

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA Ex
Rel, et al.,

v.

THE PUBLIC WAREHOUSING
COMPANY K.S.C.
also known as
Agility, et al.,

Defendants.

CIVIL ACTION FILE
NO. 1:05-CV-2968-TWT

OPINION AND ORDER

This is a qui tam action. It is before the Court on the Motion to Transfer Venue to the Eastern District of Pennsylvania [Doc. 164] filed by the Defendants The Public Warehousing Company, K.S.C. (“PWC”), *et al.* For the reasons stated below, the Defendants’ Motion to Transfer Venue to the Eastern District of Pennsylvania [Doc. 164] is DENIED.

I. Background

The Plaintiffs allege that the Defendants falsely billed the United States on three defense contracts to provide food and other subsistence items to American soldiers in

Iraq and elsewhere in the Middle East. According to the United States' First Amended Complaint (the "Complaint"), PWC entered into three contracts between May 2003 and July 2005 with the Defense Supply Center Philadelphia ("Defense Supply Center"), an agency of the Department of Defense.¹

A. The Parties

The Plaintiff-Relator Kamal Mustafa Al-Sultan is a resident of Kuwait. He is also the General Manager and controlling shareholder of Kamal Mustafa Al-Sultan Company, WLL, a limited liability Kuwait trading company that has had arrangements with the United States and the Defendants. The United States has intervened on certain counts on behalf of the Department of Defense, the Defense Logistics Agency, the Defense Supply Center, and other Federal agencies. The Defense Logistics Agency is an agency within the Department of Defense, and is headquartered in Fort Belvoir, Virginia. The Defense Supply Center is an entity within the Defense Logistics Agency that is headquartered in Philadelphia.²

¹ United States' First Amended Complaint ¶ 26 [Doc. 78] (the "Complaint"). The Defense Supply Center is the troop support center agency of the Defense Logistics Agency itself a logistics combat support agency within the Department of Defense.

² Relator's Original Complaint ¶¶ 3-5 (the "Relator's Complaint"). See also PWC's Mot. to Transfer Venue to the Eastern District of Pennsylvania, at 3-4 [Doc. 164].

The Defendant PWC is a large, publicly traded Kuwaiti logistics company now known as Agility Public Warehousing Company K.S.C. PWC is headquartered in Sulaibiya, Kuwait. The Sultan Center Food Products Co. K.S.C. (“Sultan Center Food Products”) is a supplier of various perishables and consumer goods also headquartered in Kuwait.³ The Defendant Tarek Abdul Aziz Sultan Al-Essa is an American citizen who served on the boards of both PWC and Sultan Center Food Products, and was PWC’s Board Chairman and Managing Director. The Defendant Charles Switzer is a citizen of the United States who was PWC’s General Manager of the Prime Vendor Program, which oversaw PWC’s contracts with the Defense Supply Center. The Defendant Emad Al Saleh is an American citizen who served as an employee of PWC.⁴

B. The Contracts

The Defense Supply Center issued a solicitation for the first contract, known as the PV-1 Contract, on May 10, 2002.⁵ PWC submitted a bid for the PV-1 Contract, which was accepted and entered into with an effective date of May 28, 2003. The PV-1 Contract had an initial term of one year with four one-year options. It required PWC

³ Relator’s Original Complaint ¶¶ 3-5 (the “Relator’s Complaint”).

⁴ Id. at ¶¶ 6-8.

⁵ Complaint ¶ 27.

to acquire and distribute subsistence items to U.S. military personnel located in Kuwait and Qatar.⁶ On June 27, 2003, the Defense Supply Center issued a modification which added Iraq to the contract, which it noted could potentially increase the estimated value of the contract by up to 1,200 percent.⁷ The Defense Supply Center paid PWC in excess of \$1.4 billion over the life of the PV-1 Contract.⁸

Just over a year later, on September 3, 2004, the Defense Supply Center issued another solicitation for a prime vendor contract, known as the PV-II Contract.⁹ PWC submitted an initial bid on November 16, 2004.¹⁰ In order to avoid a discontinuation of services, the Defense Supply Center awarded PWC a temporary bridge contract (the “PV-Bridge Contract”) while the PV-II Contract bid process was finalized.¹¹ On July 7, 2005, the Defense Supply Center awarded the PV-II Contract to PWC with an effective date of June 3, 2005, though PWC continued to provide services under the PV-1 Contract until December 15, 2005.¹² Through October 2010, the Defense Supply

⁶ Id. at ¶¶ 27-28.

⁷ Id. at ¶ 29.

⁸ Id. at ¶ 30.

⁹ Id. at ¶ 31.

¹⁰ Id. at ¶ 32.

¹¹ Id. at ¶ 33.

¹² Id. at ¶ 34.

Center had paid PWC over \$7.3 billion on the PV-II Contract, and \$1.1 billion on the PV-Bridge Contract.¹³ All told, the Complaint alleges that the Defense Supply Center has paid PWC in excess of \$9.8 billion on all three contracts through October 2010.

All three contracts contained the same contractual language regarding how PWC was to invoice the Defense Supply Center. Under the contracts, PWC was to invoice the “unit price” for each product delivered, which was comprised of two components: “delivered price” and “distribution price.”¹⁴ The “delivered price” was whatever PWC paid its “manufacturer/supplier” to get the product to a distribution point. The “distribution price” was supposed to be a fixed fee set by PWC which covered all of its overhead, transportation expenses, etc. The only variable cost which could change, therefore, was the actual amount paid to a supplier to deliver the product. The contracts also required PWC to return to the Defense Supply Center any rebates or discounts it received as a direct result of the contracts.¹⁵

C. The Alleged Schemes

The Plaintiffs allege that the Defendants participated in two different schemes to defraud the United States. The first scheme involved products purchased outside

¹³ Id. at ¶¶ 35-36.

¹⁴ Id. at ¶¶ 37-38.

¹⁵ Id. at ¶¶ 38-45.

the continental United States. The contracts required PWC to purchase perishable goods on the local market, products called Local Market Ready Items or LMRI. When PWC received orders from the Defense Supply Center for these local market items, PWC typically called upon the Defendant Sultan Center Food Products to fulfill them. Sultan Center Food Products would then purchase the LMRI from local producers and invoice the cost to PWC.¹⁶

The Plaintiffs allege, however, that Sultan Center Food Products substantially marked up the prices it had paid local manufacturers and suppliers for the LMRI. According to the Complaint, the Defendants knew that the prices were inflated, and knew the price Sultan Center Food Products had actually paid, but billed the Defense Supply Center at the inflated price anyway. The Plaintiffs argue that PWC should have billed the lower price because they maintain that Sultan Center Food Products was not a “manufacturer/supplier” as defined by the contract. More than that, the Plaintiffs allege that the PWC and Sultan Center Food Products had an agreement for PWC to receive a ten percent discount on the inflated price, which was never passed on to the government. The scheme allegedly extended to PWC’s arrangements with companies other than Sultan Center Food Products.¹⁷

¹⁶ Id. at ¶¶ 48-51.

¹⁷ Id. at ¶¶ 51-79.

The Plaintiffs also allege that PWC manipulated the Delivered Price from its continental United States vendors as well. According to this scheme, PWC received “prompt payment discounts” similar to the discounts it received from Sultan Center Food Products, which PWC also failed to pass along to the Defense Supply Center. The Defendants argue that because these payments were for paying their bills early, they were not directly related to the contract and PWC therefore had no need to pass them along. The Plaintiffs respond, however, that the discounts were given without any requirement of payment earlier than what was already required under the contracts.¹⁸

D. Procedural History

The Relator in this case, Kamal Mustafa Al-Sultan, was a former PWC business partner who initially filed this *qui tam* case in November 2005. The Relator then filed amended complaints on September 25, 2006 and October 1, 2009. In his complaints, the Relator alleged ten different counts against all of the Defendants. On November 13, 2009, the United States elected to intervene in part and declined to intervene in part. The United States intervened in the counts against PWC, Sultan Center Food

¹⁸ Id. at ¶¶ 80-96. Among PWC’s American vendors were: the Sara Lee Corporation (now Hillshire Farms), headquartered in Illinois; Texas Best Trading LLC, headquartered in Maryland; Barber Foods, headquartered in Maine; and Zartic, Inc., which was located in Rome, Georgia, but has since been acquired and had its Georgia facilities shuttered.

Products, and the Defendant Al-Essa relating to the inflated prices and unreported discounts PWC allegedly claimed. The United States declined to intervene against the Defendants Switzer and Al Saleh. The Defendants PWC, Sultan Center Food Products, and Al-Essa now move to transfer this case to the Eastern District of Pennsylvania.

II. Legal Standard

In considering a motion to transfer venue, the Court proceeds under a two-step analysis.¹⁹ First, the Court considers whether the case could have originally been brought in the transferee court.²⁰ Both parties agree that this case could have been brought in the Eastern District of Pennsylvania. The Court, therefore, moves on to the second step which involves the consideration of a number of factors to determine if a transfer is “[f]or the convenience of parties and witnesses [and] in the interest of justice.”²¹ The Eleventh Circuit has outlined the nine particular factors which courts are to consider:

(1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses;

¹⁹ See 28 U.S.C. § 1404(a).

²⁰ Id.

²¹ Id.

(6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.²²

“[T]rial judges are afforded considerable discretion,” when weighing these factors.²³

However, the general rule is that “[t]he plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations.”²⁴

III. Discussion

The Defendants have failed to show that Relator’s choice of forum in the Northern District of Georgia results in substantial inconvenience or is outweighed by the interests of justice. The Defendants argue that there are five factors that weigh in favor of transfer: the convenience of the parties and witnesses, the locus of operative facts, and the interests of justice. Both parties agree that the remaining factors are neutral or do not significantly tilt the balance in either direction. The Court now addresses each of these factors in turn.

A. The Convenience of Witnesses (Factor 1)

²² Manuel v. Convergys Corp., 430 F.3d 1132, 1135 n.1 (11th Cir.2005).

²³ Tommy Bahama Grp., Inc. v. The Walking Co., No. 1:07-CV-1402-ODE, 2007 WL 3156254, at *2 (N.D. Ga. Oct. 19, 2007).

²⁴ Howell v. Tanner, 650 F.2d 610, 616 (5th Cir. 1981).

The convenience of witnesses is a primary factor.²⁵ When analyzing a forum's relative convenience to witnesses, courts distinguish between party and non-party witnesses. "Party witnesses are the parties themselves and those closely aligned with a party, and they are presumed to be more willing to testify in a different forum, while there is no such presumption as to non-party witnesses."²⁶ As such, "the convenience of the non-party witnesses weighs most heavily on the Court in deciding on a motion to transfer venue."²⁷

Both parties acknowledge that none of the potential non-party witnesses in this case reside in the Eastern District of Pennsylvania. The Defendants concede that "most of the witnesses from the non-party [outside the United States] suppliers...would likely be coming from outside the U.S.,"²⁸ meaning that a change of venue for them is irrelevant. The Defendants argue, however, that the United States suppliers, located in Maine, Maryland, and Illinois, are all closer to the Eastern District of Pennsylvania. But all of those witnesses would still have to travel multiple

²⁵ Smith v. Dollar Tree Stores, Inc., No. 1:11-CV-02299-SCJ, 2012 WL 12343344, at *2-3 (N.D. Ga. May 10, 2012).

²⁶ Ramsey v. Fox News Network, LLC, 323 F. Supp. 2d 1352, 1356 (N.D. Ga. 2004) (Thrash, J.).

²⁷ Id.

²⁸ Defs.' Motion to Transfer Venue, at 20.

hours to reach Philadelphia, just as they would Atlanta. Any additional convenience would be minimal at best.

Given that the Defendants' party witnesses are located in Kuwait, the only witnesses that would potentially benefit from a change in venue would be the Plaintiffs themselves. The Defense Supply Center is located in the Eastern District of Pennsylvania, and the Defense Logistics Agency and the Department of Defense are located near Washington, D.C. While the Eastern District of Pennsylvania would be slightly more convenient for the Plaintiffs' witnesses, party witnesses are presumed to be more willing to travel. Accordingly, the convenience to witnesses tilts only marginally toward transfer.

B. The Convenience of the Parties (Factor 3)

The convenience of the parties is also a primary factor.²⁹ "Although the Plaintiffs' choice of forum is typically granted a great deal of deference, it is entitled to less weight when none of the parties resides there."³⁰ However, in order to justify transfer, the moving party must show that "the inconvenience of the present forum to the moving party substantially outweighs the inconvenience of the proposed

²⁹ Smith, 2012 WL 12343344, at *2-3 (N.D. Ga. May 10, 2012).

³⁰ Ramsey, 323 F. Supp. 2d at 1355.

alternative forum to the non-moving party.”³¹

The Defendants have failed to show how the Eastern District of Pennsylvania would be significantly more convenient for them. In fact, because they would be coming from Kuwait regardless of the venue, they concede that neither District is more nor less convenient for them than the other. The Defendants instead argue that the Eastern District of Pennsylvania would be more convenient for the Plaintiffs because that is where the Defense Supply Center is located. Not only do the Plaintiffs disagree, however, but the objective facts fail to support this argument. In a *qui tam* case such as this one, where the United States has intervened and a particular United States Attorney’s Office has been in charge of investigation and litigation, the inconvenience to the government and to the Relator would be immense. The Defendants have failed to show any potential added convenience to them that would outweigh these concerns. The convenience of the parties therefore weighs against transfer.

C. The Locus of Operative Facts (Factor 4)

“The locus of operative facts has been interpreted as the place where events and

³¹ Spanx, Inc. v. Times Three Clothier, LLC, No. 1:13-CV-710-WSD, 2013 WL 5636684, at *2 (N.D. Ga. Oct. 15, 2013).

actors material to proving liability are located.”³² Because the locus of operative facts is a significant factor in weighing a motion to transfer venue, “[c]ourts routinely transfer cases when the principal events occurred and the principal witnesses are located in another district.”³³ In this case, the Defendants allegedly sent in fraudulent invoices to the Defense Supply Center, which is located in the Eastern District of Pennsylvania. The Defense Supply Center reviewed and approved those invoices in the Eastern District of Pennsylvania. The only ties to this venue are related to one of PWC’s vendors that has since been bought out and had its Georgia facilities shut down.

The Plaintiffs argue that the true locus of operative facts actually occurred in Kuwait, not the Eastern District of Pennsylvania. Thus, the Plaintiffs contend that this factor is neutral and does not favor transfer. While the Court understands the Plaintiffs’ argument, the real issue is whether the Northern District of Georgia or the Eastern District of Pennsylvania has a closer tie to the material facts and witnesses necessary to prove liability. There is no question that the Eastern District of Pennsylvania is the answer to that question. For that reason, this factor weighs in favor of transfer.

³² Seltzer v. Omni Hotels, No. 09 CIV. 9115 BSJ JCF, 2010 WL 3910597, at *4 (S.D.N.Y. Sept. 30, 2010) (internal quotations and citations omitted).

³³ Id. (internal quotations and citations omitted).

D. The Interests of Justice (Factor 9)

There is no one test to determine whether the interests of justice are served by transferring a case to a new venue, though courts do look at many different factors. Among them are “access to evidence, availability of witnesses, the cost of obtaining witnesses, the possibility of a jury view [of relevant premises], and all other practical problems that make trial of a case easy, expeditious and inexpensive.”³⁴ The Defendants argue that judicial efficiency would be served by transferring the case because the Eastern District of Pennsylvania is significantly less busy than the Northern District of Georgia, and because the Philadelphia community has an interest in a case involving a large local employer like the Defense Supply Center.

Both of these arguments, however, pale in comparison to the other substantial inefficiencies that would be created by transferring this case after it has been pending here for eleven years. In a normal case, the Defendants would be correct that the convenience to counsel of a particular venue would be of little consequence. But in a *qui tam* case like this one, where the government has intervened, the counsel’s convenience is the government’s convenience. Transferring the case to a new venue, where completely new prosecutors would have to start from scratch on a case that has

³⁴ Ramsey, 323 F. Supp. 2d at 1357 (alterations in original) (quoting Moore v. McKibbon Bros., Inc., 41 F. Supp. 2d 1350, 1357 (N.D. Ga. 1998)).

already dragged on for more than a decade would be tremendously inefficient.

Even if the government used the same attorneys and decided to make them travel to the Eastern District of Pennsylvania, transfer would also be inefficient from the perspective of the courts. Not only has this District been the venue for this case since its inception, but this Court in particular has also been the venue for the companion criminal case. This Court has already become intimately familiar with the facts of these cases, and to split them between two different venues would hardly serve the interests of justice or the judiciary. Alternatively, transferring both cases together would place a heavy burden on a sister court for little to no benefit for the moving party. For these reasons, the interests of justice weigh strongly against transfer.

III. Conclusion

The Defendants have failed to carry their burden of showing that the balance of factors weighs significantly in favor of transferring this case to the Eastern District of Pennsylvania. Though the convenience of witnesses and the locus of operative facts lean slightly in favor of transfer, they are significantly outweighed by the convenience of the parties and the interests of justice. Because the relevant factors of Section 1404(a) do not favor a transfer of venue, the Defendants' Motion to Transfer Venue to the Eastern District of Pennsylvania [Doc. 164] is DENIED.

SO ORDERED, this 27 day of January, 2017.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge