

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

DISCOVER BANK,

Plaintiff,

Case No. C2-03-686

v.

**JUDGE GREGORY L. FROST
Magistrate Judge Mark R. Abel**

NEW VISION FINANCIAL, LLC,

Defendant.

OPINION AND ORDER

Plaintiff, Discover Bank, is seeking damages against Defendant, New Vision Financial, LLC (“New Vision”), on a breach of contract claim. This matter is before the Court on Defendant New Vision’s September 2, 2003 motion to dismiss Plaintiff’s complaint for lack of personal jurisdiction and/or improper venue, or in the alternative, to transfer venue to the United States District Court for the Northern District of Georgia (Doc. # 4), Plaintiff Discover Bank’s September 26, 2003 memorandum of law in opposition to Defendant New Vision’s motion to dismiss or transfer venue (Doc. # 8), New Vision’s October 10, 2003 reply in support of its motion to dismiss Plaintiff’s complaint for lack of personal jurisdiction and/or improper venue, or in the alternative, to transfer venue to the United States District Court for the Northern District of Georgia (Doc. # 12), Plaintiff’s October 27, 2003 Discover Bank’s memorandum opposing oral argument (Doc. # 14), and New Vision’s October 30, 2003 motion to strike Plaintiff Discover Bank’s memorandum opposing oral argument (Doc. # 15).

I. Facts

Discover Bank is incorporated under the laws of the State of Delaware, and its principal place of business is New Castle, Delaware. Discover Bank's servicing agent for the pertinent transactions in this case is Discover Financial Services, Inc. ("Discover Financial"), which is located at 3311 Mill Meadow Drive, Hilliard, Ohio 43026. New Vision is located in the state of Georgia. Discover Bank and New Vision entered into a contract in which New Vision agreed to purchase a certain amount of delinquent credit card accounts from Discover Bank on a monthly basis. (Compl. ¶ 4). The complaint alleges that New Vision breached the contract by failing to purchase any accounts from November 2002 through March 2003. (Compl. ¶ 5).

II. Arguments of the Parties

A. Defendant

New Vision argues that Discover Bank's complaint should be dismissed because this Court does not have jurisdiction. New Vision maintains that it has not had sufficient contacts with the forum to satisfy the requisites of due process, and Discover Bank is attempting to manufacture jurisdiction in Ohio in order to obtain a venue that is burdensome for New Vision.

New Vision requests that this Court transfer the case to the United States District Court for the Northern District of Georgia because venue is improper in the Southern District of Ohio because the sole defendant resides in Georgia. New Vision argues that the actions of third parties within the forum cannot be imputed to it. In the event the Court finds that Southern District of Ohio is a proper venue, New Vision also argues that because it will be inconvenienced if it is forced to litigate in Ohio, the venue should be transferred to the Northern District of Georgia.

B. Plaintiff

Discover Bank argues that New Vision is disingenuous when it says that it had no contacts with the forum state. Instead, Discover Bank asserts that New Vision appointed Enhanced Recovery Corporation (“ERC”), located in Cincinnati, Ohio, to serve as its agent to purchase delinquent credit card accounts on its behalf. Discover Bank further asserts that ERC negotiated the agreement between the two parties, and New Vision designated ERC’s address as the point of contact between the parties. Negotiations took place at ERC’s office, and the accounts purchased by New Vision underwent collection at the Cincinnati office.

Given the strong deference to the Plaintiff’s choice of venue, Discover Bank asserts that venue is proper in the Southern District of Ohio. Discover Bank also argues that the most of the relevant witnesses and documents are located in Ohio. Finally, Discover Bank argues that New Vision has not offered any evidence to suggest that the public interest will be served by transferring the action to Georgia.

III. Personal Jurisdiction

A. Standard

The party asserting that the Court has personal jurisdiction has the burden of proving it. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991); *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974). If Defendant supports its Rule 12(b)(2) motion to dismiss by affidavit, Plaintiff “by affidavit or otherwise must set forth specific facts showing that the court has jurisdiction.” *Weller*, 504 F.2d at 930. When presented with a properly supported Rule 12(b)(2) motion to dismiss, a court has the discretion to decide the motion on the briefs and affidavits or it may permit discovery and an evidentiary hearing. *Theunissen*, 935 F.2d 1458. This matter will

be decided on the basis of the briefs and affidavits filed by the parties, and New Vision's motion for an oral hearing is **DENIED**. (Doc. # 4.)

In the absence of a preliminary evidentiary hearing, the plaintiff need only make a *prima facie* showing of personal jurisdiction. *Theunissen*, 935 F.2d 1458; *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168-69 (6th Cir. 1988). In diversity cases, courts look to the law of the forum state to determine whether personal jurisdiction exists. *See Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000); *LAK, Inc. v. Deer Creek Enterprises*, 885 F.2d 1293, 1298 (6th Cir. 1989) (citing *Southern Machine Co. v. Mohasco Indus.*, 401 F.2d 374, 376 n. 2 (6th Cir. 1968)). A federal district court may exercise personal jurisdiction only if the requirements of both the state long-arm statute and constitutional due process are met. *See Calphalon*, 228 F.3d at 721; *Nationwide Mutual Ins. Co. v. Tryg International Ins. Co.*, 91 F.3d 790, 793 (6th Cir. 1996); *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1115 (6th Cir. 1994). *See also Goldstein v. Christiansen*, 70 Ohio St. 3d 232, 235, 638 N. E.2d 542, 543 (1994) ("When determining whether a state court has personal jurisdiction over a nonresident defendant, the court is obligated to (1) determine whether the state's 'long-arm' statute and the applicable Civil Rule confer personal jurisdiction, and if so, (2) whether granting jurisdiction under the statute and rule would deprive the defendant of the right to due process of law pursuant to the Fourteenth Amendment to the United States Constitution.").

This analysis is not conflated into one step because Ohio's long-arm statute does not reach to the limits allowed by the Constitution. *Cole v. Miletic*, 133 F.3d 433, 436 (6th Cir. 1998) (citing *Goldstein*, 638 N.E.2d 545, n.1). Though Ohio's long-arm statute "does not extend to the constitutional limits of the Due Process Clause, [the] central inquiry is whether minimum

contacts are satisfied so as not to offend ‘traditional notions of fair play and substantial justice.’” *Calphalon*, 228 F.3d at 721 (citing *Cole*, 133 F.3d at 436). When jurisdiction is founded on the long-arm statute, the asserted cause of action must arise from at least one of the nine criteria listed in the statute. *See* Ohio Revised Code § 2307.382(A)(1)-(9); *Berning v. BBC, Inc.*, 575 F. Supp. 1354, 1356 (S.D. Ohio 1983). Among those criteria are transacting business in Ohio, contracting to supply goods or services in Ohio, causing tortious injury in Ohio, and having a real property interest in Ohio. Ohio Rev. Code § 2307.382(A)(1)-(9).

B. Jurisdiction Under Ohio’s Long-Arm Statute

The Court must first determine whether Ohio’s long-arm statute reaches this controversy. Ohio Revised Code § 2307.382 creates a limited basis for exercise of personal jurisdiction when the litigation is based on one of the acts set forth in the statute. Discover Bank alleges personal jurisdiction under Ohio’s long-arm statute, which provides in pertinent part:

- (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;

Ohio Rev. Code § 2307.382(A)(1) (emphasis added). The Sixth Circuit’s test for determining whether a defendant transacted business for the purposes of Ohio’s long-arm statute is a two-step inquiry:

Under *Southern Machine Co. v. Mohasco Industries*, 401 F.2d 374 (6th Cir.1968), business is transacted in a state when obligations created or operations set in motion by the defendant have a realistic impact on the commerce of that state. *Id.* at 382. Similarly, a defendant has purposefully availed himself of the opportunity of acting there if he should reasonably have foreseen that the transaction would have consequences in the state. *Id.*

PTG Logistics, LLC v. Bickel's Snack Foods, Inc. 196 F. Supp. 2d 593, 599 (S.D. Ohio, 2002).

Discover Bank has made a *prima facie* showing that New Vision, through its agent, ERC, transacted business in the state through negotiating and performing the contract. Discover Bank has provided sufficient evidence to demonstrate the existence of an agency relationship between New Vision and ERC for the purposes of the contract at issue. On at least two occasions, New Vision expressly acknowledged the agency relationship. See Deter Aff., Exh. 6 & 7 (“This corporation authorizes Enhanced Recovery Corporation to act as its agent in the purchase of debt portfolios from Discover and authorized Enhanced Recovery Corporation to negotiate and enter into purchase agreements in the corporate name.”). Additionally, the address given by New Vision was c/o Enhanced Asset Management, 13 Triangle Park Drive, Suite 1302, Cincinnati, Ohio 45246.¹

Based on the actions of ERC, on behalf of New Vision, it appears clear that New Vision should have reasonably foreseen that the transaction would have consequences in the state of Ohio. The parties negotiated and entered a contract for the purchase of delinquent credit card accounts. The sale of the accounts took place in Ohio. The primary employees in Discover Bank that participated in the transaction were employed in Ohio, and the agent who actually purchased the accounts was located in Cincinnati, Ohio. Therefore, the Court finds that the requirements of Ohio’s long-arm statute have been met.

C. Due Process

¹The relationship between ERC and Enhanced Asset Management (“EAM”) is unclear. Initially, both ERC and EAM were located at the same Cincinnati, Ohio address. Subsequently, EAM relocated to Jacksonville, Florida. In a letter dated August 12, 2001, Fred Howard indicated that EAM and ERC were directed to communicate with Discover Bank on its behalf. See Deter Aff., Ex. 12.

The Court further finds that exercising jurisdiction over Defendant would comport with due process. The constitutional touchstone is whether the non-resident defendant established such minimum contacts with the forum state that the exercise of jurisdiction would comport with “traditional notions of fair play and substantial justice.” *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *Theunissen*, 935 F.2d at 1459. Courts look to three factors in making this inquiry:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant’s activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 381 (6th Cir. 1968); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 226 (6th Cir. 1972); *National Can Corp. v. K Beverage Co.*, 674 F.2d 1134, 1137-38 (6th Cir. 1982).

1. Purposeful Availment of the Forum State

Based on the following facts, Discover Bank has made a *prima facie* showing that New Vision purposefully availed itself of the forum state by creating a continuing obligation in Ohio:

- New Vision, through its agent Enhanced Recovery Corporation, initially solicited Discover Financial, which is located in Hilliard, Ohio.
- Negotiations between the parties occurred in Ohio.
- New Vision informed Discover Bank that New Vision authorized ERC, located in Cincinnati, Ohio, to act as its agent to purchase of debt portfolios and to negotiate and enter into purchase agreements in New Vision’s name.
- ERC informed Discover Bank that the physical address of New Vision was in care of EAM at a Cincinnati location.
- The performance of the contract occurred in Ohio. Discover Financial mailed its invoices to the Cincinnati address. Although ERC instructed Discover Financial to fax the invoices to ERC in Jacksonville, Florida in June 2001, the invoices were still mailed to the Cincinnati office.

2. Claim Arising from Activities in the Forum State

New Visions' contacts, and those contacts of its agent, are directly related to the breach of contract claim asserted by Discover Bank, and therefore the claim of Discover Bank clearly arises from New Vision's activities in the forum state.

3. Substantial Connection with the Forum State

The third factor examines whether the agreement between New Vision and Discover Bank has a substantial enough connection to Ohio which makes it reasonable to compel New Vision to defend this suit in Ohio. Ohio Revised Code § 2307.382(a) indicates that Ohio legislators believe that Ohio does have a substantial interest in permitting its courts to exercise jurisdiction over those individuals or entities that transact business in the state. Given the significant role played by ERC in the negotiation and performance of the contract as New Visions' agent, the exercise of jurisdiction by this Court complies with requisites of the Constitution and fundamental fairness.

IV. Venue

A. 28 U.S.C. § 1391(a)

New Vision argues that the Southern District of Ohio is not the proper venue because it is not convenient for New Vision. Section 1391(a) of title 28 of the United States Code provides:

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). New Vision places emphasis on subsection (1), suggesting that venue is only proper in the Northern District of Georgia because that is where the sole defendant in this case resides. Presumably, Discover Bank relies on subsection (2) and filed its case in the district where the breach of the contract occurred.

New Vision's position that venue is improper in the Southern District of Ohio is not persuasive. Given that delinquent credit card accounts could only be purchased from the Discover Financial office in Hilliard, Ohio, if New Vision failed to purchase those accounts and breached its agreement as alleged by Discover Bank, then the breach of that agreement giving rise to the Discover Bank's claim occurred in the Southern District of Ohio.

B. 28 U.S.C. § 1404(a)

Defendant moves to transfer venue to the Northern District of Georgia. Section 1404(a) provides:

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

The factors to be considered under §1404(a) are similar to those weighed by the courts in determining *forum non conveniens* motions; however, transfers may be granted “upon a lesser showing of inconvenience.” *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). The moving party has the burden of demonstrating that the case should be transferred to a different forum.²

² Many courts have held that a defendant must demonstrate that the balance of convenience strongly favors transfer. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1947); *Nicol v. Koscinski*, 188 F.2d 537, 537 (6th Cir. 1951); *United States v. Cinemark USA, Inc.*, 66 F. Supp. 2d 881, 887-89 (N.D. Ohio 1999)(and cases cited therein); *United States v. The Boeing*

Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 218 (2d Cir. 1978); *Time, Inc. v. Manning*, 366 F.2d 690 (5th Cir. 1966); *Armco, Inc. v. Reliance National Insurance Company*, 1997 WL 311474 (S.D. Ohio W.D. May 30, 1997). A motion to transfer venue under 28 U.S.C. §1404(a) is not intended merely to shift the burden of proceeding. *Bacik v. Peek*, 888 F. Supp. 1405, 1415 (N.D. Ohio 1993); *AMF, Inc. v. Computer Automation, Inc.* 532 F. Supp. at 1345. It “provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient.” *Van Dusen v. Barrack*, 376 U.S. 612, 645-46 (1964).

The first step is to determine whether this suit could have been brought in the proposed transferee forum. 28 U.S.C. §1404(a)(The district court “may transfer any civil action to any other district or division where it might have been brought.”). *Hoffman v. Blaski*, 363 U.S. 335,

Company, 1998 WL 54976 at *1 and *2 (S.D. Ohio January 21, 1998); *Hanning v. New England Mutual Life Insurance Company*, 710 F. Supp. 213, 214 (S.D. Ohio 1989). Recently, some courts have held that § 1404(a) requires only that a defendant demonstrate that the factors articulated in *Gulf Oil Corp* weigh in favor of transfer. E.g., *Roberts Metals, Inc. v. Florida Properties Marketing Group, Inc.*, 138 F.R.D. 89, 92-93 (N.D. Ohio 1991); *Armco, Inc. v. Reliance National Insurance Company*, 1997 WL 311474, at *4 and *5 (S.D. Ohio 1997). The rationale for these cases is that *Gulf Oil*, *Koster*, and *Nicol* were decided using the common law doctrine of *forum non conveniens* that required dismissal of the complaint if the motion was granted. Because that could be a harsh result if a plaintiff were unable to re-file before the statute of limitations ran, courts granted a defendant’s motion to dismiss based on *forum non conveniens* only where the forum plaintiff chose was “so completely inappropriate or inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else.” *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) quoting from *All States Freight v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952). But that the United States Supreme Court held in *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) that § 1404(a) did not just codify the common law doctrine of *forum non conveniens*, but also “permits courts to grant transfers upon a lesser showing of inconvenience.” The rationale advanced for the requirement of a strong showing, that plaintiffs’ forum shopping is part of the judicial system and defendants’ forum shopping undermines the judicial system, *Cinemark USA, Inc.*, 66 F. Supp. 2d at 889, is not a strong justification. Nonetheless, to the extent that the “strong presumption” cases are grounded in the idea that a movant ordinarily has the burden of proof and that a showing that merely shifts the burdens of litigating in a foreign forum from one party to the other is insufficient to cause a court to transfer venue, the rule seems sensible.

343-44 (1960); *Martin v. Stokes*, 623 F.2d 469, 474 (6th Cir. 1980); *PT United Can Company Ltd. v. Crown Cork & Seal Company, Inc.*, 138 F.3d 65, 74 (2d Cir. 1998); *Neff Athletic Lettering Co. v. Walters*, 524 F. Supp. 268, 271 (S.D. Ohio 1981).

Once Defendant demonstrates that jurisdiction over the parties can be obtained in the proposed transferee forum, the court must determine whether the private interests of the litigants and the public's interest in the administration of justice favors transfer. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). The litigants' interests include:

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). Public interests include docket congestion; the burden of trial to a jurisdiction with no relation to the cause of action; the value of holding trial in a community where the public affected live; and the familiarity of the court with the controlling law. 330 U.S. at 508-09. The Court must make an "individualized, case-by-case consideration of convenience and fairness." *Van Dusen v. Barrack*, 376 U.S. at 622.

Plaintiff's Choice of Forum. What weight to give Plaintiff's choice of forum is a question that has produced considerable disagreement. Clearly, Plaintiff's choice of forum is not by itself dispositive. When proceeding under §1404(a), by definition venue properly lies in the district where Plaintiff filed suit and in the district Defendant champions. A court must look to all the factors identified by the statute and by the Supreme Court in *Gilbert* and not limit itself solely to a determination of whether the other factors outweigh Plaintiff's choice of forum.

There is no one formulation that courts consistently follow when considering the weight to be given to a plaintiff's choice of forum. Wright, Miller & Cooper, *Federal Practice and Procedure: Civil* § 3848 at n.4 (“The courts have developed a bewildering variety of formulations . . .”). While a plaintiff's choice of forum is a factor to be considered, *Norwood v. Kirkpatrick*, 349 U.S. at 32, there is a wide divergence of opinion as to how much weight to give a plaintiff's choice of forum. See Wright & Miller, *Fed. Prac. and Proc.: Civil* § 3848 n.4 through 16; 1 Moore's *Federal Practice*, ¶ 0.145[5] at 1616.

Judges of the Southern District of Ohio have held both that a plaintiff's choice of forum is “given considerable weight and the balance of convenience, considering all relevant factors, must be strongly in favor of a transfer before such will be granted,” *Artisan Development v. Mountain State Development Corp.*, 402 F. Supp. 1312, 1314 (S.D. Ohio 1975); *United States v. The Boeing Company*, 1998 WL 54976 at *1 (S.D. Ohio January 21, 1998), and that a plaintiff's choice of forum is not given considerably greater weight than other factors. *Neff Athletic Lettering v. Walters*, 524 F. Supp. 268, 272 (S.D. Ohio 1981); *Mead Corp. v. Boldt*, 508 F. Supp. 193, 198 (S.D. Ohio 1981). This Court has held that “a trial court retains discretion to determine the weight to be given the plaintiff's choice of forum on a case-by-case basis.” *Wendy's International, Inc. v. Suburpia Submarine Sandwich Shops of Milwaukee, Inc.*, C-2-84-1243 (S.D. Ohio E.D. Oct. 11, 1985)(unreported op. at p. 7).

When the cause of action has little connection with the forum, a plaintiff's choice of forum is entitled to no greater weight than any other factor. See *Mead Corp. v. Boldt*, 508 F. Supp. at 198 (transferred because none of the actionable conduct occurred in the forum selected by plaintiff and most of the witnesses were located in the transferee forum). In the instant case, it

appears that the performance and the alleged breach of the contract occurred in Ohio, so there is a connection between the cause of action and the forum.

Convenience of the Witnesses. Courts normally give considerable weight to this factor. *E.g., Picker International, Inc. v. Travelers Indemnity Company*, 35 F. Supp. 2d 570, 573 (N.D. Ohio 1998). However, the convenience of the witnesses does not weigh heavily in the balance when there are witnesses on both sides of the case who will be inconvenienced depending on which forum is selected. *Id.*; *AMF, Inc. v. Computer Automation, Inc.* 532 F. Supp. 1335, 1341 (S.D. Ohio 1982)

Location of Documents. Since documents can normally be easily copied and, when they must be reviewed before copying that review is usually conducted by counsel, the location of documents is frequently only a minor consideration. *See United States v. Cinemark USA, Inc.*, 66 F. Supp. 2d 881, 890 (N.D. Ohio 1999); *AMF, Inc. v. Computer Automation, Inc.* 532 F. Supp. at 1340 (holding that the amount of documents reviewed was irrelevant “since regardless of trial location, the same files and documents will have to be examined”).

Relative Financial Strength of the Parties. The relative financial strength of the parties and their respective abilities to conduct the litigation in the original forum and the proposed transferee forum are factors relevant to a decision. *AMF, Inc. v. Computer Automation, Inc.* 532 F. Supp. at 1344; *Galonis v. National Broadcasting Co., Inc.*, 498 F. Supp. 789, 793 (D.N.H. 1980); *Garrett v. Ruth Originals Corporation*, 456 F. Supp. 376, 385 (S.D. Ohio 1978); *AAMCO v. Bosemer*, 374 F. Supp. 754, 757 (E.D. Pa. 1974). Here, there is no evidence that any party is financially incapable of litigating the case either here or in the Northern District of Georgia, but New Vision has indicated that if it is required to litigate in Ohio its offices will have to be

closed. New Vision also contends that the relative size and financial strength of Discover Bank in comparison to New Vision weigh in favor of transferring venue to the Northern District of Georgia. On the other hand, New Vision represented itself as a highly experienced entity in the debt industry, and presumably it was sufficiently aware that by entering into a contractual relationship with Discover Bank it opened itself up to potential litigation with respect to that contract.

Relative Docket Congestion. Relative docket congestion is a factor. *Gulf Oil*, 330 U.S. at 508. Statistics found in the *Federal Court Management Statistics* 2002, U.S. District Court Judicial Caseload Profile indicate that there were 363 civil case filings per judgeship in the Southern District of Ohio in 2002. The median time from filing to disposition in a civil case was 11.3 months. For the same year, there were 416 civil case filings per judgeship in the Northern District of Georgia in 2002. The median time from filing to disposition in a civil case was 9.8 months. See <<http://www.uscourts.gov/cgi-bin/cmsd2002.pl>>. To the extent that relative docket congestion is considered in balancing the public interests, it weighs slightly in favor of transfer to the Northern District of Georgia.

Familiarity with Controlling Law. The familiarity of the judges in the competing forums with the controlling law is not a factor unless the law is “unclear, unsettled, or difficult.” *AMF, Inc. v. Computer Automation, Inc.*, 523 F. Supp. at 1346-48. Here, the suit is brought for a breach of contract claim, and both the Court for the Northern District of Georgia and this Court are equally competent decide the case based on Delaware law, that governs this case.

Consideration of the factors does not suggest that transferring the case to the Northern District of Georgia is appropriate. The actions giving rise to the action occurred in the Southern

District of Ohio which supports giving some deference to Plaintiff's choice of forum. Although invariably some witnesses will be inconvenienced regardless of the forum, many of the witnesses are located in Ohio as employees of Discover Financial and ERC. The disparity of the relative financial strength of the parties is mitigated by the representations of New Vision with regard to its experience and sophistication. The difference in docket congestion between the districts is slight, and both districts are equally capable of applying the controlling law. Consequently, New Vision has not met its burden in showing that the Northern District of Georgia is a more convenient forum, and New Vision's motion to transfer venue is **DENIED**.

V. Conclusion

For the foregoing reasons, the Court **DENIES** both New Vision's request for oral argument and its September 2, 2003 motion to dismiss Plaintiff's complaint for lack of personal jurisdiction and/or improper venue, or in the alternative, to transfer venue to the United States District Court for the Northern District of Georgia. (Doc. # 4.)

/s/ Gregory L. Frost

GREGORY L. FROST

UNITED STATES DISTRICT JUDGE