

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PROGRESS HEALTH CARE, INC. : CIVIL ACTION
 :
 v. :
 :
 ELTON GLYNN BEEBE, SR., et al. : NO. 98-3959

MEMORANDUM AND ORDER

HUTTON, J.

June 30, 1999

Presently before the Court are the Defendants' Motions to Dismiss, or, Alternatively, Transfer to the Western District of Louisiana (Docket Nos. 33 and 34), the Plaintiff's Opposition to Defendants' Motions (Docket No. 37), Defendants' Reply Memoranda (Docket Nos. 38 and 39), and Plaintiff's Surreply to Defendants' Reply Memoranda (Docket No. 41). Also before the Court is the Defendants' Praecipe to Substitute Affidavits of Elton Glynn Beebe, Jr. and Samuel Thomas Mahfouz (Docket No. 40). For the following reasons, the Defendants' Motions are **DENIED**.

I. BACKGROUND

Plaintiff, Progress Health Care, Inc. ("Progress"), is a Pennsylvania corporation based in Bensalem, Pennsylvania. All of the defendants are either Louisiana, Mississippi, or Texas residents or are corporations incorporated under the laws of the states of Louisiana or Mississippi, with their principal place of

business in Louisiana or Mississippi.\¹ Now, both the Beebe, Jr. Defendants and the Beebe, Sr. Defendants move separately to dismiss the Plaintiff's action for lack of personal jurisdiction over them pursuant to Federal Rule of Civil Procedure 12(b)(2). The Defendants contend that there are insufficient minimum contacts to establish in personam jurisdiction in Pennsylvania. In the alternative, both the Beebe, Jr. Defendants and the Beebe, Sr. Defendants move for a change of venue from the Eastern District of Pennsylvania, where this action was originally filed, to the Federal District Court for the Western District of Louisiana, Alexandria Division, pursuant to 28 U.S.C. §§ 1404 and 1406.

Viewed in the light most favorable to the Plaintiff, the facts are as follows. Progress is a Medicare supplier that specializes

¹ The Plaintiff has named the following parties as defendants: Elton Glynn Beebe, Jr., Orthotics, Incorporated, Samuel Thomas Mahfouz, Premier Marketing Associates, L.P. d/b/a Millennium Medical, L.L.C., Premier Marketing Associates, Inc., Pamela Gray, and Tracy Beebe (collectively, the "Beebe, Jr. Defendants"). Also named as defendants in the Complaint are the following: Elton G. Beebe, Sr., Magnolia Management Corporation, H.M. Rolling Fork, Tishomingo Manor, Community Care Center Leesville, Heritage Manor of Mandeville, Heritage Manor of Napoleonville, H.M. Natchitoches Rehab and Retirement, Ridgecrest rehab and Retirement, Oak Haven Rehab and Retirement, Community Care Center of Ruston, Senior Village Nursing Home, Heritage manor South, Tioga Manor, St. Martinville Rehab and Nursing Center, H.M. Ville Platte, Westwood Manor Nursing and Rehab, H.M. Alexandria Rehab and Nursing, Audubon Guest House, Community Care Center Baker, Baton Rouge Heritage House II, Heritage Manor Baton Rouge, Bayou Vista Manor, Beeauregard Rehab and Retirement, The Columns Rehab and Retirement, D'Ville House, Flannery Oaks Guest House, Forest Manor Nursing Home, Heritage Manor of Houma, Landmark-Hammond, Landmark of Shreveport, Picayune Convalescent Center, Vicksburg Trace Haven, Glenburney Nursing Home, Hilltop Manor, McComb Extended Care Center, Starkville Manor, Winona Manor, Heritage Manor Bossier City, Heritage Manor Ferriday, Heritage Manor of Franklinton, Glen Oaks Nursing Home, Brookwood Manor Nursing Home, Lawrence County Nursing Center and Covington County Nursing Center (collectively, the "Beebe, Sr. Defendants" or "Defendant-facilities") (Beebe, Jr. and Beebe, Sr. Defendants referred to collectively as the "Defendants").

in furnishing wound care supplies to patients in nursing homes and in their own homes. Medicare refers to wound care supplies as surgical dressings and covers these supplies when they are medically necessary for the treatment of a wound caused by, or treated by, a surgical procedure or when debridement of a wound is medically necessary.

On or about April 1997, Ron Manno, the former Vice President of Sales and Marketing for Progress, contacted Sam Mahfouz ("Mahfouz"), one of the owners of Orthotics, Inc. ("Orthotics"), in Louisiana in an attempt to solicit wound care services. Manno and Alan Rose ("Rose"), President of Progress, and Mahfouz and Elton Glynn Beebe, Jr. ("Beebe, Jr.") of Orthotics met in Mississippi on May 12, 1997, to discuss a potential business arrangement. The meeting was held at the corporate office of Magnolia Management Corporation ("Magnolia"), a company that manages nursing homes, including the defendant-facilities in the instant lawsuit. Beebe, Jr. is one of the owners of Orthotics and Vice President and Director of Magnolia. During this meeting, two options were discussed: (1) a Marketing and Service Agreement and (2) an Employment Agreement.

Talks continued between the parties over the next several months. Shortly before August 12, 1997, Beebe, Jr. contacted Rose and stated that he wanted to sell the assets of the wound care business. This now raised a third option. Rose agreed to consider

this option and invited Beebe, Jr. and Mahfouz to Pennsylvania at

progress' expense in the hope of coming to an agreement regarding one of the three options.

On August 12, 1977, Beebe and Mahfouz had lunch with Rose, Manno and Gloria Miller ("Miller"), who oversees all operations for Progress, at T.G.I. Friday's in Philadelphia, Pennsylvania. Beebe, Jr. stated that he was no longer interested in being in the wound care business and the only option that he would consider was sale of the wound care assets of his company. Discussions continued before and after lunch regarding the value of the assets. Discussions between Rose and Beebe, Jr. continued by telephone over the next three weeks. The purchase price and installment payments and the assets to be sold were agreed upon in the telephone negotiations.

Orthotics was to sell its Wound Care Program, which was a clinically supported wound care program including a full line of products, clinically trained personnel, in-services and quality assurance to over one hundred (100) nursing facilities throughout the southeastern United States. The wound care assets to be sold by Orthotics included all transferable Preferred Provider Agreements ("PPAs"), marketing materials, in-service and educational programs, clinical consultants and employees.

The parties then commenced putting their agreement into writing. On September 8, 1997, Magnolia faxed Rose a blank agreement between Orthotics and a nursing home facility. On this

same date, Magnolia faxed a draft Buy/Sell Agreement to Rose in Pennsylvania. A revised draft of the Buy/Sell Agreement was faxed to Rose in Pennsylvania on September 9, 1998. Rose made changes and additions to the draft Agreement and faxed these back to Beebe, Jr. on September 10, 1997. The parties reached agreement through the telephone and fax communications. On September 15, 1997, Progress signed the Agreement and met with its new employees in Alexandria, Louisiana. Pursuant to the Agreement and a subsequent amendment, Progress made payments to Orthotics by checks dated September 15, 1997, December 11, 1997, and March 24, 1998. Payment in full was completed by the latter date.

Wound care supplies furnished to Medicare patients required ongoing, detailed clinical documentation and extensive paperwork required by Medicare. This necessitated and resulted in extensive communications between the nursing home facilities and Progress. The facilities were served by both Progress field employees, who were part of the assets of the Buy/Sell Agreement and who were knowledgeable about the facilities, and by Progress' Customer Service Department in Pennsylvania. The field employees contacted the facilities to obtain PPAs on behalf of Progress; made initial contact with the facilities; visited them on at least a monthly basis to assure that they were satisfied with Progress' services; assisted with problem accounts; and obtained some paperwork which could not be obtained directly from the Pennsylvania office.

Initially, twelve field employees worked to obtain PPAs from more than one hundred (100) nursing home facilities throughout Louisiana, Mississippi, Texas, Tennessee and New Mexico, as well as serving the facilities who were purchasing products from Progress. Approximately eighty (80) facilities purchased wound care supplies from Progress throughout this area, although the field employees did not obtain signed PPAs from many of them. The field employees obtained twenty-four (24) PPAs. All of the PPAs contained a Pennsylvania choice of law provision. In June 1998, Progress had eleven field employees.

Progress did the payroll for these employees from its office in Pennsylvania. Initially, Progress had the field employees obtain all the paperwork needed. Because of inadequate results in this regard, however, this task was taken over by Progress' Customer Service Department, which is located in Pennsylvania. Progress devoted two full-time Customer Service Representatives ("CSR") to manage the accounts, and at times they were assisted by a third CSR. Their job required them to have frequent contact with the facilities. In most cases, wound care supply orders for new patients were made directly from the facility contact person to Progress' office in Pennsylvania. The CSR would then request the facility to fax back a copy of the patient's admission sheet so that the CSR would have the information necessary to complete the Assignment of Benefits ("AOB") form and other information necessary

to bill Medicare for the supplies.

The CSR would then mail or fax the Assignment of Benefits form to the facility for signature by the patient, if able, or by an authorized facility staff member, usually a treatment nurse (Registered Nurse ("RN") or Licensed Practical Nurse ("LPN")), Assistant Director of Nurses ("ADON"), or the Director of Nurses ("DON"). Once signed, the facility would mail or fax the form back to the CSR in Pennsylvania. In addition to this documentation, the CSR needed to obtain a signed Certificate of Medical Necessity from the Physician. The clinical information would be obtained by the CSR from the facility nurse, sent to the physician for signature, and returned to the CSR in Pennsylvania by fax or mail.

Wound care supplies were shipped from Progress' Pennsylvania warehouse directly to the facility. The volume of business from the former Orthotics' accounts was so large that Progress needed to hire an additional warehouse employee. Under Medicare rules, since Progress was the wound care supplier, it and not the facilities, billed Medicare for the wound care supplies. Progress billed Medicare from its office in Pennsylvania. Medicare, not the facilities, paid Progress for the supplies furnished to Medicare patients. The facilities needed the wound care supplies to care for their patients and benefited from having these supplies furnished to their patients. If Medicare denied a claim for the wound care supplies, Progress filed an appeal in Pennsylvania.

Orders covered one month of supplies. The CSR contacted the facility about monthly reorders. The CSR prepared a monthly wound reorder sheet which identified the patient's name and location of the wound. The CSR would fax this to the treatment nurse or DON at the facility. The nurse needed to include detailed clinical information about the wound, including its length, width, depth, stage of wound, amount of drainage, correct wound care products and treatment, and whether the wound healed or the patient expired. Progress needed this detailed clinical information to satisfy Medicare billing requirements. The facility would fax this information to Progress in Pennsylvania.

As the patient's medical condition changed, changes were made to the wound care treatment. Sometimes the physician changed the prescription. Sometimes treatment was discontinued. Other times patients had expired after the wound care supplies had been shipped to the facility. Virtually all facilities encountered one or more of these changes. In each of these instances, the facility could request to return the unused product to progress. In most instances, the facility contact person called Progress' office in Pennsylvania, and Progress sent the facility a postage-free return label so that products could be returned at no cost to the facility.

This course of dealing was typical for each of the facilities that progress furnished wound care supplies to on behalf of their

patients, including the Defendant-facilities. The only exceptions were those eleven facilities which Progress had no business with, which were: Glenbury Nursing Home, Heritage Manor Bossier City, Heritage Manor Ferriday, Heritage Manor Franklinton, H.M. Rolling Fork, McComb Extended Care Center, Oak Haven Rehab & Retirement, Picayune Convalescent Center, Starkville Manor, Vicksburg Trace haven and Winona Manor.\² An abrupt change occurred at the end of June 1998 and the beginning of July 1998. When Progress contacted the facilities about reordering wound care supplies, Progress was advised that (1) all patients had healed, or (2) wound care supplies were no longer needed, or (3) the facilities had been advised that progress was no longer servicing their accounts and that they should place their orders with Millennium with whom Orthotics had merged, or (4) that the facilities had to use Millennium because Progress could no longer serve them because it was located too far away, or (5) Magnolia directed the facility not to reorder from Progress but to order all wound care supplies from then on from Millennium, or (6) the facility did not respond to the reorder request.\³

²The Beebe, Sr. Defendants contend that no facility named "Heritage Manor Westwood" exists. Progress alleges that it had significant business with a facility named in the Complaint as Heritage Manor Westwood, which it now believes is called Westwood Manor Nursing and Rehab.

³Millennium Medical, L.L.C. is the business name of Premier Marketing Associates, L.P. Orthotics, Inc., owned by Beebe, Jr. and Mahfouz is a member of Premier. Premier's general partner is Premier Marketing Associates, Inc., whose President is Tracy Beebe. Magnolia manages all of the Defendant-facilities. Magnolia is owned by Beebe, Sr., who is also President and

(continued...)

On or about June 30, 1998, the employees that Progress had obtained from Orthotics abruptly stopped working for Progress and switched the wound care supply business to Orthotics' successor entity, Premier, d/b/a Millennium at Millennium's direction. The Defendant-facilities purchased wound care supplies from Millennium at the direction of Magnolia, owned by Beebe, Sr. and controlled by Beebe, Jr. and Beebe, Sr. In addition to the Defendant-facilities, the other facilities whose wound care business Progress obtained as a result of the Buy/Sell Agreement also abruptly ceased ordering wound care supplies from Progress. The enterostomal therapy nurse consultants obtained from the Buy/Sell Agreement also abruptly stopped working for Progress at this time.

Progress alleges that the abrupt discontinuation of service left Progress with thousands of dollars of inventory, which was purchased specifically for these accounts. Progress had to lay off the warehouse employee hired to handle the additional inventory for these accounts, and had to lay off one of the Customer Service Representatives. Progress claims that its business reputation was harmed by the wrongful information told to the facilities, including the statement that Progress was unable to serve accounts far from Pennsylvania. Progress also contends that it incurred significant lost profits from no longer supplying wound care

³(...continued)
Director, and its Vice President is Beebe, Jr., who is also a Director of Magnolia.

supplies to facilities whose business was obtained as a result of the Buy/Sell Agreement.

On December 1, 1998, the Beebe, Jr. Defendants filed their Motion to Dismiss Complaint pursuant to Rule 12(b)(2), or in the alternative, to Transfer Venue to the United States District Court for the Western District of Louisiana. On December 1, 1998, the Beebe, Sr. Defendants also filed their Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2) or, in the alternative, to Transfer Venue. On January 15, 1999, the Plaintiff filed its opposition to the Defendants' Motions to Dismiss or, in the alternative, Transfer Venue. Attached as exhibits, the Plaintiff submitted the Declarations of Alan Rose, President of Progress, and Laura Stern, a Progress Customer Service Representative who worked on the former Orthotics, Inc. ("Orthotics") accounts. The Beebe, Jr. Defendants filed a Reply Memorandum on February 1, 1999. On February 5, 1999, the Beebe, Sr. Defendants filed a Reply Memorandum. On February 8, 1999, the Beebe, Jr. Defendants filed a Praecipe to substitute affidavits of Elton Glynn Beebe, Jr. and Samuel Thomas Mahfouz. On February 12, 1999, the Plaintiff filed a Surreply to Defendants' Reply Memoranda. Because the Defendants' Motions to Dismiss or, in the alternative, to Transfer Venue are ripe for review, the Court now considers the Defendants' Motions.

II. DISCUSSION

A. Motions to Dismiss

1. Applicable Law

When a defendant raises a defense of lack of personal jurisdiction, the plaintiff then bears the burden to come forward with sufficient facts to establish that jurisdiction is in fact proper. Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir.1992). The plaintiff must produce "sworn affidavits or other competent evidence," since a Rule 12(b)(2) motion "requires resolution of factual issues outside the pleadings" Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 67 n. 9 (3d Cir. 1984). For the purposes of the motion, the court must accept as true the plaintiff's version of the facts, and draw all inferences from the pleadings, affidavits and exhibits in the plaintiff's favor. DiMark Mktg., Inc. v. Louisiana Health Serv. & Indem. Co., 913 F.Supp. 402, 405 (E.D.Pa. 1996); In Re Arthur Treacher's Franchisee Litigation, 92 F.R.D. 398, 409-10 (E.D. Pa. 1981).

Under Federal Rule of Civil Procedure 4(e), this Court may exercise personal jurisdiction over non-resident defendants to the extent permitted by Pennsylvania's long-arm statute. Pennsylvania exercises jurisdiction over non-residents to the fullest extent allowed under the Due Process Clause of the Fourteenth Amendment of the Constitution. See 42 Pa. Cons.Stat. Ann. § 5322(b). The constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or

specific jurisdiction over a non-resident defendant. See Mellon, 960 F.2d at 1221. General jurisdiction permits a court to exercise personal jurisdiction over a non-resident for non-forum related activities when the defendant has engaged in "systematic and continuous" activities in the forum state. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the 'minimum contacts' framework" of International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. Mellon, 960 F.2d at 1221.

2. Specific Jurisdiction

The Plaintiff in this case asserts specific jurisdiction over the Defendants, (Pl.'s Opp'n, 12.), apparently conceding that there is no general personal jurisdiction over the Defendants under the facts of this case. A court's inquiry as to whether it has specific jurisdiction over a defendant starts with the Pennsylvania long-arm statute, which provides in pertinent part that "[a] tribunal of this Commonwealth may exercise [specific] personal jurisdiction over a person ... who acts directly or by an agent ... (1) Transacting any business in this Commonwealth." 42 Pa.

Cons.Stat. Ann. § 5322(a) (Supp.1997). The statute permits the exercise of jurisdiction "based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." § 5322(b). Under the Due Process Clause, a court can exercise specific jurisdiction over a defendant who has purposefully established "minimum contacts" in the forum state such that it "should reasonably anticipate being haled into court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

"Specific jurisdiction is invoked when the cause of action arises from the defendant's forum related activities ... 'such that the defendant should reasonably anticipate being haled into court there.'" Verotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co., 75 F.3d 147, 151 (3d Cir. 1996) (citations omitted). To establish specific jurisdiction, "the plaintiff must show that the defendant has constitutionally sufficient 'minimum contacts' with the forum." IMO Industries, Inc. v. Kiekert AG, 155 F.3d 254, 259 (3d Cir. 1998). In applying the minimum contacts standard, it is clear that a "defendant will not be haled into a jurisdiction solely as a result of 'random,' fortuitous,' or 'attenuated' contacts." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Rather, the plaintiff must

establish that the defendant "purposefully availed itself" of the privilege of conducting activities within the forum. Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

3. Analysis

a. Beebe, Jr. Defendants

In the present case, Plaintiff has provided evidence in support of its argument on personal jurisdiction over the Beebe, Jr. Defendants. The facts described above, supported by the Rose and Stern declarations, and the attached Exhibits, establish that the Beebe, Jr. Defendants reached out beyond Louisiana and Mississippi to form a contract with Progress, sold their business to Progress, and accepted payment in full. The Beebe, Jr. Defendants met with Progress officials in Pennsylvania, and per the Rose and Stern declarations, discussed the sale of their wound care business in Alexandria, Pennsylvania.⁴ See Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 147-48 (3d Cir. 1992) ("contract negotiations with forum residents can empower a court to exercise personal jurisdiction over persons outside the forum").

Moreover, through telephone and fax communications with Pennsylvania, the parties reached agreement on the sale of the

⁴The Beebe, Jr. Defendants contend that at the time of their arrival in Alexandria, Pennsylvania, they were unaware of any intention of Progress to solicit Orthotics' wound care business. In support of this contention, the Beebe, Jr. Defendants submitted Substitute Affidavits of Elton Glynn Beebe, Jr. and Samuel Thomas Mahfouz. Nonetheless, Progress has satisfied its burden by coming forward with sufficient facts to establish that jurisdiction is in fact proper over the Beebe, Jr. Defendants.

wound care business. The Supreme Court has emphasized that mail and wire communications are important jurisdiction contacts. Burger King, 471 U.S. at 476. The fact that the contract was signed in Louisiana and has a Louisiana choice of law provision does not defeat Pennsylvania's jurisdiction. Id., at 478, 482.

In Burger King, the Supreme Court specifically stated that:

Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." (citations omitted). It is these factors--prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing--that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Burger King, 471 U.S. at 479. By coming to Pennsylvania to negotiate the sale of Progress' wound care business and continuing to negotiate with Progress officials located in Pennsylvania by telephone and fax, the Beebe, Jr. Defendants "purposefully directed" their activities at residents of Pennsylvania. Their alleged breach of contract caused foreseeable injuries to Progress, which is located in Pennsylvania. For these reasons it was, at the very least, presumptively reasonable for the Beebe, Jr. Defendants to be called to account in Pennsylvania for such injuries. Thus, the Court finds that it has specific personal jurisdiction over the Beebe, Jr. Defendants.

b. Beebe, Sr. Defendants

The Plaintiff has also satisfied its burden of coming forward with sufficient facts to establish that specific jurisdiction is proper over the Beebe, Sr. Defendants. As has been shown by the course of dealing described in the Stern Declaration, Exhibit 2, and the extensive documentation in Exhibits 8-39, the Beebe, Sr. Defendants reached out beyond Louisiana and Mississippi to do business with Progress. Mr. Beebe, Sr. is owner, President and director of Magnolia, the company, which Beebe, Sr. described as furnishing "field supervision for all of the nursing home facilities ... named as defendants." (Beebe, Sr. Affidavit ¶ 2.) Magnolia manages the Defendant-facilities, many of which serve Medicare patients, and many of which had obtained wound care supplies on behalf of these patients prior to Progress. The Defendant-facilities actively sought out information from Progress due to the complex clinical and documentation requirements necessary for Progress to satisfy medicare billing requirements. Progress provided this information to the Defendant-facilities by ongoing and continuous telephone and fax communications.

The Defendant-facilities were not "passive buyers," as the Defendants contend. The Buy/Sell Agreement contemplated a future course of dealing between Progress and the Defendant-facilities. All of the PPAs, both those executed with the Defendant-facilities and the other facilities, contained a Pennsylvania choice of law

provision. Progress maintained extensive inventory in Pennsylvania and shipped the wound care supplies directly to the facilities from Pennsylvania. The volume was so great that Progress needed to hire an additional warehouse employee. The Progress CSRs in Pennsylvania obtained extensive documentation from the facilities in order to bill Medicare for the supplies furnished and Progress billed Medicare from its office in Pennsylvania for the supplies furnished. Progress filed appeals in Pennsylvania for the claims in which Medicare denied payment. Progress did the payroll for the field employees from its office in Pennsylvania.

The fact that the Defendant-facilities have no physical contacts with Pennsylvania does not defeat a finding of personal jurisdiction. See Burger King, 471 U.S. at 476 (noting that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted"). Thus, the Court finds that the Defendant-facilities purposefully availed themselves of the "privilege of conducting activities within [Pennsylvania]." Hanson v. Denckla, 357 U.S. at 253. Accordingly, the Court finds that this Court has specific personal jurisdiction over the Beebe, Sr. Defendants.

B. Venue

The Defendants assert that venue is not proper in the Eastern District of Pennsylvania, and the case should therefore be dismissed pursuant to 28 U.S.C. § 1406(a). The Plaintiff contends, however, that venue is proper under 28 U.S.C. § 1391(a)(2), asserting that the Eastern District of Pennsylvania is "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." As the Third Circuit has pointed out, events or omissions must be more than tangentially connected to the claim to qualify as substantial under § 1391(a)(2). See Cottman Transmission Sys., Inc., v. Martino, 36 F.3d 291 (3d Cir. 1994). "Substantiality is intended to preserve

the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute." Id. at 294. Rather than looking at a defendant's "contacts" with a particular district, the test for determining venue is the location of those "events or omissions giving rise to the claim." Id. To determine whether an act or omission giving rise to the claims is substantial, the court must look at the nature of the dispute. Id. at 295.

In this case, some of the same facts that establish personal jurisdiction also establish that venue is proper in this District. BABN Technologies Corp. v. Bruno, 25 F. Supp.2d 593, 598-99 (E.D. Pa. 1998). For the reasons stated above, all of the Defendants had significant contacts with Pennsylvania. (See supra Part I, II.A.3.a and Part II.A.3.b.) Accordingly, the Court finds that Progress has sufficiently alleged that a substantial part of the events giving rise to its claims occurred within Pennsylvania. See BABN Technologies, 25 F. Supp.2d at 596 (holding venue requirements satisfied by same facts establishing personal jurisdiction). Thus, venue is proper and the motion to dismiss for improper venue is denied.

C. Transfer Venue

The Defendants argue in the alternative that this action should be transferred to the Western District of Louisiana pursuant to 28 U.S.C. § 1404(a). Section 1404(a) provides: "For the

convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a)(1994). The decision whether to transfer an action pursuant to § 1404(a) rests in the Court's discretion and is reviewed for abuse of discretion. See Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 631-32 (3d Cir. 1989) (decision to grant or deny forum non convenience motion is within sound discretion of trial court). The party seeking transfer of venue bears the burden of establishing that transfer is warranted and must submit "adequate data of record" to facilitate the court's analysis. Ricoh Co. v. Honeywell, Inc., 817 F. Supp. 473, 480 (D.N.J.1993). Before transferring venue, the district court must articulate specific reasons for its decision. Lacey v. Cessna Aircraft Co., 862 F.2d 38 (3d Cir. 1988); Ricoh, 817 F.Supp. at 480.

The Court's analysis under Section 1404(a) is flexible and turns on the particular facts of the case. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29-30, 108 S.Ct. 2239, 2243-44, 101 L.Ed.2d 22 (1988). In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), the Supreme Court listed several factors that guide the Court's decision-making in this area. These factors fall into two categories: (1) the private interests of the litigants; and (2) the public interest in the fair and efficient

administration of justice. Gulf Oil, 330 U.S. at 508-509, 67 S.Ct. at 843.

The private interest factors are: (1) plaintiff's choice of forum; (2) the relative ease of access to sources of proof; (3) the availability and cost of compulsory process for unwilling witnesses; (4) obstacles to a fair trial; (5) the possibility of viewing the premises, if viewing the premises would be appropriate to the action; and (6) all other factors relating to the expeditious and efficient adjudication of the dispute. Gulf Oil, 330 U.S. at 508-09, 67 S.Ct. at 843. The public interest factors are: (1) the relative backlog and other administrative difficulties in the two jurisdictions; (2) the fairness of placing the burdens of jury duty on the citizens of the state with the greater interest in the dispute; (3) the local interest in adjudicating localized disputes; and (4) the appropriateness of having the jurisdiction whose law will govern adjudicate the dispute in order to avoid difficult problems in conflicts of laws. Id.

The Supreme Court articulated these factors with respect to a motion to dismiss for forum non convenience. Nevertheless, courts routinely look to the Gulf Oil factors in deciding a motion to transfer venue under 1404(a). See, e.g., Ricoh, 817 F. Supp. at 479-88. Because transfer of venue is less drastic than dismissal, however, district courts have broader discretion to transfer venue than to dismiss on forum non convenience grounds. Norwood v.

Kirkpatrick, 349 U.S. 29, 32, 75 S.Ct. 544, 546, 99 L.Ed. 789 (1955); All States Freight, Inc. v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952); Ricoh, 817 F.Supp. at 479.

1. Analysis

Applying these principles to the instant case, the Court cannot find that the Defendants have met their burden of showing that transfer of this case to the Western District of Louisiana will best serve the interests of convenience and justice. In this case, the Buy/Sell Agreement contains a Louisiana choice of law provision. However, all of the PPAs, both those executed with the Defendant-facilities and the other facilities, contained a Pennsylvania choice of law provision. Moreover, for the reasons stated above, all of the Defendants had significant contacts with Pennsylvania. (See supra Part I, II.A.3.a and Part II.A.3.b.) In addition, Pennsylvania has an interest in providing a Pennsylvania corporation with a Pennsylvania forum for redressing injuries inflicted by out-of-state actors. See Burger King, 471 U.S. at 473-74 ("where individuals 'purposefully derive benefit' from their interstate activities, (citations omitted), it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities").

Moreover, transfer to the Western District of Louisiana is not appropriate because several defendants are residents of Mississippi who might not be amenable to compulsory process in Louisiana. In

particular, Progress is concerned whether it can establish that the Mississippi facilities have minimum contacts with Louisiana. The Defendants fail to convince the Court that the Western District of Louisiana would have jurisdiction over these defendants. It does not appear from the record before the Court that the Defendant-facilities located outside of Louisiana are subject to the personal jurisdiction of the district court located in Alexandria, Louisiana. See International Shoe Company v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (to satisfy due process, defendant must have minimum contacts with forum state so that maintenance of suit does not offend "traditional notions of fair play and substantial justice"). Indeed, all of the contacts identified in the pleadings and submissions of counsel by the Defendant-facilities, which are located in Mississippi, occur in Mississippi or Pennsylvania. Thus, transferring venue to Louisiana could lead to piecemeal litigation adversely impacting the efficient administration of justice.

The Defendants argue that this action should be transferred because all of the documentary evidence is located either in Louisiana or Mississippi. Keeping the action in Pennsylvania, however, does not affect counsel's access to these documentary depositories. Also, the Defendants argue that most of the defendant-witnesses reside in either Louisiana or Mississippi and

therefore would be inconvenienced by the case taken place in Pennsylvania. This argument fails to persuade the Court that venue should not be transferred. The convenience of non-party witnesses is accorded greater weight in the § 1404(a) analysis than party witnesses. See Aquatic Amusement Associates v. Walt Disney World, 734 F. Supp. 54, 57 (N.D.N.Y. 1990); DEV Indus., Inc. v. NPC, Inc., 763 F.Supp. 313, 315 (N.D.Ill.1991). Because the Defendants have not shown that the balance of convenience weighs heavily in their favor, this Court will not transfer this case to the Western District of Louisiana.

An appropriate Order follows.

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 ELTON GLYNN BEEBE, SR., et al. : NO. 98-3959

O R D E R

AND NOW, this 30th day of June, 1999, upon consideration of the Defendants' Motions to Dismiss, or, Alternatively, Transfer to the Western District of Louisiana (Docket Nos. 33 and 34), the Plaintiff's Opposition to Defendants' Motions (Docket No. 37), Defendants' Reply Memoranda (Docket Nos. 38 and 39), Plaintiff's Surreply to Defendants' Reply Memoranda (Docket No. 41), and the Defendants' Praecipe to Substitute Affidavits of Elton Glynn Beebe, Jr. and Samuel Thomas Mahfouz (Docket No. 40), IT IS HEREBY ORDERED that the Defendants' Motions are **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.