travel to New York then it would for three defendants to travel to Iowa; (3) Klimley has failed to prove that the records and documents are difficult to transport to Iowa; (4) the events giving rise to the complaint took place in Iowa; and (5) this case, unlike the matter in the transferee district, requires the court to decide several issues of Iowa law.

II. CONCLUSIONS OF LAW

Section 1404(a) of Title 28, United States Code states "[f]or the convenience of the 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). In deciding a motion to transfer venue, the court must consider: (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interests of justice. Terra Int'l, Inc. v. Mississippi Chem. Corp., 119 F.3d 688, 691 (8th Cir. 1997). However, courts are not limited to considering these factors, but rather shall make a "case-by-case evaluation of the particular circumstances at hand and a consideration of all relevant factors." Id. (citations omitted). In deciding the general "balance of convenience," the court may consider:

> (1) The convenience of the parties;
> (2) The convenience of the witnesses-including the willingness of witnesses to appear, the ability to subpoena witnesses, and the adequacy of deposition testimony;
> (3) The accessibility to records and documents;
> (4) The location where the conduct complained of occurred; and
> (5) The applicability of each forum state's substantive law.

Id. at 696.

In determining the "interest of justice," relevant factors include:

(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.

Id.

"The idea behind § 1404 is that where a 'civil action' to vindicate a wrong–however brought in court–presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court." Continental Grain Co. v. The FBL-585, 364 U.S. 19, 26 (1960). The court gives considerable deference to the plaintiff's choice of forum. See Terra Int'l, 119 F.3d at 695. Therefore, the burden is on the moving party–here, Klimley, to demonstrate that a transfer of venue is warranted. See id. at 691.

A. Where This Matter Might Have Been Brought

Neither party makes any arguments over whether this matter could have been brought in the Southern District of New York. Yet, it appears that defendants are subject to personal jurisdiction in that district based on the fact that they are domiciled in New York. As a result, this court finds that this action could have been brought in the Southern District of New York.

B. Balance of Convenience

1. The convenience of the parties

It is clear that litigating this matter in New York would be more convenient for Klimley than litigating this matter in Iowa. Klimley and Palmero have had no contact with the State of Iowa. Klimley and her co-defendants all reside in New York. Plaintiffs readily concede these points for the sake of argument. However, it is equally clear that litigating this matter in New York would be more inconvenient for plaintiffs than litigating this matter in Iowa. Plaintiffs argue that it would be far less convenient for each of the plaintiffs, some of whom invested relatively small sums with VWE, to travel to New York to litigate this matter.[1] Klimley responds that plaintiffs have failed to provide the court with any basis for determining that the transfer would be unduly burdensome for them. However, the burden is on Klimley to establish that the balance of conveniences favors the transfer. See Terra Int'l, 119 F.3d at 691. Even though it is clear to the court that litigating this matter in New York would be more convenient for Klimley and her co-defendants, a transfer would merely shift this inconvenience to plaintiffs. It would be at least equally burdensome for the plaintiffs to have to travel to New York to litigate their claims as it would for defendants to have to travel to Iowa to defend the suit. "'Merely shifting the inconvenience from one side to the other, however, obviously is not a permissible justification for a change of venue.'" Id. at 696–97 (Scheidt v. Klein, 956 F.2d 963, 966 (10th Cir. 1992)). As a result, the court concludes that Klimley has failed to establish that the convenience of the parties weighs in favor of transfer.

[1]Such individuals can, and should, be deposed by telephone rather than forcing them to appear in New York.

2. *The convenience of the witnesses–including the willingness of witnesses to appear, the ability to subpoena witnesses, and the adequacy of deposition testimony*

Klimley argues that the convenience-of-witnesses factor strongly supports the transfer because ten of the eleven non-party witnesses whose testimony may be significant in this case reside in New York.[2] Because none of these witnesses are Klimley's employees, she expects that subpoenas will be necessary to ensure the trial testimony of all but two of these witnesses.[3] Plaintiffs respond by arguing that Klimley has failed to provide evidence that these witnesses are unable or unwilling to attend a trial in Iowa. Plaintiffs argue that even if these witnesses were unavailable, they would be able to testify by way of deposition. In addition, plaintiffs assert that they intend to call at least eight non-party witnesses that are located in the Southern District of Iowa.

"The convenience of non-party witnesses is generally considered to be one of the most important factors to be weighed in the venue transfer analysis." Medicap Pharmacies, Inc. v. Faidley, 416 F. Supp. 2d 678, 687 (S.D. Iowa 2006) (citation omitted). However, the sheer number of witnesses will not decide which way this factor tips. Terra Int'l, 119 F.3d at 696. The court must "examine the materiality and importance of the anticipated witnesses' testimony and then determine their accessibility and convenience to the forum." Reid-Walen v. Hansen, 933 F.2d 1390, 1396 (8th Cir.

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[2]In an affidavit in support of her motion to transfer, Klimley lists eleven non-party witnesses that she expects to call at trial: Brooks Klimley, Alicia Eimicke, Thomas Amlicke, Michael A. Meyers, Claire Gruppo, Loretta Buscarino, Elizabeth Longinetti, Michelle Bronski, Barbara Demuth, Brian Dutzer, and Leann Pignone. Klimley believes that all of these non-party witnesses reside in New York with the exception of Leann Pignone, who is believed to reside in Geneva, Illinois. Neither this court nor the Southern District of New York has the ability to subpoena Ms. Pignone to testify.

[3]Of the ten non-party witnesses that reside in New York, Klimley expects to have to subpoena each of them to testify with the exception of her husband, Brooks Klimley, and her sister, Alicia Eimicke.

1991). "The burden is on the [the moving party] to provide these facts by way of affidavit or other information." Id. (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 258 (1981)). "[T]he party seeking the transfer must clearly specify the essential witnesses to be called and must make a general statement of what their testimony will cover." Medicap Pharmacies, Inc., 416 F. Supp. 2d at 687 (citation omitted).

Klimley has provided an adequate statement regarding the non-party witnesses she intends to call. Ten of the non-party witnesses that Klimley plans to call to testify reside in New York. It is apparent that it would be inconvenient for these non-party witnesses to travel to Iowa to testify in this case. While plaintiffs' brief lacks the same level of specificity as Klimley's brief in asserting witness inconvenience, plaintiffs represent that they plan on calling at least eight non-party witnesses that reside in this district and have material information on the issues before the court.[4] Plaintiffs assert that it would be just as inconvenient for these witnesses to travel to New York to testify. Because the burden is on Klimley to establish inconvenience, the resisting party is not required to establish witness inconvenience with the same level of specificity. The court finds that both parties have succeeded in showing that its witnesses would be inconvenienced by the other's preferred forum.

Klimley also represents that it may be necessary to subpoena nine of the eleven non-party witnesses. Pursuant to Fed. R. Civ. P. 45(b), this court has the power to subpoena a witness to testify who resides within the district or within 100 miles of the place the testimony is to be given. See Fed. R. Civ. P. 45(b)(2)(A)-(B). Because each of the non-party witnesses that Klimley has identified in her affidavit reside more than 100 miles away

[4]In plaintiffs' Memorandum of Law in Opposition to the Motion to Transfer of Defendant Laura Klimley, plaintiffs assert that they intend to call the following non-party witnesses that reside in the Southern District of Iowa: Bartholomew Ryan, Barbara Ryan, Loren Backhaus of Central State Bank, Joan U. Axel, John W. Axel, Scott Snow of First National Bank, Representatives of the Trinity Episcopal Church in Muscatine, Iowa, and "other representatives of Iowa financial institutions which transferred monies to the Company at the behest of Plaintiffs" (Dkt. No. 24).

from Davenport, Iowa, it is clear that this court lacks the power to subpoena any of these witnesses to testify at trial. These witnesses could testify by deposition; however, if these witnesses refuse to give deposition testimony, a subpoena can compel them to attend a deposition in that district pursuant to Fed. R. Civ. P. 45(a)(2)(B).

