

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Discover Bank,	:	
	:	Civil Action No. C2-3-686
Plaintiff,	:	
	:	Judge Gregory L. Frost
v.	:	
	:	Magistrate Judge Mark R. Abel
New Vision Financial, LLC,	:	
	:	(ORAL ARGUMENT REQUESTED)
Defendant.	:	

**MOTION TO DISMISS PLAINTIFF’S COMPLAINT FOR LACK
OF PERSONAL JURISDICTION AND/OR IMPROPER VENUE
OR IN THE ALTERNATIVE
MOTION FOR TRANSFER OF VENUE TO THE UNITED STATES
DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA**

Pursuant to Rule 12(b)(2), Federal Rules of Civil Procedure, 28 U.S.C. §1391(a) and 28 U.S.C. §1404(a), New Vision Financial, LLC (“New Vision”) enters its limited appearance solely to move for the dismissal of the above captioned action. Discover Bank’s (“Discover”) complaint must be dismissed because this Court does not have personal jurisdiction over New Vision and because venue is improper in the Southern District of Ohio. Under well established case law and the United States Constitution, this Court cannot exercise personal jurisdiction over New Vision because New Vision does not have adequate contacts with Ohio under either the Ohio long-arm statute or the United States Constitution. Discover is engaging in an unfortunate and improper attempt to manufacture jurisdiction over New Vision in this Court. If the case is not dismissed, the overwhelming weight of authority requires this Court to transfer it to the United States District Court for the Northern District of Georgia. This motion is more fully

supported by the attached Memorandum of Points and Authorities, exhibits attached thereto, and any oral argument that may be heard in this matter.

Respectfully submitted,

s/ Rodney A. Holaday

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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

Plaintiff Discover Bank is a national banking organization incorporated under the laws of the state of Delaware. *See* ¶ 1 of *Discover's Complaint*. Discover's principal place of business is in New Castle, Delaware. *Id.* Discover Financial Services' is a servicing agent of Discover. *Id.* Discover Financial Services' headquarters are located in Riverwoods, Illinois. *See Printout from Discover Financial Services website, attached hereto as Exhibit 1.* One of Discover Financial Services sixteen regional offices is located in Hilliard, Ohio. Importantly, Discover Financial Services is not a party to this lawsuit. No claims have been filed on behalf of Discover Financial Services. *See Plaintiff's Complaint*. The only Discover entity that has filed claims against New Vision is Discover Bank.

New Vision is a small financial services company located in the State of Georgia. *See Affidavit of Frederick A. Howard at* ¶6, *attached hereto as Exhibit 2.* New Vision has six employees in Georgia. *Id. at* ¶¶5, 7. All of New Vision's business is conducted from its one Georgia office. *Id. at* ¶6. New Vision does not have any offices, employees or contacts within the State. *Id. at* ¶¶6-11, 16-18, 20.

New Vision purchases charged off credit card accounts from credit card issuers. New Vision transfers all of the accounts that it purchases to independent third party collection agencies which, in return for a percentage of the actual collections, attempt to collect some or all of the charged off debt. New Vision does not actually collect debt in any state. All of New Vision's business is conducted from its office in Georgia. *Id. at* ¶6.

New Vision and Discover executed a Credit Card Sale Agreement (the “Agreement”). *Attached to Discover’s Complaint as Exhibit A.* Between January 2001 and October 2002, New Vision purchased accounts from Discover on a monthly basis. Each month Discover provided documents to New Vision reflecting the accounts purchased. New Vision did not and does not maintain any bank accounts in Ohio. New Vision did not travel to Ohio to negotiate the contract. *See Howard Aff. at ¶18.* In fact, no New Vision employee ever entered the State of Ohio concerning the Agreement. All business was conducted from its Georgia office either on the telephone, via email, or correspondence. The Agreement contains no forum selection provision but states that Delaware law governs the agreement between the parties. *See Agreement, §13.8 at p.16.*

II. THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO DOES NOT HAVE PERSONAL JURISDICTION OVER NEW VISION.

A. Ohio’s Long-arm Statute Does not Authorize this Court to Exercise Personal Jurisdiction over New Vision.

To properly exercise personal jurisdiction over New Vision, an out of state defendant, the Court must first determine whether the exercise of personal jurisdiction is permitted under Ohio’s long-arm statute. *Mimco Inc. v. Virginia Iron & Metal Recycling, Inc.*, 840 F.Supp. 1171, 1173 (S.D.Ohio 1993). Ohio Revised Code Section 2307.382, Ohio’s long-arm statute, details the limited circumstances when personal jurisdiction may be exercised over an out of state defendant:

- (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
 - (1) Transacting any business in this state;
 - (2) Contracting to supply services or goods in this state;
 - (3) Causing tortious injury by an act or omission in this state;

- (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
 - (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
 - (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
 - (7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.
 - (8) Having an interest in, using, or possessing real property in this state;
 - (9) Contracting to insure any person, property, or risk located within this state at the time of contracting.
- (B) For purposes of this section, a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. As used in this division, "principal" and "sales representative" have the same meanings as in section 1335.11 of the Revised Code.
- (C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

Discover, as the party seeking assertion of personal jurisdiction, bears the burden of showing that such jurisdiction exists. *See, e.g., Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir.1991). If Discover is unable to meet its burden, the motion to dismiss must be granted.

Id.

Discover alleges only that New Vision breached the Agreement and that the alleged breach caused it damage (Claims for Relief I and II both specifically allege breach of the Agreement). *See* ¶¶30, 31, 37 of *Discover's Complaint*. There are no claims asserted or damages alleged that can be construed as tortious, involving real property, a breach of warranty, or involving an insurance relationship. Merely entering into contract with an Ohio company would not, without more, establish that nonresident subscriber had minimum contacts with that company's home state, for purpose of exercising personal jurisdiction over it. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir.1996.) Therefore, to persuade the Court to exercise personal jurisdiction over New Vision, Discover must show that either (1) New Vision's alleged breach involved business transacted within the State of Ohio or (2) that New Vision's agreed to provide goods and services within the State of Ohio. Because neither is true, personal jurisdiction cannot be exercised under Ohio's long-arm statute.

New Vision does not carry on any business nor have dealings within the State of Ohio. *See, e.g., Walker v. Concohy*, 79 F.Supp.2d 827, 831-835 (N.D.Ohio 1999). No negotiations concerning the agreement were conducted in Ohio. No negotiations regarding the amendments to the Agreement were conducted in Ohio. New Vision's work concerning the Agreement and its relationship with Discover arose exclusively from its Georgia office. *Howard Aff. at* ¶¶6, 9-12, 14-20. New Vision's business with Discover was completely transacted within the State of Georgia. *Id.*

Discover unabashedly filed its lawsuit as Discover Bank c/o Discover Financial Services. This is nothing more than an overt attempt to manufacture jurisdiction by including a second company in a pleading without actually filing any claims on behalf of that company. Discover Financial Services was not a party to the Agreement that Discover Bank alleges New

Vision breached. The Complaint even indicates that the interested party is a Delaware corporation. Discover Bank's attempt to utilize Discover Financial Services' regional office to establish Ohio jurisdiction is improper and should not be permitted.

Ohio's long-arm statute was specifically enacted to prevent Discover from haling an out of state company into an Ohio court. There is nothing alleged indicating that New Vision carried on any business in Ohio or transacted business within Ohio. New Vision does not and did not provide goods and services to the State of Ohio and has not transacted any business within the State of Ohio. Discover's complaint must be dismissed.

B. New Vision Does Not Have Sufficient Contacts With The State of Ohio For This Court To Exercise Personal Jurisdiction Over It.

The resolution of questions of personal jurisdiction requires a two-part analysis. The Court must first determine that Ohio's long-arm statute permits the exercise of personal jurisdiction over New Vision. Then, the Court must determine whether the extension of jurisdiction violates notions of fair play and substantial justice encompassed by the due process clause of the Fourteenth Amendment to the United State Constitution. *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 638, N.E.2d 541 (1994)(Ohio's long-arm statute and federal due process are not co-extensive). Compliance with Ohio's long-arm statute does not insure compliance with the due process clause of the Fourteenth Amendment. *Id. Highway Auto Sales, Inc. v. Auto-Konig of Scottsdale, Inc.*, 943 F.Supp. 825, 829-830 (N.D.Ohio 1996)(recognizing that Ohio's long-arm statute is not to be equated with the limits of due process). The burden of proof lies with the plaintiff to show that the Court's exercise of personal jurisdiction complies with due process. *Walker v. Concoby*, 79 F.Supp.2d at 829 citing *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929 (6th Cir. 1974). Where a defendant's motion to dismiss is supported by affidavit, the plaintiff must set forth specific facts showing that the court has jurisdiction. *Id.*

To prove that the exercise of personal jurisdiction is consistent with fair play and substantial justice, Discover must show: (i) that New Vision purposefully availed itself of the privilege of transacting business in Ohio or of causing consequence in Ohio; (ii) that the cause of action arose from New Vision's conduct in Ohio; and (iii) that New Vision's conduct have a substantial connection to Ohio as to make the exercise of jurisdiction over it reasonable. *Mimco v. Virginia Iron & Metal Recycling, Inc.*, 840 F.Supp at 1173 (emphasis added). The conduct alleged in Discover's complaint does not meet any, let alone all three of the criteria necessary for this Court to exercise jurisdiction. The Fourteenth Amendment to the United States Constitution requires that the Complaint be dismissed.

1. New Vision Did Not Purposefully Avail Itself of the Privilege of Acting in Ohio or Causing Consequence in Ohio.

To prove that New Vision purposefully availed itself of the privilege of acting in Ohio, Discover must plead and prove that New Vision should have reasonably foreseen that the transaction would have consequences in Ohio. *Id.* The purposeful availment requirement protects non-residents from being haled into Ohio courts solely as the result of attenuated contacts over which it had no control. *Burger King v. Rudewicz*, 471 U.S. 462 at 475, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985). The plaintiff must prove that the defendant reasonably anticipated being haled into an Ohio court. *Id.*

There is no evidence or even an allegation that New Vision anticipated being haled into an Ohio court. It entered into an Agreement with Discover Bank, which is a Delaware company. *Agreement at p.1*. The fact that Discover Financial Services (Discover Bank's servicing agent) has an office in Ohio does not provide any reasonable notice to New Vision that it could be haled into an Ohio court. Discover Financial Services is headquartered in Illinois, not

Ohio. *See Exhibit 1.* Because New Vision did not and could not have foreseen being sued in Ohio, Discover's claims must be dismissed.

2. Discover's Claims Do Not Arise From Conduct by New Vision Within the State of Ohio.

Discover alleges that "New Vision breached the contract by failing to purchase any accounts for the last two months of 2002 and the first three months of 2003." *See Complaint at ¶5.* Even Plaintiff's Complaint reveals that New Vision's alleged breach did not occur within the State of Ohio when the Agreement. Neither New Vision nor any of its employees were in Ohio. New Vision's communication with Discover was limited to telephone calls, emails or facsimiles from Georgia. The use of the telephone and "other secondary or ancillary" lines of communications cannot alone provide the minimum contacts required by due process. *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir.1994) (quoting *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309, 314 (8th Cir.1982). *See also*, *Market/Media Research v. Union Tribune Pub.*, 951 F.2d 102, 105 (6th Cir.1991), *cert. denied*, 506 U.S. 824 (1992)(telephone calls and mail sent to Ohio insufficient for personal jurisdiction); *Capital Dredge & Dock Corp. v. Midwest Dredging Co.*, 573 F.2d 377 at 380 (6th Cir.1978)(telephone calls from plaintiff in Ohio along with mailing of final agreement and first payment to Ohio insufficient for long-arm jurisdiction).

The subject of plaintiff's cause of action -- an alleged breach of the agreement -- occurred in Georgia. There is no conduct alleged in Discover's Complaint that insinuates, let alone sufficiently shows, that the conduct leading to the Complaint arose within the State of Ohio. Discover's Complaint must be dismissed.

3. The Conduct Alleged by Discover as the Basis for its Claims Against New Vision Is Insufficient for this Court to Reasonably Exercise Personal Jurisdiction Over New Vision.

This dispute involves a Delaware company and a Georgia company. The dispute arises strictly from Discover's allegation that New Vision failed to purchase accounts from it over a five month period. *See Exhibit A to the Complaint*. The alleged breach did not involve any conduct within the State of Ohio. No Ohio companies are parties to the Agreement. The only connection to the State of Ohio appears to be a non-party servicing agent's address. *Id.* There is no reasonable basis for this Court to require New Vision to defend a breach of contract claim against it in Ohio.

III. DISCOVER'S COMPLAINT MUST BE DISMISSED BECAUSE THE CORRECT VENUE FOR THIS ACTION IS THE NORTHERN DISTRICT OF GEORGIA.

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought. *28 U.S.C. §1391(a)*.

The Court in evaluating which is the proper venue must look to the convenience of the litigants and witnesses. *15 Fed. Prac. & Proc. Juris. 2d §3801*. In assessing convenience of the litigants and witnesses, the Court should look at the facts in a light most favorable to the party who has not chosen the forum. *Id.* That is because "the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great Western United Corp.*, 443 U.S. 173, 183-84, 99 S.

Ct. 2710, 2716, 61 L.Ed.2d 464 (1979)(emphasis in original). There is a fundamental and historical principle that there is a particular court or courts where an action should be brought. The convenience of the defendant is of particular import to a District Court's determination of which Court is the right venue. *Delta Air Lines, Inc. v. Western Conference of Teamsters*, 722 F.Supp. 725, 727 (D.Ga. 1989).

The Southern District of Ohio is not convenient to New Vision. All of New Vision's employees are located in Suwanee, Georgia. Many, if not all of its witnesses live in either Georgia or Jacksonville, Florida. All of New Vision's documents, and evidence are located in Georgia. The totality of the circumstances requires that the case be dismissed for improper venue.

Discover also has significant connections to Georgia. It is a national banking organization that issues credit cards in all 50 states. Its subsidiary, Discover Financial Services is headquartered in Illinois and registered and licensed under the laws of Georgia. *See Printout from Secretary of State for the State of Georgia, attached hereto as Exhibit 3*. The correct venue for this action is Georgia, not Ohio.

IV. IF NOT DISMISSED, THIS CASE SHOULD BE TRANSFERRED TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

28 U.S.C. §1404 provides, in relevant part:

For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district court or division where it may have been brought.

Decisions on the transfer of venue are left to the sound discretion of the District Court. *Artisan Development v. Mountain States Development Corp.*, 402 F.Supp. 1312, 1314 (S.D.Ohio 1975). District courts are granted an opportunity to transfer a case as opposed to

dismissing because of concerns that valid claims were being dismissed simply because the plaintiff had made an erroneous guess with regard to the existence of sufficient facts to establish proper venue. Wright & Miller, *15 Fed. Prac. & Proc. Juris.2d* §3827. A court may not transfer an action under unless the Court has jurisdiction of the subject matter of the action. *Id.*

There is not a definitive set of factors that the district court must examine in determining whether to transfer a case to a different district. *Artisan Development Corp.*, 402 F. Supp. at 1314. Ohio District Courts rely upon several general factors to determine whether transfer would be best “for the convenience of the parties and witnesses and in the interests of justice.” *Midwest Motor Supply Co. v. Kimball*, 761 F.Supp. 1316, at 1318 (S.D.Ohio 1991). The factors used include: (i) the nature of the suit; (ii) the place of the events involved; (iii) the relative ease of access to sources of proof; (iv) the nature and materiality of the testimony to be elicited from witnesses who must be transported; (v) the respective courts’ familiarity with the applicable law and (vi) the residence of the parties. *Id.*

Ohio District Courts routinely transfer cases which are filed in the wrong district. *See, e.g., Illius v. Greyhound Bus Lines, Inc.*, 1995 U.S. District LEXIS, unreported, (N.D. Ohio September 15, 1995), attached hereto as Exhibit 4. In *Illius v. Greyhound Bus Lines*, the District Court granted defendant Greyhound’s motion to transfer venue to the District of Texas. Plaintiffs (two Ohio residents) filed suit against Greyhound for alleged securities fraud. Greyhound filed a motion to transfer venue to Texas. The Ohio District Court granted the motion to transfer. In doing so, it recognized that Greyhound’s corporate headquarters, key personnel, relevant documents, records, sources of proof and other persons with knowledge of the matters at issue were located in Texas. Most of the key witnesses did not reside in Ohio and were therefore beyond the reach of the district court’s subpoena power. Even if the witnesses

were willing to travel to Ohio, the costs associated with transporting and housing witnesses would be unfairly cumbersome. *Id.*

Discover is a multi-billion dollar company incorporated in Delaware but operating pursuant to the laws of multiple states including Georgia. As a national banking organization, it has contacts with all 50 states including Georgia. There is no state that Discover could reasonably assert as inconvenient to it because it conducts business across the country. Ohio is no more convenient to Discover than any other state.

New Vision, in turn, is a small company with one office in Georgia. It is incorporated under the laws of Georgia and does not have any contacts with Ohio. Venue rules were created to protect defendants from lawsuits filed in inconvenient venues. Discover has gone out of its way to file these claims in an inconvenient venue. The burden of appearing in Ohio courts and transporting its witnesses, documents and evidence to Ohio would be burdensome. Having the case heard in Georgia, the only state where New Vision has an office, supports the interests of justice and the parties. At a minimum, this case should be transferred to the Northern District of Georgia.

V. ORAL ARGUMENT REQUESTED

Pursuant to Local R. 7.1(b), New Vision respectfully requests oral argument on this Motion. Plaintiff and the other Discover entities identified in the complaint have attempted to obfuscate well established limitations on personal jurisdiction. New Vision believes the Court would benefit from oral argument as to the nature and extent of the parties' relationship and identities, as well as New Vision's lack of contacts within the Southern District of Ohio.

VI. CONCLUSION

Discover's claims against New Vision should be dismissed. This Court may not assert personal jurisdiction over New Vision under either Ohio's long-arm statute or the Due Process Clause of the Fourteenth Amendment to the United State Constitution. Even if personal jurisdiction is established, the venue picked by plaintiff is improper. Discover, a Delaware company, filed a lawsuit in Ohio against a Georgia defendant with no connections to Ohio. The District Court should dismiss the action because it was filed in the improper venue.

If the action is not dismissed, it should be transferred to the United States District Court for the Northern District of Georgia. As detailed above and in the affidavit of Mr. Howard, it would be extremely inconvenient, unduly burdensome and unreasonably expensive for New Vision, a small company with more limited resources than Discover, to be required to bring its witnesses, evidence to Ohio and to expend the time and energy associated with defending a lawsuit in a foreign jurisdiction. Well established law supports, at a minimum, the transfer of this case to the District of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2003, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system, and I hereby certify that I have mailed by United States Postal Service the document to the following:

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