

United States District Court, E.D. Pennsylvania.

C. Clark HODGSON, Jr., Receiver

v.

Thomas GILMARTIN, et al.

Civil Action No. 06-1944.

Sept. 18, 2006.

[Keith R. Dutil](#), [Lee A. Rosengard](#), [Leslie Miller Greenspan](#), Stradley, Ronon, Stevens & Young LLP, Philadelphia, PA, for Plaintiff.

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MEMORANDUM RE: VENUE

[BAYLSON](#), J.

*1 The issues presented are whether venue is proper in this district and whether the case should be transferred pursuant to [28 U.S.C. § 1404](#). Plaintiff C. Clark Hodgson, Jr. (“Plaintiff” or “Receiver”) brings this suit against multiple Defendants, namely Man Financial, Inc. (“Man”), as well as various employees of Man (the “Employee Defendants”) (collectively, “Defendants”), alleging fraudulent conduct in their relationship with the Philadelphia Alternative Asset Management Company (“PAAMCo”) and its principal, Paul M. Eustace (“Eustace”).^{[FN1](#)} According to the Complaint, Man is a future commissions merchant (“FCM”) through which Philadelphia Alternative Asset Fund, Ltd. (the “Offshore Fund”) traded commodity futures and options. PAAMCo was its trading advisor. The Employee Defendants in this case, Thomas Gilmartin, Sep Alavi, William Wambach, Timothy Braun, Jody McMillan, James Zamora, and Monica Rodriguez, each worked at Man during all times material to the Complaint. The Court has jurisdiction pursuant to [28 U.S.C. § 1331](#), as the case involves causes of action arising under federal law, and [28 U.S.C. § 1332](#), since the suit is between citizens of different states and the matter in controversy exceeds \$75,000, exclusive of interest and costs.

^{[FN1](#)}. The ten-count Complaint was filed on May 8, 2006 and alleges: Negligence Against Man (Count I); Negligent Supervision Against Man (Count II); Respondeat Superior Against Man (Count III); Negligence Against Employee Defendants (Count IV); Violation of the Commodity Exchange Act Against Man (Count V); Aiding and Abetting Violations of the Commodity Exchange Act Against Man (Count VI); Common Law Fraud Against Man (Count VII); Aiding and Abetting Common Law Fraud Against Man (Count VIII); Violations of the Racketeer Influenced and Corrupt Organizations Act Against Man and Employee Defendants (Count IX); and Deepening Insolvency Against Man and Employee

Defendants (Count X). Motions to Dismiss are pending. However, the Court has previously advised counsel that, at a minimum, the negligence claims will survive the Motion to Dismiss. Discovery is ongoing pursuant to a detailed Case Management Order.

*1 Presently before the Court is Defendants' Motion to Transfer Venue to the Northern District of Illinois (Doc. No. 17) filed on June 21, 2006.[FN2](#) Plaintiff filed a response in opposition (Doc. No. 46) on July 17, 2006 and Defendants submitted a reply (Doc. No. 53) on July 31, 2006. Oral argument was held by telephone on August 29, 2006.

[FN2](#). The Motion to Transfer Venue was filed on behalf of Employee Defendant Thomas Gilmartin and Man. Although the remainder of the Employee Defendants have not joined the present Motion, as a matter of convenience, the Court will refer to the moving Defendants simply as “Defendants” for purposes of this opinion.

I. Background

*1 The present case has been filed as a related case to Civil Action No. 05-2973 in which the Commodity Futures Trading Commission, (“CFTC”) as plaintiff, sued Eustace and PAAMCo [FN3](#) for enforcement and other relief. The CFTC alleged that Defendants were responsible for investor losses of over \$200 million. C.

Clark Hodgson, Plaintiff in the present case, was appointed Receiver of PAAMCo and related entities in an Order by Judge Padova dated June 23, 2005, an appointment that was made permanent in the Consent Order signed by the Court on September 21, 2005. On April 21, 2006, the Court reappointed the Receiver and resubmitted the Consent Order. In several hearings in the CFTC case, the Court instructed the Receiver to investigate whether additional actions should be brought, but also required the Receiver to seek Court approval prior to bringing any such suits. Pursuant to the Court's above-noted requirement, and with the Court's approval, the Receiver submitted a letter in camera briefly identifying certain civil actions that he intended to file. In an Order dated April 28, 2006, the Court permitted the Receiver to initiate this and other civil actions but expressed no predisposition as to the merits of the case.

[FN3](#). In the parties' briefs and during oral argument there was extensive discussion of the actions of Eustace and/or PAAMCo on behalf of the Offshore Fund. Hereinafter, when discussing the trading entered into with Man, the Court will simply refer to the actions of "PAAMCo." This simplification of terminology is only for purposes of convenience in this opinion and should not be taken to have any substantive significance.

II. Parties' Contentions

A. Defendants' Motion

*1 Defendants argue that none of the three subsections of [28 U.S.C. § 1391\(b\)](#), the statute governing venue where jurisdiction is not founded solely on diversity of citizenship, apply in this case and that venue in the Eastern District of Pennsylvania is therefore improper. First, Defendants contend that though Man arguably resides in the Eastern District by virtue of its transaction of business herein, all of the Employee Defendants are citizens of states other than Pennsylvania and therefore Plaintiff cannot rely on subsection (b)(1) because he cannot demonstrate that all of the Defendants reside in the same state. As for subsection (b)(2), Defendants assert that the relevant analysis is where the events or omissions giving rise to the claim took place, and because the Complaint refers entirely to events which occurred in New York and Illinois, venue in the Eastern District is inappropriate. Finally, subsection (b)(3) does not permit venue to be laid in this District because the action clearly could have been brought in either the Southern District of New York or the Northern District of Illinois.

*2 Defendants next address the relevance of the so-called receivership statutes and their applicability to the venue determination. Examining the statutory provisions which Plaintiff utilized to establish in personam jurisdiction over individuals holding receivership property, Defendants maintain that Plaintiff's reliance on these statutes to establish venue is misplaced. Because the Complaint includes only causes of action for money damages and does not allege that any Defendant possesses receivership property, there is quite simply no authority for the Court to assert venue in this case on the basis of the receivership statutes.

*2 Defendants alternatively argue that the case should be transferred pursuant to [28 U.S.C. § 1404\(a\)](#), since the Receiver, who stands in the shoes of the Offshore Fund, is contractually bound to a forum selection clause requiring suit to be brought in the Northern District of Illinois. They contend that public policy strongly favors the enforcement of forum selection clauses and that there is simply no compelling reason to reject the contractual choice of forum in this case. In particular, Defendants argue that the Northern District of Illinois is not an inconvenient forum and is “fully competent to adjudicate the Receiver's claims under both federal and state law.” Defs' Br. at 19-21. They also assert that neither the presence of additional parties nor the Court's familiarity with the background of this case should prevent transfer.

B. Plaintiff's Response

*2 Plaintiff argues that, while Defendants' objections to the establishment of venue under [§ 1391](#) focus on the three factors set forth in subsections (b)(1), (b)(2), and (b)(3), they ignore an important provision of the statute which applies those categories only if venue is not “otherwise provided by law.” Plaintiff asserts that there are three separate bases for venue in this case, namely: (1) the receivership statute, [28 U.S.C. § 754](#); (2) the Commodity Exchange Act (“CEA”), [7 U.S.C. § 25\(c\)](#); and (3) the civil Racketeer Influenced and Corrupt Organizations Act (“RICO”), [18 U.S.C. § 1965\(a\)-\(b\)](#).

*2 Plaintiff argues that because [28 U.S.C. § 754](#) establishes jurisdiction over any and all ancillary civil actions asserted by the Receiver in his capacity as Court-

appointed Receiver, venue should also lie in this District. In support of this proposition, Plaintiff relies on three federal appellate court decisions.

*2 In addition to the receivership statutes, Plaintiff also contends that both the CEA and RICO statutes provide separate bases for venue in the Eastern District of Pennsylvania. Plaintiff first argues that the CEA, in [7 U.S.C. § 25\(c\)](#), provides venue for the Plaintiff's CEA claim against Man. Because Man has admitted that it "resides" in this District pursuant to [28 U.S.C. § 1391\(c\)](#) due to its transaction of business therein, Plaintiff asserts that it is clear from the plain language of the venue provision in the CEA that venue lies over Man on the CEA claims in Counts V and VI of the Complaint and therefore over all claims in the case. In using the CEA to establish venue, Plaintiff relies on the doctrine of pendent venue, which states that once venue is established for one claim in the case, it is proper for all other claims which arise from the same common nucleus of operative facts. A pendent venue analysis in this case, according to Plaintiff, would result in proper venue for all claims once it has been established for any individual claim.

*3 As an alternative to the CEA, Plaintiff attempts to use the RICO statute, specifically [18 U.S.C. § 1965\(a\) and \(b\)](#), to confer venue. According to Plaintiff, Subsection (a) provides venue for Man, since, just as in the CEA analysis, it has acknowledged that it resides in this District by transacting business here. Subsection (b) establishes venue for the Employee Defendants because the "ends of justice" require them to appear before this Court for the adjudication of the Receiver's claims against them. Therefore, using any or all of the statutes noted above, Plaintiff argues that venue is clearly "otherwise provided by law" under [§ 1391\(b\)](#), and transfer of the case to another district where it "could have been brought" under [28 U.S.C. § 1406\(a\)](#) is not warranted.

C. Defendants' Reply

*3 In their reply brief, Defendants first argue that Plaintiff's attempt to establish venue is insufficient, as he failed to show that significant events related to Eustace's alleged scheme took place in the Eastern District of Pennsylvania, thus failing to meet the requirements of [§ 1391\(b\)\(2\)](#). As for Plaintiff's attempt to establish venue under the receivership statutes, Defendants maintain that venue is a separate concept from jurisdiction, and statutorily created ancillary jurisdiction does not automatically establish venue in the ancillary suit. Defendants argue that Plaintiff has improperly conflated the two concepts in its effort to establish venue in this District.

*3 Defendants also object to Plaintiff's attempt to establish venue under the CEA and RICO. Because Defendants have moved to dismiss Plaintiff's claims under these statutes for failure to state a claim, they argue that the statutes cannot be relied upon to confer venue in this District. Moreover, Defendants maintain that neither the CEA nor RICO properly establishes venue. The CEA only confers venue over Man, and though Plaintiff attempts to utilize the doctrine of pendent venue, that doctrine only properly functions to establish venue over additional claims and cannot be used to establish venue for additional parties. Defs' Reply at 7.

*3 As for Plaintiff's attempt to establish venue under RICO, Defendants argue that neither Plaintiff's co-conspirator venue theory nor the "ends of justice" language within the statute require venue in this District. They contend that the Third Circuit has not yet spoken definitively on the co-conspirator venue theory and relying on this theory, as the sole basis for conferring venue in this case, is therefore not advisable. As for the "ends of justice" provision in [18 U.S.C. § 1965\(b\)](#), Defendants state that "while it makes sense for all of the defendants to appear in one court, the 'ends of justice' do not require that court to be located in this District." *Id.* at 10.

III. Discussion

A. Venue is Proper in this District Under [28 U.S.C. § 1391\(b\)](#)

*3 Defendants first argue that venue is improper, since Plaintiff is unable to establish that it has met the requirements of [§ 1391\(b\)\(1\), \(2\), or \(3\)](#). A defendant bringing a [§ 1406\(a\)](#) motion to transfer has the burden of proving that venue is improper. See [Lomanno v. Black, 285 F.Supp.2d 637, 641 \(E.D.Pa.2003\)](#); see also Myer s v. [Am. Dental Ass'n, 695 F.2d 716, 724 \(3d Cir.1982\)](#). Plaintiff contends, however, that the issue of venue turns on additional language in the statute which states that venue may be established outside of the bounds of subsections (b)(1), (b)(2), and (b)(3) if "otherwise provided by law."

*4 [Section 1391\(b\)](#) provides as follows:

*4 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.

*4 [28 U.S.C. § 1391\(b\)](#) (emphasis added). The Court will first turn to the “otherwise provided by law” language of the statute, because if venue is proper under another statute, an analysis of subsections (1)-(3) would be unnecessary.

*4 Plaintiff first contends that the “receivership statutes” which have been invoked in this case, [28 U.S.C. §§ 754, 1692](#), function to establish both jurisdiction and venue in the Eastern District of Pennsylvania. The Receiver, first appointed on a temporary basis by this Court in a June 30, 2005 Order in the related CFTC case, assumed permanent status in that role after the Court's approval of the Consent Order on September 25, 2005. On April 21, 2006, pursuant to a motion filed by the Receiver, the Court reappointed the Receiver and republished the prior Consent Order in its entirety.

*4 For a receiver to obtain personal jurisdiction over property in another district, it is necessary to comply with a two-step statutory process. First, the receiver must

meet the requirements of [28 U.S.C. § 754](#) by filing copies of its court-ordered appointment as well as copies of the complaint in the case it is pursuing in the district courts in each district in which the property is located. [Section 754](#) provides as follows:

*4 A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof. He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title. Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

*4 [28 U.S.C. § 754](#). After complying with the procedural requirements of [§ 754](#), the Receiver has still not established personal jurisdiction, however, as the statute has been termed “a stepping stone on [the court's way] to exercising in personam jurisdiction over” those holding receivership assets in a remote district. [SEC v. Bilzerian, 378 F.3d 1100, 1103 \(D.C.Cir.2004\)](#) (quoting [SEC v. Vision Commc'ns., Inc., 74 F.3d 287, 290 \(D.C.Cir.1996\)](#)).

*5 The second step of the process involves [28 U.S.C. § 1692](#), which provides for service beyond the territorial limits of the state in which the district court sits in the case at bar.^{FN4} [Section 1692](#) provides:

[FN4](#). Section 1962 provides personal jurisdiction because [Rule 4 of the Federal Rules of Civil Procedure](#) provides that “service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant ... when authorized by a statute of the United States.” [F.R. Civ. P. 4\(k\)\(1\)\(D\)](#).

*5 In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

*5 [28 U.S.C. § 1692](#).

*5 Here, the Receiver, after being reappointed on April 21, 2006, proceeded to follow the procedures set forth in [§ 754](#) and was therefore “vested with complete jurisdiction and control of all such property.” The question presently before the Court is whether the receivership statutes, used to establish “jurisdiction and control” over the property as to which the Receiver seeks possession, also function to create proper venue. Plaintiff relies on the decisions of three appellate courts in its briefs, arguing that venue is established through [§ 754](#), as it “is as much a venue statute as it is a jurisdiction statute, and it provides venue for all claims in this case.” Pl’s Resp. at 18. Defendants disagree with Plaintiff’s characterization of the receivership statutes and assert that because venue and jurisdiction are legally distinct, the fact that the statutes in question establish personal jurisdiction, in no way requires the conclusion that they also establish venue. Defs’ Reply at 4-6.

*5 The most recent case upon which Plaintiff relies is [SEC v. Bilzerian, 378 F.3d 1100 \(D.C.Cir.2004\)](#), in which the district court had created a receivership estate and appointed a receiver to satisfy the SEC's judgment against the defendant. The receiver had subsequently filed a complaint against a third party, Ernest B. Haire, in an effort to recover the principal, interest, and fees owed to the receivership estate on a prior loan, and Mr. Haire had appealed the decision of the district court, arguing that the court lacked personal jurisdiction over him, that venue in the District of Columbia was improper, that the forum was not convenient, and that the receiver had failed to join a necessary party.

*5 In *Bilzerian*, the Court of Appeals for the District of Columbia Circuit first engaged in an extended discussion of the receivership statutes and ultimately upheld the district court's jurisdiction over the defendant. Turning to the issue of venue, the court also concluded that "because the receiver's complaint was brought to accomplish the objectives of the Receivership Order and was thus ancillary to the court's exclusive jurisdiction over the receivership estate, venue was properly established." *Id.* at 1107. In essence, the *Bilzerian* court found that if jurisdiction is ancillary, then venue should also be ancillary and it is therefore unnecessary to satisfy the venue statutes.

*6 In [Scholes v. Lehmann, 56 F.3d 750 \(7th Cir.1995\)](#) (Posner, C .J.), the Seventh Circuit considered an appeal from a case filed by a court-appointed receiver in an effort to recover funds lost in an illegal Ponzi scheme. While the appellate court's focus was on the substantive fraud claims put forth by the receiver in the district court, Scholes did provide an explicit holding regarding the laying of venue under the receivership statutes, concluding as follows: "The laying of venue in the Northern District of Illinois is authorized by [28 U.S.C. §](#)

[754](#), which allows a receiver to sue in the district in which he was appointed to enforce claims anywhere in the country.” *Id.* at 753.

*6 Finally, Plaintiff cites [Haile v. Henderson National Bank, 657 F.2d 816 \(6th Cir.1981\)](#), in support of its position on venue. In *Haile*, the district court had appointed a receiver for a church in order to collect its assets for payment to its bank creditors. The receiver subsequently filed suit in that district against certain non-resident defendants in order to recover property related to the church. However, the trial court dismissed the action, holding that it lacked personal jurisdiction over the suit, since the defendants did not have sufficient minimum contacts with the forum. The Sixth Circuit reversed, concluding that the district court had both personal and subject matter jurisdiction over the case. *Id.* at [822-26](#). In a footnote to its discussion of subject matter jurisdiction under the receivership statutes, the *Haile* court addressed the issue of venue: “We ascribe to the view, under the facts and circumstances of this case, that where jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well. We therefore reject appellee Henderson National Bank’s argument that the suit was properly dismissed since venue was improper under [12 U.S.C. § 94](#).” *Id.* at 822 n. 6.

*6 Although Defendants cite to multiple cases holding generally that jurisdiction and venue are distinct concepts, see, e.g., [Wall St. Aubrey Golf, LLC v. Aubrey, 2006 WL 1525515 \(3d Cir. June 5, 2006\)](#) (non-precedential); [U.S. v. Contents of Accounts Nos. 3034504504 & 144-07143, 971 F.2d 974 \(3d Cir.1992\)](#), they provide only one case which specifically addresses the issue of venue as related to jurisdiction established under the receivership statutes, [United States v. Franklin National Bank, 512 F.2d 245 \(2d Cir.1975\)](#). In *Franklin*, the Second Circuit agreed that the court which appointed the receiver would have ancillary

subject matter jurisdiction over a suit filed in furtherance of the receiver's duties, as “[t]he ancillary suit is cognizable in the court of the main suit regardless of the citizenship of the parties or the amount in controversy ...” *Id.* at 249. Defendants contend that two footnotes in the case indicate that venue and jurisdiction are to be separated analytically in cases filed under the receivership statutes. Footnote six reads as follows: “There had been a prior civil suit by the Receiver and the United States against several defendants, Franklin among them, attempting to recover the monies looted from Roosevelt. Franklin successfully moved to dismiss the claim against it because of improper venue in the Southern District.” *Id.* at 247 n. 6. A later footnote in the case reinforced the venue problems in the district court. See *id.* at 249 n. 8 (stating that the receiver had attempted to file suit in the Southern District of New York (the appointing court) “but was blocked because of venue problems”).

*7 After considering the arguments of the parties, the Court is convinced that venue has been properly established under the receivership statutes. First, the Court finds that, at the time that the Receiver was appointed, property of the receivership estate was located in districts around the United States and that [§ 754](#) authorized the current case as an “ancillary suit.” ^{FN5} Therefore, the instant case clearly falls within the ambit of *Bilzerian*, as the Plaintiff here is the court-appointed Receiver who has filed suit in order to accomplish the objectives of the June 23, 2005 Receivership Order and the subsequent Consent Order. See [Bilzerian, 378 F.3d at 1107](#) (concluding that venue was properly established since the receiver's complaint was filed in furtherance of the receivership order and ancillary jurisdiction was appropriate). In addition, the *Scholes* and *Haile* cases are directly on point and serve to reinforce the *Bilzerian* court's conclusion as to venue.^{FN6} See [Scholes, 56 F.3d at 753](#) (“the laying of venue ... is authorized by [28 U.S.C. § 754](#), which allows a receiver to sue in the district court in which he was appointed to enforce claims anywhere in the country.”); [Haile, 657 F.2d at](#)

[822 n. 6](#) (“[W]here jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well.”). Finally, a leading treatise addresses the conceptual framework of venue in relation to ancillary jurisdiction and reads, in pertinent part, as follows:

[FN5](#). Although Plaintiff argues that “[C]ompliance with [§ 754](#) does not and cannot, confer venue in this District in this case because the case does not involve “property” of the receivership estate.” PI’s Br. at 14, the Court does not find such a requirement in [§ 754](#) or the case law which has applied it. In fact, the Bilzerian case involved a suit by the appointed receiver for the principal, interest, and fees on a loan that was owed to the receivership estate. [378 F.3d at 1101](#). Here Plaintiff seeks damages for, inter alia, alleged acts of negligence and fraud, in an effort to recover funds for the receivership estate, and eventually for distribution to the investors. While Defendants may attempt to distinguish the differences between the ancillary suits in this case and the one at issue in Bilzerian, the Court concludes that such an analysis is unnecessary in light of the broad statement by the court in Haile. The Sixth Circuit wrote:

We begin with the undisputed proposition that the initial suit which results in the appointment of the receiver is the primary action and that any suit which the receiver thereafter brings in the appointment court in order to execute his duties is ancillary to the main suit. As such, the district court has ancillary subject matter jurisdiction of every such suit irrespective of diversity, amount in controversy or any other factor which would normally determine jurisdiction. [657 F.2d at 822](#). This case properly qualifies as an ancillary suit under the receivership statutes and venue will be analyzed accordingly.

[FN6](#). Bilzerian and Haile have been cited approvingly by Judge Giles of this Court on the issue of the receivership statutes' creation of personal jurisdiction, see [U.S. Small Bus. Admin. v. Chimicles, 2004 WL 2223304, at * *2-4 \(E.D.Pa. Sept. 22, 2004\)](#). Defendant offer no good reason to discontinue this practice in regard to the establishment of venue.

*7 It was usually held that where ancillary jurisdiction sufficed to allow a claim or a party without independent jurisdictional grounds, it was also unnecessary to satisfy the venue statutes with regard to that claim or party.... Though there were some early cases to the contrary, if procedural convenience is enough to avoid the constitutional limitations on the jurisdiction of the federal court, it should suffice to dispense with the purely statutory requirements as to venue.

*7 20 Charles Alan Wright & Mary Kay Kane, Federal Practice and Procedure: Federal Practice Deskbook § 10, at 52-53 (2002). The Court agrees with this broad conclusion and finds that since the receivership statutes function to avoid the constitutional restrictions on jurisdiction in an ancillary suit like this one, it requires no great logical leap to conclude that the statutory limitations on venue do not apply in such a case.

*7 As for Defendants' reliance on Franklin, the Court finds that case unpersuasive. The Second Circuit, despite several references to the dismissal of the district court case based on venue, never squarely addressed the issue of venue for an ancillary suit under the receivership statutes. The Court is unwilling to find that venue is inappropriate in this case based upon these indirect references, especially in the face of more recent and compelling case law to the contrary.

*7 The Court thus concludes that the receivership statutes function to establish both jurisdiction and venue in this case.[FN7](#) Therefore, venue is appropriate under [28 U.S.C. § 1391\(b\)](#) because this is “a civil action wherein jurisdiction is not founded solely upon diversity of citizenship,” and venue has been established “as otherwise provided by law.”

[FN7](#). Because the Court has found that venue was properly established for all Defendants under the receivership statutes, it need not examine the various other theories put forth by the parties. Defendants' arguments concerning [§ 1391\(b\)\(1\)-\(3\)](#) and Plaintiff's use of the CEA and RICO (in conjunction with the application of the doctrine of “pendent venue”) need not be addressed.

B. Whether Transfer Is Warranted Under [28 U.S.C. § 1404\(a\)](#)

*8 Before considering the relevant [§ 1404](#) factors, the Court must consider whether the forum selection clause in the Man Customer Agreement is binding on Plaintiff.

1. The Forum Selection Clause in the Customer Agreement Is Binding Upon the Receiver, Who Stands in the Shoes of the Offshore Fund

*8 In order for the forum selection clause found in the Man Customer Agreement to be binding on Plaintiff, the Court must initially find either that PAAMCo and Eustace had actual or apparent authority to act on the Offshore Fund's behalf or, in the alternative, that the Offshore Fund directors subsequently ratified the actions of PAAMCo in entering into that agreement. Where a forum selection clause is found to be binding on a party, it is “presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes that: 1) it is the result of fraud or overreaching; 2) enforcement would violate a strong public policy of the forum; or 3) enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable.” [iGames Entm't v. Regan, 2004 WL 2538285, at *5 \(E.D.Pa. Nov. 9, 2004\)](#) (citing [Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202 \(3d Cir.1983\)](#)).

a. Actual or Apparent Authority

*8 Because the Court finds that the Offshore Fund directors ratified PAAMCo's actions in signing the Customer Agreement, it is unnecessary for the Court to engage in a significant analysis of the relative merits of the parties' arguments on this issue. An outline of the parties' contentions and the facts upon which those arguments are based is nonetheless useful in focusing that discussion.

*8 Several contractual agreements entered into between or among various parties are relevant to give context to the discussion. On May 28, 2004, the Offshore Fund adopted Articles under the law of the Cayman Islands. The Man Financial Customer Account Application, signed by Eustace as "President" of the Applicant, the Offshore Fund, and the Customer Agreement itself between the Offshore Fund and Man Financial, also signed by Eustace as "President," are both dated June 10, 2004.

*8 Several agreements are dated July 29, 2004. First is the Trading Advisory Agreement between PAAMCo and the Offshore Fund under which PAAMCo would act as the trading advisor. New York law controls the interpretation of this agreement. The other agreements are an agreement for the provision of directors between the Offshore Fund and Maples Finance Ltd., of the Cayman Islands, and an administrative agreement between the Offshore Fund and UBS Financial Services (Cayman) Ltd., a bank located in the Cayman Islands. Plaintiff has asserted that PAAMCo did not have authority to enter into any of the above agreements on behalf of the Offshore Fund.

*8 Defendants assert that Eustace and/or PAAMCo's authority to execute the Customer Agreement is clear and enforceable. They maintain that PAAMCo had actual authority to open the trading accounts with Man and to execute the Customer Agreement. Defendants contend that, taken together, the Confidential Offering Memorandum, the Articles of Association, and the Trading Advisory Agreement all gave PAAMCo express authority to open the accounts and sign the Customer Agreement.

*9 In the alternative, Defendants contend that PAAMCo had apparent authority to act on the Offshore Fund's behalf based on the fact that the Fund's directors had notice of PAAMCo's actions and acquiesced in its conduct. Finally, even if there was no actual or apparent authority, Defendants assert that the failure of the Offshore Fund to repudiate the actions of PAAMCo constitutes ratification of that conduct. They argue that, even if PAAMCo's actions were unauthorized, the Offshore Fund's failure to object to those actions and its acceptance of the benefits of those actions amount to affirmation of the execution of the Customer Agreement.

*9 Plaintiff makes cogent arguments on the issue of actual authority, asserting that Eustace and PAAMCo had no authority to act for the Offshore Fund, and that PAAMCo's powers to establish trading accounts were limited by the language in paragraph 2 of the Trading Advisory Agreement, which did not become effective until after the Customer Agreement was signed. See Pl's Resp. at 27-28; Pl's Letter Brief at 1. Plaintiff also argued that there was no apparent authority for PAAMCo, as agent, to act on the Offshore Fund's behalf, since the actions of the principal, in this case the Offshore Fund, in no way indicated that PAAMCo had the authority to enter into contracts. Plaintiff contends that Man had no reason to believe that Eustace, who was in charge of PAAMCo, was able to sign on the Offshore Fund's behalf, and the very documents which set forth PAAMCo's powers carefully confined its abilities to act for the Offshore Fund. See Confidential Offering Memorandum, Defs' Br., Ex. B; Trading Advisory Agreement, Pl's Resp., Ex. D.

*9 Defendants, on the other hand, assert that PAAMCo's actions in opening an account with Man, and signing the Customer Agreement, were accomplished under actual authority from the Offshore Fund. In support of their claim of actual

authority, Defendants rely upon both the Confidential Offering Memorandum and the Articles of Association, which gave PAAMCo, as the trading advisor to the Offshore Fund, “plenary authority” to act on its behalf. They argue that because there were no obvious restrictions placed on PAAMCo's authority, it had actual authority to execute the Customer Agreement in connection with the trading arrangement established with Man. Even if actual authority is in question, Defendants argue in the alternative that PAAMCo was operating with apparent authority to enter into contracts on behalf of the Offshore Fund. Specifically, they contend that the Offshore Fund directors had full knowledge that PAAMCo had executed many contractual agreements on behalf of the Offshore Fund, see Defs' Br., Ex. D, as well as knowledge of PAAMCo's specific activities in connection with Man. See *id.*, Ex. F.

*9 Because there were no obvious restrictions placed on PAAMCo's authority, Defendants argue that PAAMCo had actual authority to open the trading account at Man and sign the Customer Agreement. Addressing Plaintiff's arguments on the issue of apparent authority, Defendants argue that, strictly speaking, the events surrounding the opening of accounts at UBS are not relevant to the analysis of apparent authority in this case, and that even if the UBS events were relevant, the facts show that “the directors of the Offshore Fund were willing to allow Eustace to sign contracts on the Offshore Fund's behalf and authorized him to open an account for the Offshore Fund at UBS Cayman, just as they allowed him to open the account at Man Financial.” *Id.* at 21.

*10 Although the issue of actual or apparent authority is a close question and one which would require considerable time for the parties and the Court to address fully, due to both the factual uncertainties and the required interpretation of the contractual language contained in the Offshore Fund's corporate documents, the

Court need not engage in such an analysis in light of its decision on the matter of ratification.[FN8](#)

[FN8](#).A decision on authority would likely have to await completion of discovery and perhaps an evidentiary hearing.

b. Ratification

*10 During oral argument held via telephone on August 29, 2006, the parties agreed that the ratification theory can survive independently from the authority analyses. The Court concludes that the actions of PAAMCo in signing the Customer Agreement were undisputedly subsequently ratified by the Offshore Fund directors.

*10 For the reasons that follow, the Court finds that Defendants have shown as a matter of law that PAAMCo's actions were subsequently ratified by the Offshore Fund directors and thus concludes that the Offshore Fund, and Plaintiff as Receiver standing in the shoes of the Fund, are bound by the terms of the forum selection clause found in the Customer Agreement.[FN9](#)

[FN9](#). The Man Customer Agreement applies Illinois law. “The law of the State of Illinois appears to be well settled that a party who alleges, asserts or relies on a ratification of an unauthorized act of an agent must show that the principal intended to ratify and at the time of ratification had full knowledge of all of the material facts connected with the transaction.” See [Morse v. United States, 265 F.2d 788, 796 \(9th Cir.1959\)](#)(citing [Scharf v. Solomon, 17 N.E.2d 240, 242 \(Ill.App.Ct.1938\)](#)). Scharf is the most recent Illinois state case located on this issue. The rule in Pennsylvania is the same as the one in Illinois. Under Pennsylvania law, the Pennsylvania Supreme Court has held that the burden is on the party seeking to establish ratification. See [McRoberts v. Phelps, 138 A.2d 439, 446 \(Pa.1958\)](#).

*10 It is a basic tenet of agency law that ratification of an unauthorized transaction can occur through failure to repudiate it. See [Restatement \(Second\) of Agency § 94 \(1958\)](#) (“An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it.”); see also *id.* cmt. a (“Silence under such circumstances that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent can be inferred.”). Moreover, receipt and retention of something to which a principal would not be entitled, unless an act purported to be done for him were affirmed, constitutes ratification. However, if the principal repudiates such benefits at the time he receives them, ratification does not occur. See *id.* at §§ 98-99.

*10 Plaintiff argues that ratification did not occur because even if the Offshore Fund was aware of the trading account at Man and utilized that account extensively, it was still unaware of both the Customer Agreement and the forum selection clause therein. See Pl's Letter Brief at 2-3; thus, ratification of the

Customer Agreement and forum selection clause did not occur, and the motion to transfer to the Northern District of Illinois should be denied.

*10 Defendants assert that it was not necessary for purposes of ratification for the directors of the Offshore Fund to have read the fine print of the Customer Agreement. In fact, Defendants maintain that to the extent the Offshore Fund directors may have been negligent in failing to read the terms of the Customer Agreement, "such failure would provide no defense to their ratification of all of its terms and conditions." Defs' Reply at 15. Defendants also focus on the Offshore Fund's acceptance of the benefits of the terms of the Customer Agreement and argue that such acceptance estops any attempt to avoid the burdens thereof.

*11 The Court finds Plaintiff's arguments unsupported by the undisputed facts which are established from documents in the record, and concludes that the Offshore Fund, both by failing to repudiate the actions of PAAMCo and by accepting the benefits of the contract it had entered into, ratified the Customer Agreement. One key document in the ratification analysis is the July 26, 2004 e-mail to David Brooks, an attorney for the Offshore Fund.^{FN10} This e-mail, whether the actual signed Customer Agreement was attached or not, clearly indicates that account opening documents for the Man account existed. Though the parties cannot definitively determine whether the signed Customer Agreement was actually attached to the July 26th e-mail, the Court finds that the message itself put Brooks, and therefore the Offshore Fund, on notice that PAAMCo had entered into a trading agreement with Man. The Court finds that the fact that an agreement was mentioned in the message, combined with the millions of dollars of transfers subsequently made by the Offshore Fund to its Man account over the course of many months, see Defs' Reply, Ex. N, is sufficient to make the Offshore Fund directors aware of the relationship between the Offshore Fund

and Man.^{FN11} Whether officials at the Offshore Fund chose to make a reasonable investigation of the “acct opening doc” mentioned in the July 26, 2004 e-mail should not be the determining factor for the Court in deciding whether ratification occurred. See, e.g., [Renault v. L.N. Renault & Sons, Inc., 188 F.2d 317, 321 n. 11 \(3d Cir.1951\)](#) (“If ... the circumstances are such as to put reasonable men on inquiry, a jury can infer that the directors possess the knowledge necessary for ratification.”). Any reasonable business person would know that a relationship such as existed between the Offshore Fund and Man would be governed by a contract and it is usual for such contracts to have forum selection clauses.

^{FN10}.The July 26, 2004 e-mail was sent from “staff@paamcollc.com” to David Brooks with the subject heading of “man account docs” and reads as follows: “david: attached is copy of acct opening doc for man. also, board should specify Paul Eustace and Gary Perez as dual signatories on fund's account w/ UBS.”
Defs' Br., Ex. F.

^{FN11}.As Defendants importantly note in their letter brief, there was no affidavit submitted on behalf of the Offshore Fund asserting that the directors of the Offshore Fund were unaware of either the Customer Agreement or the forum selection clause contained therein. While the lack of an affidavit on this issue is not necessarily fatal to Plaintiff's position, Plaintiff, as the party disputing ratification, but standing in the shoes of the Offshore Fund, had the opportunity and the ability to produce evidence supporting his position, but did not do so. The absence of such evidence further supports the Court's conclusion that there was notification of the Offshore Fund as to PAAMCo's signing the Customer Agreement with Man.

*11 As for the directors' ratification of the forum selection clause within the Customer Agreement, Plaintiff argues that because the Offshore Fund directors were unaware of the material facts of the contract which PAAMCo had entered into, ratification cannot have occurred. In support of this contention, Plaintiff cites [Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co., 602 A.2d 1348 \(Pa.Super.Ct.1992\)](#), arguing that in order for ratification of an agent's actions to occur, a principal must have "full knowledge of all material facts attending the transaction intended to be ratified." [Id. at 1353](#). In Hilltop Oil, the Pennsylvania Superior Court applied Pennsylvania law on ratification as stated above, writing as follows:

*11 Absent knowledge on the part of the fire company regarding the nature and effect of the corrective deed, it could not effectively ratify the deed. In view of the trial court's finding that such knowledge was lacking, we are constrained to accept also its legal conclusion that the fire company did not ratify the corrective deed.

*12 *Id.* (citations omitted). In this case, the Court finds that knowledge of the Customer Agreement was not lacking based on the notification of the Offshore Fund as to the existence of that agreement.

*12 Even if the Offshore Fund and its attorneys never gained actual knowledge of the forum selection clause, however, the Court finds that the Offshore Fund could only have been unaware of the contents of the Customer Agreement because it chose not to inquire into its terms, and such ignorance is no excuse when determining whether ratification occurred. In [Currie v. Land Title Bank & Trust](#)

[Co., 5 A.2d 168 \(Pa.1939\)](#), the Pennsylvania Supreme Court specifically addressed the material fact requirement, stating as follows:

*12 It is undoubtedly a general principle of law that a person affirming a transaction, made on his behalf but without his authority, may avoid the effect of his ratification if at the time he was ignorant of material facts[.] But there is an equally well-recognized limitation of this doctrine to the effect that “principal can ... ratify the unauthorized act of his agent without full knowledge of all material facts connected with it if he intentionally and deliberately does so, knowing that he does not possess such knowledge and does not care to make further inquiry into the matter[.]” [Pollock v. Standard Steel Car Co., 230 Pa. 136, 141](#). It is inferred from a ratification under such circumstances that the principal is willing to assume the risk of facts as to which he knows he is ignorant.

*12 Id. at 170. The Court thus finds that Plaintiff's arguments as to the Offshore Fund's lack of knowledge concerning material facts is contrary to the common-sense approach to the ratification doctrine endorsed by Currie. Only if it did not “care to make further inquiry into the matter” did the Offshore Fund (and its directors) remain ignorant of the contents of the Customer Agreement entered into by PAAMCo. It is simply impossible to accept Plaintiff's argument, not withstanding millions of dollars of trades between the Offshore Fund and Man, that any reasonable business person could have assumed this volume of transactions could have been accomplished without an agreement between the two entities. However, there is no evidence that the Offshore Fund took any steps to learn about this agreement and/or to challenge it.

*12 For this reason the Court concludes that the Offshore Fund ratified the actions of PAAMCo, including both the opening of the trading account at Man

and the Customer Agreement associated therewith. Ratification of the Customer Agreement includes ratification of the forum selection clause found in paragraph 11(d) of that document, and the Court thus holds that a valid forum selection clause exists as to the Plaintiff in this case, who serves as the Court-appointed Receiver for the Offshore Fund and, for all intents and purposes, stands in its shoes in the present matter.

2. The Forum Selection Clause Encompasses All of Plaintiff's Claims

*13 Defendants contend that the clause is very broad and covers all claims in this case because they arise out of or are related to the contractual agreement between the parties

*13 Plaintiff argues that even if the forum selection clause were given legal effect by this Court, the clause does not encompass the claims asserted against Man and the Employee Defendants in the Complaint.

*13 Although Plaintiff attempts to argue that the claims against Man and the Employee Defendants included in the Complaint do not arise from or relate to the Customer Agreement, the Court finds otherwise. Both recent case law and common sense dictate that the claims put forth by Plaintiff are encompassed by the broad language of the forum selection clause.

*13 First, Defendants argue, and the Court agrees, that the simplest claims raised against Defendants allege that they were negligent in their dealings with Eustace and PAAMCo. Of course, liability for negligence requires a showing that Defendants owed a duty to Plaintiff and the terms of the Customer Agreement between Man and the Offshore Fund are therefore material to the negligence claims. The Customer Agreement functions to define the duties (and is the source of the duties) owed by Man to the Offshore Fund. See, e.g., Customer Agreement, Defs' Br., Ex. A ¶¶ 9-10. Similarly, Plaintiff's allegations of limited access to the eMidas system is addressed in ¶ 28 of the Customer Agreement, which relates to "Online Services/Electronic Statements."

*13 In addition, and perhaps more importantly, the Third Circuit in [John Wyeth & Brother Limited v. Cigna International Corp., 119 F.3d 1070 \(3d Cir.1997\)](#), found that in interpreting forum selection clauses, it is essential to look to the language of the specific clause at issue. [Id. at 1075](#). Here, the forum selection clause reads, in pertinent part, as follows: "all actions or proceedings ... with respect to any controversy arising out of or related to this agreement, shall be litigated only in courts whose situs is in the State of Illinois." Customer Agreement, Defs' Br., Ex. A, at ¶ 29B. In fact, the very cases relied upon by Plaintiff in its response brief are distinguished by the John Wyeth court, which noted that neither [Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 \(3d Cir.1983\)](#), nor [Crescent International Corp. v. Avatar Communities, Inc., 857 F.2d 943 \(3d Cir.1988\)](#), involved forum selection clauses which used broad language like the "arising out of or related to" wording found in the clause presently before the Court. ^{FN12} See [John Wyeth, 119 F.3d at 1075](#) (holding that "[d]rawing analogy to other cases is useful only to the extent those other cases address contract language that is the same or substantially similar to that at issue [n]either the forum selection clause in Coastal Steel nor that in Crescent contained the phrase 'arising in relation to' or something similar").

[FN12](#). The Court also notes that the other case law cited by Plaintiff in its response does not affect the analysis of the forum selection clause in this case. Those cases either predate the John Wyeth decision or involve narrower forum selection clauses which do not contain language akin to the “arising out of or related to” terminology at issue in this case.

*13 The Court concludes that the claims set forth by Plaintiff are related to the Customer Agreement between Man and the Offshore Fund, as that document stated the parameters of the business relationship entered into by those two parties. The Customer Agreement is therefore relevant in considering, inter alia, the duties owed by each party to the other, as well as the obligations assumed by each party in the business relationship that had been embarked upon.[FN13](#) In light of the very broad reading of similar forum selection clauses by the Third Circuit, this Court finds that the forum selection clause found in paragraph 29B of the Customer Agreement encompasses all of Plaintiff's claims in this case.[FN14](#)

[FN13](#). That the suit does not include claims for breach of contract does not require the Court to reconsider its position. A recent decision from this Court held that “pleading alternative, non-contractual theories is not enough to avoid a forum selection clause if the claims arise out of the contractual relationship and implicate the contract.” [Kahn v. Am. Heritage Life Ins. Co., 2006 WL 1879192, at *6 \(E.D. Pa. June 29, 2006\)](#) (quoting [Crescent Int'l, Inc., 857 F.2d at 944](#)); see also

[Hay Acquisition Co. v. Schneider, 2005 WL 1017804, at *6 \(E.D.Pa. Apr. 27, 2005\).](#)

[FN14](#). The Court also finds that the forum selection clause, in addition to encompassing all of the claims in the present case, applies to each of the Employee Defendants. While only persuasive authority, the Court finds the reasoning in [American Patriot Insurance Agency, Inc. v. Mutual Risk Management, Ltd., 248 F. Supp 2d 779 \(N.D.Ill.2003\)](#) (rev'd on other grounds, [364 F.3d 884, 889 \(7th Cir.2004\)](#)), compelling on this point. The American Patriot court wrote: "Similarly, we also reject Plaintiffs' argument that enforcement of the forum selection clause is precluded by the fact that certain Defendants are not parties to the Agreement. Plaintiffs cannot escape their contractual obligations simply by joining parties who did not sign the contract and then claiming that the forum selection clause does not apply." Id. at 785 (citing [Hugel v. Corp. of Lloyd's, 999 F.2d 206, 209-10 \(7th Cir.1993\)](#); [Friedman v. World Transp., Inc., 636 F.Supp. 685, 691 \(N.D.Ill.1986\)](#)). Here, Plaintiff should similarly be prevented from avoiding the impact of a valid forum selection clause by suing Man employees who were not signatories to the Customer Agreement.

The Court also recognizes that its holding that Plaintiff is bound to the terms of the Customer Agreement may impact other aspects of this case, but unless there is new information that has not been put forward on the venue issue, the Court believes that the evidence is clear that the Receiver is bound to the Customer Agreement.

3. Considering The Factors Under [28 U.S.C. § 1404](#)

*14 The decision to transfer an action pursuant to [§ 1404\(a\)](#) is discretionary with the Court, reviewed only for abuse of that discretion. See [Lony v. E.I. DuPont de Nemours & Co.](#), 886 F.2d 628, 631-32 (3d Cir.1989). “The party seeking transfer of venue bears the burden of establishing the propriety of such and must submit ‘adequate data of record’ to support its position.” [Standard Knitting, Ltd. v. Outside Design, Inc.](#), 2000 WL 804434, at *3 (E.D. Pa. June 23, 2000). The Third Circuit has stated that “In ruling on [§ 1404\(a\)](#) motions, courts have not limited their consideration to the three enumerated factors in [§ 1404\(a\)](#) (convenience of parties, convenience of witnesses, or interests of justice), and, indeed, commentators have called on the courts to ‘consider all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.’ “ [Jumara v. State Farm Ins. Co.](#), 55 F.3d 873, 879 (3d Cir.1995) (quoting [15 Charles Alan Wright et al., Federal Practice and Procedure § 3847, at 370 \(1986\)](#)).

*14 As stated above, private factors include: (1) the plaintiff's choice of venue; (2) the defendants' preference; (3) where the claim arose; (4) the relative physical and financial condition of the parties; (5) the extent to which witnesses may be unavailable for trial in one of the forums; and (6) the extent to which books and records would not be produced in one of the forums. See [Miller v. Atkins Nutritionals, Inc.](#), 2005 WL 503261, at *3 (E.D.Pa. Mar. 3, 2005) (citing [Jumara, 55 F.3d at 879](#)). Public factors include: (1) enforceability of a judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty resulting from court congestion; (4) the local interest in deciding the controversy; (5) the public policies of the forums; and (6) the familiarity of the trial judge with the applicable state law in diversity cases. Id.

*14 Defendants assert that consideration of the private and public factors set forth in [§ 1404\(a\)](#) warrants transfer. They argue that each of the private interests to be considered by the Court, Plaintiff's contractual agreement of the forum, Defendants' preference, where the claim arose, the convenience of the parties, the convenience of the witnesses, and the location of the books and records, all point toward the Northern District of Illinois as the more appropriate forum for this litigation. Similarly, Defendants maintain that the public interests the Court must consider, the enforceability of the judgment, practical considerations that could make the trial easy, expeditious, or expensive, the relative administrative difficulty resulting from court congestion, the local interest in deciding local controversies, and the familiarity of the trial judge with the applicable state law in diversity cases, all weigh heavily in favor of transfer.

*15 Plaintiff puts forth his own evaluation of the [§ 1404](#) factors, concluding that an analysis of both the private and public interests in this case requires the conclusion that transfer is inappropriate. In particular, Plaintiff focuses on the preservation of the Receiver's resources and consolidation of this ancillary matter with the related matter currently pending before this Court, noting that the Court is already familiar with many of the facts and the documents at issue in the present case.

*15 Looking at the first private factor, the Court finds that the forum selection clause, which the Court has concluded is binding on Plaintiff, negates the weight that is usually given to the Plaintiff's choice of forum. The Defendants' preference is clearly the Northern District of Illinois, which is a rational choice supported by the forum selection clause. As to the third factor, the claim could be said to have

arisen in several districts, including this district and the Northern District of Illinois, because substantial acts took place in these districts, as well as other districts. As to the relative physical and financial condition of the parties, the Court must take into account that the Receiver, a private lawyer who is in charge of attempting the collection of over \$200 million in investor losses and eventually disbursing whatever is actually collected to the investors, does not have any funds of his own or his law firm invested in this litigation. Indeed, a prime consideration for the Receiver (and the Court) is the conservation of the funds which the Plaintiff holds, essentially on behalf of the investors. Man appears to be a substantial and successful financial services firm. This factor does not support transfer to the Northern District of Illinois because litigating this case there will be much more expensive for Plaintiff. The principal additional costs would be retaining counsel in Chicago to work with the Receiver and his Philadelphia counsel. It would require substantial work for new Chicago counsel to become familiar with the intricacies of this case, a familiarity which the Receiver's counsel has already achieved through some fifteen months of active litigation since appointment by this Court. As to the fifth factor, it appears that material witnesses are present in or near both districts, their testimony can be secured by deposition, and thus this factor is not weighted in favor of either party.

*15 Although there has been much discussion about books and records at various pretrial conferences in this case and in the companion case brought by the CFTC, the great majority, if not all, of Man's relevant books and records have already been produced. Indeed, the Court believes that the significance once given to the presence of books and records in a particular district is no longer appropriate in view of the fact that, in most complex cases, relevant documents are easily copied into a form of electronic memory, such as a CD disc, and easily provided to other counsel.

*16 Concerning the public factors, the Court finds that a judgment entered in this case could be enforced in either district. Practical considerations strongly favor the case remaining in this district because the Receiver, a Philadelphia attorney represented by his Philadelphia law firm, can obviously prepare and present the case with much greater facility and less expense if the case remains in Philadelphia, whereas considerable expense would be involved to try this case in Chicago. Although Man's primary defense counsel is located in New York City, which is obviously closer to Philadelphia than Chicago, the Court will not consider this factor against Defendants in view of Man's own rational choice that it is apparently willing to bear the expense of having its lead counsel travel to Chicago for a trial.

*16 The Court finds that court congestion is not a relevant factor. General docket "congestion" is not relevant if the judge to whom a case is assigned is going to give it priority status, as has the undersigned. Under the pretrial management schedule already entered by this Court, discovery is ongoing and this case will be tried in the spring 2007. Because of the significance of the case, the undersigned has given it a high priority in case management, discovery and trial calendar status over other cases. The local interest in deciding the controversy does not appear to be a factor. The public policies of the forums are not different, and the fact that a judge in Chicago might be more familiar with the laws of Illinois, which is applicable under the Customer Agreement, gives some weight to transfer, but not overwhelmingly. There are significant federal claims in the case, although still subject to a motion to dismiss, and due to the ease of electronic-based legal research, it is no longer difficult for any judge to learn the applicable law of another state.

*16 In balancing all of these factors under the principles of *Jumara* and its progeny, the Court concludes that the public factor, that by this case remaining in this district, it will be tried promptly within the next six to seven months, and less expensively by Plaintiff, serving in the quasi-public role of Receiver, counsels against transfer. Although it does not appear that the Northern District of Illinois has a congested calendar, if transfer were ordered, there would surely be some delay in the progress of this case if only because of its complexity, when it appeared on the docket of a judge in the Northern District of Illinois. Realistically, transfer would make it difficult for the case to be tried at the scheduled date if the case remains in this district.

*16 The other public factor which is of considerable concern of the Court is the much greater expense that would be required to be borne by the Receiver. Although the Court has no opinion as to whether Man and its employees have any liability whatsoever in this case, the fact that the Receiver has chosen to initiate this action indicates that, at least in the Receiver's judgment, this case is worthy of investment of receivership assets, and if successful, would result in a substantial recovery on behalf of the investors. Requiring the Receiver to try this case in Chicago would not only require additional logistics, it would dramatically and, in this Court's view, unnecessarily, place great expenses upon the Receiver, which would come out of the receivership estate, and if there was any recovery by the Receiver in this case, these additional expenses would diminish the net assets available to the investors.

IV. Conclusion

*17 For the reasons stated above, the Court concludes that venue in this district is appropriate under [28 U.S.C. § 1391\(b\)](#) because this is “a civil action wherein jurisdiction is not founded solely upon diversity of citizenship,” and venue has been properly established under the receivership statutes for this “ancillary suit.” The Court also concludes that the forum selection clause in the Customer Agreement is valid and applies to all claims and parties in this case. After careful consideration of both the public and private factors of [§ 1404\(a\)](#), the Court finds that Defendants' Motion to Transfer Venue to the Northern District of Illinois will be denied.

*17 An appropriate Order follows.

ORDER

*17 AND NOW, this 18th day of September, 2006, upon consideration of the briefs and oral argument, it is hereby ORDERED that Defendants' Motion to Transfer Venue to the Northern District of Illinois (Doc. No. 17) is denied.

E.D.Pa.,2006.

Hodgson v. Gilmartin

Slip Copy, 2006 WL 2707397 (E.D.Pa.)

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- [2007 WL 514388](#) (Trial Motion, Memorandum and Affidavit) Motion of Third-Party Defendants Scott Somerville and David Lashbrook for Reconsideration (Jan. 10, 2007) Original Image of this Document (PDF)
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