Klimley asserts that live testimony is always preferred over the presentation of deposition testimony. While it is true that live testimony may be preferred, this does not mean that transfer is always justified to attain such live testimony. Granting transfer to attain live testimony of these witnesses may force the resisting party to rely on deposition testimony of his non-party witnesses. Plaintiffs have not argued that their non-party witnesses would be unwilling to travel to New York to testify if this lawsuit is transferred. Nor have plaintiffs argued that deposition testimony for these non-party witnesses would be inadequate. However, because the burden is on Klimley, not the plaintiffs, to establish witness inconvenience, the court assumes for purposes of this motion to transfer that plaintiffs would argue that it is necessary for their non-party witnesses to provide live testimony. Thus, the court will weigh the relative importance of live testimony of the non-party witnesses.

Klimley lists eight non-party witnesses that reside in New York that she expects to have to subpoena to testify. Klimley plans to call VWE's former accountants, investment bankers, lawyers, and employees, all of whom can likely shed light on what occurred at VWE. According to Klimley, each of these witnesses has knowledge of Klimley's lack of involvement in the management, operations, and affairs of VWE. Klimley's non-party witnesses are material to determining whether Klimley and the other defendants engaged in the fraudulent conduct about which plaintiffs have complained. It is unclear what plaintiffs' non-party witnesses are expected to testify about, but the court expects their testimony to be centered around the mechanics of the transaction between plaintiffs and defendants based on the fact that three of these eight witnesses are representatives of Iowa

financial institutions. However, the focus of the trial will more likely be on whether defendants engaged in the fraudulent conduct that plaintiffs complain of, such as failing to disclose material information, failing to register the securities, engaging in illegal activity, and paying excessive compensation and illegal dividends. As a result, Klimley's non-party witnesses seem more critical to the resolution of this litigation than the non-party witnesses that plaintiffs have identified. Because of the preference for live testimony from these critical non-party witnesses, this factor weighs in favor of transfer.

3. The accessibility to records and documents

Klimley asserts that the vast majority of the documents and records relevant to plaintiff's claims are located in New York. Plaintiffs dispute this, contending that records of plaintiffs' investment in VWE are located in Iowa. Plaintiffs also assert that even if the vast majority of the documents material to this litigation are located in New York, Klimley has failed to show that the documents would be difficult to transport or copy. Finally, plaintiffs assert that the relevant documents have already been copied by plaintiffs' counsel and that they will provide Klimley's present counsel access to these records to the extent that such records are not already in their possession.

Little weight should given to the location of material documents if the records can be easily transported. Medicap Pharmacies, Inc., 416 F. Supp. 2d at 688. It is clear that the majority of the significant documents relevant to this case are located in New York. Yet, Klimley does not provide a specific number of documents that would need to be transported, besides the fact that her counsel estimates that there are more than 100 boxes of documents at one particular location. Klimley has failed to establish that the documents are so voluminous that it would make transport difficult. Furthermore, plaintiff's counsel has already copied these documents and promised to make them available to Klimley.

Accordingly, the court finds that Klimley has failed to establish that the accessibility of the records and documents weighs in favor of transfer.

4. The location where the conduct complained of occurred

Klimley asserts that transfer is warranted because all of the allegedly improper conduct of which plaintiffs complain occurred in New York. Plaintiffs respond that they have alleged in their complaint that plaintiffs were solicited by mail in Iowa and took delivery of the securities in Iowa. This court agrees with those courts that have transferred securities fraud litigation where "the operative events" occurred somewhere other than where the securities were purchased. See Ahlstrom v. Clarent Corp., No. Civ. 02-780RHKSRN, 2002 WL 31856386, at *5 (D. Minn. Dec. 19, 2002) (finding that the material facts underlying plaintiffs' claims occurred in California, not in Minnesota, because that is where the fraudulent financial and SEC statements were prepared). In the instant case, plaintiffs have alleged that defendants made false statements in connection with the financial status of VWE, actively withheld financial information from plaintiffs, failed to register the subject securities or provide required disclosures, and encouraged plaintiffs to invest in VWE in person and by telephone in New York and New Jersey. In addition, plaintiffs have alleged that VWE paid illegal dividends and excessive compensation, engaged in a ponzi scheme, and engaging in a pattern of corrupt activities. Even though the actual purchase of VWE securities occurred in Iowa, the fraudulent conduct that plaintiffs complain of took place in New York. Accordingly, this court finds that this factor weighs in favor of Klimley.

5. The applicability of each forum state's substantive law

Klimley asserts that the question of the substantive law applicable to plaintiffs' claims is a neutral factor that does not weigh against transfer. However, plaintiffs assert that transfer is improper here because they have alleged violations of Iowa securities laws. Plaintiffs have also brought claims under federal statutes for alleged violations of federal securities statutes and regulations as well as federal racketeering statutes. In addition, plaintiffs have brought claims for fraud, recovery of fraudulent conveyances, waste of corporate assets, self-dealing, civil conspiracy, and breach of fiduciary law. It is unclear which state's substantive law will apply to this last set of claims. Even if Iowa law applies to these claims, there is no indication that the Southern District of New York is substantially less equipped than this court to apply Iowa law. As a result, the court finds that this factor has no bearing on its venue transfer analysis.

Accordingly, the court concludes that the balance of conveniences weighs in favor of transferring this case to the Southern District of New York because of the preferences in favor of securing the testimony of material witnesses and the fact that the almost all of the conduct in dispute occurred in New York.

C. The Interest of Justice

"The 'interest of justice' is a significant part of a § 1404(a) transfer analysis, and 'may be determinative in a particular case, even if the convenience of the parties and witnesses might call for a different result.'" Ahlstrom, 2002 WL 31856386, at *4 (quoting Coffey v. Van Dorn Iron Works, 796 F.2d 217, 221 (7th Cir. 1986)); see also Larsen v. Pioneer Hi-Bred Int'l, Inc., 4:06-cv-0077-JAJ, 2007 WL 3341698 (S.D. Iowa Nov. 9, 2007) (finding that judicial economy weighs heavily in favor of transfer). Thus, the convenience of the witnesses as well as the "interest of justice" warrants transfer of this

case to the Southern District of New York.

1. Judicial economy

Klimley asserts that judicial economy would best be served by transferring this litigation to the Southern District of New York because plaintiffs' complaint is very similar to litigation pending in that district against the same defendants. Klimley contends that the New York and Iowa actions assert nearly identical claims against the same defendants, but Klimley concedes that the Iowa complaint includes a claim under Iowa securities law which is not part of the New York complaint. Plaintiffs acknowledge that their counsel also represents individuals in a case against these same defendants in the Southern District of New York in which many of the issues are similar. However, plaintiffs assert that this court is best suited to preside over this case because it requires the court to decide several issues of Iowa law.

The Supreme Court has made clear that "[t]o permit a situation in which two cases involving precisely the same issues are pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." Ferens v. John Deere Co., 494 U.S. 516, 531 (1990) (citing Continental Grain, 364 U.S. at 26)). Where the cases are factually and legally similar, judicial economy weighs heavily in favor of transfer. See Larsen, 2007 WL 3341698, at *11 (transferring case where lawsuit was "factually and legally similar" to a pending case in the transferee district). Plaintiffs concede that many of the issues are similar here. The fact that this litigation involves a claim under Iowa securities law is not enough to weigh against transfer. The court agrees with Klimley that because plaintiffs' primary claims arise under federal law, the court is to give minimal weight to the local interest in considering plaintiffs' supplemental state and common law claims. Plaintiffs have failed to establish that the Southern District of New York is unable to properly apply Iowa securities law to the facts of this case. Because this case is factually and legally similar to the case that plaintiffs' counsel filed the same day

in New York, judicial economy mandates transfer of the Iowa complaint to the Southern District of New York.

2. The plaintiff's choice of forum

Klimley argues that plaintiff's choice of forum has a reduced significance in the "interest of justice" analysis. Even though plaintiffs have not asserted that their choice of forum is entitled to some deference, the court is hesitant to disturb a plaintiff's choice of forum. See Terra Int'l, 119 F.3d at 695 (noting that generally "federal courts give considerable deference to a plaintiff's choice of forum"). Klimley is correct to note that a plaintiff's choice of forum is no longer entitled to the great weight given it under the forum non conveniens analysis and is just one factor to be considered. Medtronic, Inc. v. Am. Optical Corp., 337 F. Supp. 490, 497 (D. Minn. 1971). However, the court rejects Klimley's argument that plaintiff's choice of forum is entitled to less deference because it is a securities fraud lawsuit. The case that Klimley cites for this proposition suggests that a plaintiff's choice of forum is entitled to less deference when it is a class action or derivative lawsuit. See Guenther v. Cooper Life Sciences, Inc., Civ. No. 4-88-503, 1988 WL 131340, *4 (D. Minn. 1988) (stating that "[b]ecause a class or derivative action potentially involves a vast number of plaintiffs, those few plaintiffs who seek to represent the body cannot be accorded special attention, particularly in their choice of forum"). Here, plaintiffs have not brought a class action or derivative lawsuit. Accordingly, plaintiffs' decision to bring the lawsuit in this district should be entitled to some deference.

The court has given plaintiff's choice of forum the appropriate level of deference by placing the burden on defendants to establish that transfer is warranted. However, plaintiff's choice of forum is not determinative. Plaintiffs choice of forum weighs against transfer, but not enough to warrant denying Klimley's motion to transfer because the judicial economy factor weighs so heavily in favor of transfer.

3. The comparative costs to the parties of litigating in each forum

Klimley contends that if the motion to transfer is denied, the defendants will be forced to proceed in two districts and incur duplicative litigation costs to defend nearly identical lawsuits in two separate jurisdictions. Plaintiff does not argue that litigating the instant lawsuit in the Southern District of New York would be prohibitively expensive. In fact, plaintiffs may arguably litigate their case more efficiently in the transferee district because their counsel is already litigating similar claims against the defendants in that district. The court agrees with Klimley that denying this motion would cause defendants to incur duplicative litigation costs. See Larsen, 2007 WL 3341698, at *11 (transferring case to district court where similar litigation was already pending in part to prevent duplicative litigation costs). In the absence of any suggestion that litigating this case in New York would be prohibitively expensive for plaintiffs, this factor weighs in favor of transfer.

4. Remaining factors

Klimley asserts that the remaining factors do not offset the "interest of justice" considerations that weigh in favor of transfer. Nor do the plaintiffs assert that any of these factors weigh against transfer. Plaintiffs have not argued that litigating the instant lawsuit in the Southern District of New York would cause difficulty in enforcing a judgment from that district, that they would not receive a fair trial in the transferee district, or that conflict of law issues preclude transfer. Because transfer would prevent duplicative litigation costs and further judicial economy, the "interest of justice" weighs in favor of transfer.

As set forth above, the court finds that the interest of justice would be served by the transfer of this matter to the Southern District of New York. When the interest of justice is considered in light of the fact that the balance of convenience weighs in favor of transfer, the court concludes that this matter should be transferred to the Southern District of New York. Klimley's motion to transfer is granted.

Upon the foregoing,

IT IS ORDERED

That defendant's motion to transfer (Dkt. No. 21) is granted. Pursuant to 28 U.S.C. § 1404(a), this matter shall be transferred to the Southern District of New York for further proceedings.

DATED this 16th day of March 2009.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA