

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

DISCOVER BANK,

Plaintiff,

-against-

NEW VISION FINANCIAL, LLC,

Defendant. :

Civil Action No. C2-3-686

Judge Gregory L. Frost

Magistrate Judge Mark R. Abel

**PLAINTIFF DISCOVER BANK'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT NEW VISION FINANCIAL LLC'S
MOTION TO DISMISS OR TRANSFER VENUE**

Plaintiff Discover Bank respectfully submits this memorandum in opposition to the motion of defendant New Vision Financial, LLC. ("New Vision") to dismiss the complaint on jurisdictional grounds, or, in the alternative, to transfer venue to the Northern District of Georgia. The pertinent facts supporting this memorandum are set forth in detail in the accompanying Affidavit of Robert Deter, sworn to September 25, 2003 ("Deter Aff.").

Preliminary Statement

There can be no doubt whatsoever that this Court's jurisdiction over this action is both proper and reasonable. New Vision's assertion that the "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" (New Vision Motion at 1) is completely

disingenuous in light of the fact that New Vision retained and used an Ohio agent to act on its behalf in both its negotiations and performance of the contract at issue. Incredibly, in its moving papers, New Vision virtually ignores the activities of its Ohio agent and attempts to conceal these activities from the Court. Although New Vision may wish otherwise, the unavoidable facts remain that the contract at issue was negotiated and performed almost exclusively in Ohio by New Vision's Ohio agent and, as a result, New Vision has subjected itself to the jurisdiction of this Court.¹

In its complaint, Discover Bank seeks approximately \$850,000 in mitigation damages for New Vision's breach of contract, plus an additional \$2 million in future lost profits. Pursuant to the parties' agreement of January 2001 (the "Agreement"), New Vision agreed that it would purchase a certain amount of delinquent credit card accounts from Discover Bank on a monthly basis, and that if it failed to do so, Discover Bank, among other things, had the right to resell the unpurchased accounts in order to mitigate its damages and to obtain any deficiency from New Vision, plus attorneys' fees.

¹ New Vision misleads the Court when it states in its moving papers that "New Vision does not carry on any business nor have dealings within the State of Ohio. (citation omitted) 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 . . . New Vision's business with Discover was completely transacted within the state of Georgia." New Vision Memorandum at 6. As demonstrated throughout this memorandum and in the supporting affidavit of Robert Deter, the undisputed documentary evidence demonstrates that these assertions of defendant are so false as to possibly merit sanctions.

The following is a summary of the undisputed contacts between the State of Ohio and defendant New Vision:

- New Vision appointed an agent in Cincinnati, Ohio (Enhanced Asset Management) to negotiate and to carry out the Agreement;
- The address set forth in the Agreement for New Vision is the Cincinnati, Ohio address of New Vision's agent;
- Two of the three written amendments to the Agreement were in the form of letters addressed to the Cincinnati, Ohio office of New Vision's agent;
- The accounts sold by plaintiff to New Vision were worked on for collection purposes from the Cincinnati, Ohio office of New Vision's agent;
- Meetings were held at the Cincinnati, Ohio office of New Vision's agent and in the Hilliard, Ohio office of Discover Financial to discuss the collection of accounts sold to New Vision and amending the Agreement;
- Correspondence, invoices, e-mails, faxes, and other documents regarding the negotiation of the Agreement in late 2000 and early 2001, and implementation of the Agreement thereafter were sent to and from the Cincinnati, Ohio office of New Vision's agent.

As set forth in Point I(A) herein, under Ohio's longarm statute, a court may exercise jurisdiction over a party if that party, through an agent, "transacts business" within the state. Courts have consistently held that where, as here, a party's agent solicits or negotiates the terms of a contract within a state, then that party is subject to the jurisdiction of the court with respect to the contract at issue.

That is precisely what happened here -- Defendant New Vision actively conducted business in Ohio through its Cincinnati, Ohio agent, Enhanced Asset Management ("EAM"), which activities bring defendant squarely within the

longarm statute. One need look only as far as the parties' Agreement itself, which provides an Ohio address for New Vision care of its Ohio agent, to see that New Vision is subject to the jurisdiction of this Court. Moreover, New Vision later sent Discover correspondence reaffirming its desire to have an Ohio agent act on its behalf. The Agreement and the other documents annexed to the Deter affidavit demonstrate that this Court has jurisdiction over New Vision by virtue of the significant activities of its Ohio agent.

As set forth in Point I(B) herein, this Court may also exercise jurisdiction over New Vision in accordance with the due process clause of the United States Constitution. All that is required is the "purposeful direction" of activities within the State, either directly or through an agent, and that the assertion of jurisdiction be fair and just to the defendant. There can be no doubt that this standard has not only been met, but exceeded due to the extensive operations of New Vision's agent within the State of Ohio with respect to the Agreement. Accordingly, New Vision's motion to dismiss on jurisdictional grounds must be denied.

As set forth in Point II herein, this Court should also deny New Vision's request that the action be dismissed or transferred from this Court to the Northern District of Georgia on venue grounds. It is black letter law that plaintiff's choice of venue is entitled to strong deference by the Court. Plaintiff Discover Bank's key witnesses -- all of whom are employees of Discover Financial Services, Inc. ("Discover Financial"), its servicing agent -- are located within the

State of Ohio. Also, virtually all of the documents relied upon by Discover Bank are located at the offices of Discover Financial in Hilliard, Ohio. Crucial meetings concerning the Agreement at issue also occurred within Ohio over the course of the parties' relationship.

Significantly, New Vision has not provided any compelling reason to dislodge Discover Bank's choice of venue. While New Vision's president, Fred Howard ("Howard"), is located in Georgia, there is no evidence that travel to Ohio for trial will pose any substantial difficulty for him such that plaintiff's choice of forum should be disregarded. Defendant has not identified any witness other than Mr. Howard who lives outside of Ohio. Both the Agreement and the correspondence indicates that Mr. Howard is a sophisticated businessman who purchased millions of dollars of credit card debt each month through an agent in Ohio with many employees. Having run this business through an Ohio agent, and having dealt extensively with plaintiff's Ohio agent, New Vision can hardly be surprised that litigation involving the business would be venued in Ohio. Accordingly, plaintiff's choice of venue should be honored and the case should be heard by this Court.

ARGUMENT

POINT I

THIS COURT HAS PERSONAL JURISDICTION OVER NEW VISION, WHICH ACTED THROUGH AN OHIO AGENT TO TRANSACT BUSINESS IN OHIO

The Agreement was negotiated and performed within the State of Ohio

through the actions of the agents of each of the parties, and the claims at issue in this action arose as a direct result of the business activity of New Vision's Ohio agent in the State of Ohio. Under these circumstances, New Vision has no basis for ousting this Court of jurisdiction over the parties' dispute.²

A. The Ohio Longarm Statute Authorizes The Court To Assert Personal Jurisdiction Over New Vision

Ohio's longarm statute, Ohio Rev. Code Ann. § 2307.382(A), provides, in pertinent part, that a party transacting business in the State through an agent is subject to its jurisdiction:

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... [emphasis added].

In applying this statute to the determination of whether to exercise jurisdiction in a particular case, the Sixth Circuit Court of Appeals has developed a three-prong test:

First, the defendant must purposefully avail himself of the privilege of conducting activities within the forum state; second, the cause of action must arise from the defendant's activities there; and third, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make its exercise of jurisdiction over the

²To defeat a motion to dismiss for lack of personal jurisdiction, the plaintiff need only demonstrate jurisdiction by a preponderance of the evidence. American Greetings Corp. v. Cohn, 839 F.2d 1164, 1169 (6th Cir. 1988). As set forth in the accompanying Deter Affidavit, Discover Bank has more than met that burden.

defendant fundamentally fair.

Cole v. Mileti, 133 F.3d 433, 436 (6th Cir.), cert. denied, 525 U.S. 810, 119 S.Ct. 42 (1998). As set forth below, Discover Bank has satisfied each prong of the test.

1. New Vision Purposely Conducted Activity in Ohio

A defendant like New Vision, whose agent in the State of Ohio actively conducts business within the State on its behalf, has purposefully conducted business in the State for the purpose of meeting the statute's requirements:

The physical presence of the defendant in Ohio is not a prerequisite to jurisdiction. . . . [Here, an] agent acting on behalf of defendant physically came to Ohio and there were numerous contacts made to Ohio through the mail. Consequently, the exercise of jurisdiction over defendant by Ohio courts was reasonable.

Kemple v. Lutheran Retirement Community, Inc., No. 81-AP1011, 1982 WL 4545, *3 (Ohio App. 1982) (citation omitted). See also Barile v. University of Va., 441 N.E.2d 608 (Ohio App. 1981) (acts of agent soliciting and contracting business in Ohio subjected non-resident defendant to jurisdiction in Ohio); Floyd P. Bucher & Sons, Inc. v. Spring Valley Architects, Inc., 683 N.E.2d 875 (Lucas County Ohio Ct. C.P. 1996) ("The business activities of an agent may render the principal subject to the personal jurisdiction of an Ohio court by virtue of the "transacting * * * business" provisions of Ohio's long-arm statute"); Didactics Corp. v. Welch Scientific Corp., 291 F. Supp. 890 (N.D. Ohio 1968) (sales agent in Ohio who executed contract in Ohio subjected non-resident defendant to jurisdiction in Ohio); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F.Supp 381, 390 (S.D. Ohio 1967) (sales agent who entered Ohio and negotiated sale of

equipment subjected non-resident defendant to jurisdiction in Ohio).³

New Vision purposefully availed itself of the benefits of conducting business in Ohio. The Agreement was negotiated and performed through the agents of both of the parties within the physical boundaries of the State of Ohio.

Reflecting the reality of the parties' relationship, the Agreement itself specifies that all notices and communications from Discover to New Vision should be transmitted to New Vision's Ohio agent in Ohio. See Agreement, Section 13.1.

New Vision's memorandum completely ignores these dispositive facts. It also makes a number of statements that are flatly contradicted by the unassailable documentary evidence presented by Discover Bank.

First, despite the key business role of New Vision's agent in the State, New Vision disingenuously states in its memorandum that "the only connection to the State of Ohio appears to be a non-party servicing agent's address [in the contract documents]." New Vision Memorandum at 10. New Vision cannot sidestep the facts so easily: its agent was given explicit written authority to negotiate with Discover Bank in Ohio; Deter Aff. At ¶18 and Exhibit 6 (New Vision "authorizes Enhanced Recovery Corporation [located in Ohio] to act as its

³ Jurisdiction under Ohio's longarm statute can be predicated even on the single act of negotiating a contract. Reliance Elec. Co. v. Luecke, 695 F.Supp. 917, 920 (S.D. Ohio 1988) ("The intentional act of entering into a contractual relationship with a resident of Ohio is sufficient to meet the purposeful action requirement"); In-Flight Devices, Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 228 n.14 (6th Cir. 1972) ("the Ohio statute's 'transacting business' subsection properly may be applied to a single act of the defendant"). Based on this case law, there can be no doubt that this Court's jurisdiction over New Vision is proper.

agent in the purchase of debt portfolios and authorized Enhanced Recovery Corporation to negotiate and enter into purchase agreements in the corporate name"). New Vision's agent also provided a top to bottom review of its operations within the State of Ohio; it met with representatives of Discover Bank on at least two occasions within the State of Ohio; and it conducted collection activities required for the Agreement within the State of Ohio. Deter Aff. At ¶¶ 15-26. New Vision cannot simply ignore facts it dislikes in hopes of prevailing on its motion to dismiss.

Second, New Vision inaccurately states that "[n]o negotiations concerning the agreement were conducted in Ohio." New Vision Memorandum at 6. This statement is plainly wrong and misleading. The documentary evidence annexed to the Deter affidavit shows unequivocally that there were important and lengthy negotiations between Discover Financial's Ohio office and New Vision's Ohio agent which all occurred within the physical bounds of the State Of Ohio. Deter Aff. at ¶¶ 17, 20, 21, 25.

Third, New Vision's memorandum states that "New Vision's work concerning the Agreement and its relationship with Discover arose exclusively from its Georgia office." New Vision Memorandum at 6. As demonstrated in Deter's affidavit, this statement is alarmingly false. New Vision's relationship with Discover Bank arose from the actions of its Ohio agent in soliciting Discover Bank's Ohio servicing agent, and New Vision's agent performed in Ohio the very collection work necessary for New Vision to carry out its duties under its

Agreement with Discover Bank. Deter Aff. At ¶¶15-26.

Fourth, New Vision contends that its only contact with the State of Ohio was through "telephone calls, emails or facsimiles." New Vision Memorandum at 9. Again, New Vision cavalierly ignores that activities of its agent within the physical boundaries of the state in connection with the negotiation and performance of the Agreement. Deter Aff. At ¶¶15-26.

In sum, the factual arguments made in New Vision's motion are unsupported by any facts. And the statements in Mr. Howard's affidavit are disturbingly contrary to the undisputed facts, which are set forth in the documents attached to Deter's Affidavit.⁴

New Vision is on no sounder ground when it comes to arguing the law. None of New Vision's cases address a situation where, as here, a defendant has purposely retained an Ohio agent to solicit, negotiate or perform a contract in the State of Ohio. Accordingly, the cases cited in support of its motion are readily distinguishable. See, e.g., Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110 (6th Cir.) (in a case where no agent for a party acted within

⁴ For example, Mr. Howard states in paragraph 9 of his affidavit that New Vision has "not contracted to provide goods or services within the State of Ohio" and in paragraph 16 states that it "does not engage in business within the State of Ohio." New Vision has clearly done so through its agent, EAM. In paragraph 9, Mr. Howard states that New Vision had no mailing address in the State of Ohio, when, in fact, the Agreement (Section 13.1) provides for one care of EAM. In paragraph 18 and 19 he states that New Vision had not "acted" within the State and has "no contacts" with the State, despite the wide-reaching activities of its agent with respect to the Agreement. It is clear from these examples that Mr. Howard's factual statements are no more accurate than New Vision's misleading memorandum of law.

the physical bounds of the state, the court held that correspondence sent by defendant into Ohio after the alleged cause of action had arisen was insufficient alone to create jurisdiction), cert. denied, 513 U.S. 962, 115 S.Ct. 423 (1994); Market Media Research v. Union Tribune Pub., 951 F.2d 102 (6th Cir. 1991) (to the same effect), cert. denied, 506 U.S. 824, 113 S.Ct. 79 (1992); Capital Dredge & Dock Corp. v. Midwest Dredging Co., 573 F.2d 377 (6th Cir. 1978) (holding that jurisdiction was improper where agent within state played no role, all negotiations occurred outside Ohio, and the only contacts with Ohio involved the mailing of a final, executed agreement and one payment into the state).

For the foregoing reasons, there can be no doubt that New Vision conducted business in Ohio within the meaning of the statute.

2. Discover's Lawsuit Arises Out of the Defendant's Activities in Ohio

Where, as here, the lawsuit arises out of a breach a contract connected with the activities of the defendant or its agent within the State of Ohio, then the lawsuit "arises" from the defendant's activities within the State of Ohio, and the second jurisdictional element promulgated by the Sixth Circuit is satisfied. See, e.g., Cole, 133 F.3d at 436 ("if the cause of action is for breach of that contract, as it is here, then the cause of action naturally arises from the defendant's activities in Ohio"); PTG Logistics, LLC v. Bickel's Snack Foods, Inc., 196 F. Supp. 2d 593, 601 (S.D. Ohio 2002) ("When the cause of action is for breach of contract and the defendant's activities in the forum state were connected with that

contract, the second prong ... is easily met"); Barile, 441 N.E.2d at 614 (defendant acted in Ohio when its agents solicited plaintiff in Ohio to play sports in Virginia); Floyd P. Bucher & Sons, 683 N.E.2d at 878-79 (defendant acted in Ohio when its agents in Ohio negotiated a contract with plaintiff there).

This action arises from the breach of an agreement which New Vision, through its agent, negotiated and performed in substantial part within the State of Ohio. Accordingly, under governing law, the cause of action for defendant's breach clearly arises out of activities conducted in Ohio, and the assertion of jurisdiction is wholly appropriate.

3. New Vision's Retention of an Ohio Agent Renders the Exercise of Jurisdiction Over It Fundamentally Fair

There can be no doubt that the exercise of jurisdiction by this Court is fundamentally fair, due to: (a) New Vision's explicit authorization to its Ohio agent to conduct negotiations and business on its behalf in the State, (b) its selection of that agent to perform the contract on its behalf during the term of the Agreement, and (c) the conducting of business by that agent within the State.

As a preliminary matter, it should be noted that when the first two prongs of the Sixth Circuit's jurisdictional inquiry have been satisfied, there is a legal presumption that assertion of jurisdiction over the defendant is "fundamentally fair." Norcold, Inc. v. Greg Lund Products, Ltd., 109 F. Supp. 2d 819 (S.D. Ohio 2000). See also Cole, 133 F.3d at 436; Reliance Elec., 695 F. Supp. at 919 ("Only in an unusual case will the third criterion not be found when the first two criteria

are met"). There is nothing in this case which would remove that presumption of jurisdiction.

In examining the fairness prong, this Court must consider whether the "defendant could foresee the possibility of being haled into court in the forum state." Rose v. Rusnak Automotive Group, C-1-01-462, 2002 WL 741290 (S.D. Ohio Apr. 11, 2002). The court should also consider the interest of the forum state in enforcing agreements negotiated and performed in Ohio:

holding a defendant responsible for failure to fulfill contract obligations stemming from a transaction made within the forum upholds Ohio's expressed policy of insuring that its businessmen get the benefit of their bargains.

Kemple, 1982 WL 4545 at *2, citing In-Flight, 466 F.2d at 227 (upholding fundamental fairness of asserting jurisdiction over non-resident where the defendant acts in ways that make clear it is more than "a passive purchaser").

Here, New Vision and its Ohio agent were not "passive purchasers" of financial paper. They were active participants in this Agreement, fully cognizant of the Agreement's connection to Ohio. Defendant should have foreseen that disputes arising under this Agreement might be litigated in courts sitting in Ohio, and therefore there is no unfairness in compelling New Vision to defend itself here.⁵

⁵ The two cases cited by New Vision concerning the fairness issue actually support the assertion of jurisdiction in this case. In both of these cases, the Ohio courts held that the exercise of jurisdiction over the defendants – both of whom had fewer connections to Ohio than Defendant New Vision has here – was entirely proper. See CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)

B. New Vision's Minimum Contacts With Ohio Satisfy Constitutional Requirements For The Assertion Of Personal Jurisdiction

New Vision's purposeful contracts with Ohio also satisfy federal due process standards for the assertion of jurisdiction. "[T]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 73, 105 S.Ct. 2174, 2182 (1985). The U.S. Constitution allows a State to assert personal jurisdiction over a non-resident defendant where

the defendant has "purposefully directed" his activities at residents of the forum, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 *473 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984).

Id. at 472-73, 105 S.Ct. at 2182. The assertion of jurisdiction must also comport with "fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S.Ct. 154, 160 (1945).

1. New Vision Purposefully Directed Its Activities into Ohio

The requirement that a defendant "purposefully direct" activities into the forum is satisfied where the defendant has had mere "minimum contacts" with

(defendant who "entered into a written contract with CompuServe which provided for the application of Ohio law, and ... then purposefully perpetuated the relationship with CompuServe via repeated communications with its system in Ohio" is subject to personal jurisdiction in Ohio); Walker v. Concoby, 79 F. Supp. 2d 827 (N.D. Ohio 1999) (defendants who traveled to Ohio to negotiate book distribution agreement, but had no other contacts with Ohio, were subject to personal jurisdiction there). Here, the activities of New Vision's agent were far more comprehensive, thus making it eminently fair to have the case heard here.

the forum state. Burger King, 471 U.S. at 473, 105 S.Ct. at 2182. Even a single act within the forum may be sufficient to warrant the exercise of personal jurisdiction over the defendant. Id. at 476 n.15, 105 S.Ct. at 2184. "The only requirement is that the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities." Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374, 384 n.27 (6th Cir. 1968), cited by Bird v. Parsons, 289 F.3d 865, 875 (6th Cir. 2002) (non-resident who never entered Ohio is subject to personal jurisdiction there on trademark infringement claim where several of the instances of infringement occurred in Ohio).

Significantly, minimum contacts need not be based on the defendant's physical presence in the State. Id. An agent's actions within Ohio unquestionably subject the agent's principal to personal jurisdiction in the State within Constitutional bounds. See, e.g., American Greetings, 839 F.2d at 1170 (court properly exercised jurisdiction in Ohio over California resident in declaratory action over an amendment to a company's article of incorporation, where defendant designated his brother and an attorney to act within Ohio with respect to the amendment); Floyd P. Bacher, 683 N.E.2d at 878-79 (court properly exercised jurisdiction in Ohio over Michigan residents who had retained an architect to act as their agent to design building and negotiate contract terms within the state).

New Vision's substantial, repeated and persistent contacts with Ohio --

through its duly appointed Ohio agent -- allow this Court to assert personal jurisdiction over it because these contacts relate directly to the causes of action asserted against New Vision.⁶

2. The Assertion Of Jurisdiction Over New Vision Is Fair and Just

Where the defendant has purposefully availed itself of the forum state, it is the defendant's burden to demonstrate that the assertion of jurisdiction is unreasonable:

where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Burger King, 471 U.S. at 477, 105 S.Ct. at 2184-85. It must be shown that the nature of the contacts with the forum State are so "random," "fortuitous," or "attenuated" that it cannot fairly be said that the defendant "should reasonably anticipate being haled into court" in another jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567 (1980). A

⁶In almost all of the cases cited by New Vision on this point, the defendants had far fewer contacts with Ohio than New Vision had with respect to the Agreement and the court chose to exercise jurisdiction. See Goldstein v. Christensen, 638 N.E.2d 541 (Ohio 1994) (Florida accountants who performed accounting services for partnerships regarding Florida real estate were subject to personal jurisdiction in Ohio because their duties involved transmitting financial information to partners who lived in Ohio); Mimco v. Virginia Iron & Metal Recycling, Inc., 840 F. Supp. 1171 (S.D. Ohio 1993) (Virginia Company which purchased scrap copper from Ohio corporation, but had no other contacts with Ohio, is subject to jurisdiction in Ohio). But see Highway Auto Sales, Inc. v. Auto-Konig of Scottsdale, Inc., 943 F. Supp. 825 (N.D. Ohio 1996) (no jurisdiction where only contacts are the negotiation of a contract with an Ohio resident conducted from outside Ohio and the broadcast of national

party who purposefully seeks out business opportunities in the forum State should reasonably anticipate that it would be subject to personal jurisdiction there.

Burger King, 471 U.S. at 473, 105 S.Ct. at 2183. At a minimum, when a defendant

"'deliberately' has engaged in significant activities within a State * * * or has created 'continuing obligations' between himself and residents of the forum * * * he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in the forum as well."

Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc., 559 N.E.2d 477, 480 (Ohio

1990) (emphasis and alterations in original), cert. denied, 499 U.S. 975, 111 S.Ct.

1619 (1991), quoting Burger King, 471 U.S. at 475-76, 105 S.Ct. at 2183-84.

New Vision has not -- and cannot -- demonstrate a compelling reason why this Court should not assert personal jurisdiction over it. Indeed, the bare bones affidavit submitted by Mr. Howard in support of defendant's motion provides no basis for this court to reject jurisdiction. The fact remains that New Vision purposely directed its activities into Ohio by retaining an Ohio agent to solicit, negotiate and perform a contract with Discover Bank within the State of Ohio. New Vision, which represents itself to be a sophisticated, well financed operation, was -- or should have been -- fully aware that it might be subject to jurisdiction in Ohio. Accordingly, this Court's exercise of jurisdiction is entirely fair and defendant's motion to dismiss on jurisdictional grounds should be denied in

advertising).

its entirety.

II.

**THIS COURT SHOULD DENY DEFENDANT NEW
VISION'S MOTION TO TRANSFER VENUE TO
THE NORTHERN DISTRICT OF GEORGIA**

It is well-settled that plaintiff's choice of venue is entitled to strong deference by the Court.

Under the traditional § 1404 analysis, the Plaintiff's choice of forum should be given substantial weight. West American Ins. Co. v. Potts, 1990 WL 104034, *2, 908 F.2d 974 (6th Cir. 1990).

Centerville ALF, Inc. v. Balanced Care Corp., 197 F.Supp.2d 1039, 1050 (S.D. Ohio 2002). It is the defendant's burden to show that "the factors weigh 'strongly' in favor of transfer." United States v. Cinemark USA, Inc., 66 F.Supp.2d 881, 887 (N.D. Ohio 1999) (citations omitted). See also Charles Alan Wright et al., Federal Practice and Procedure, § 3849 (2003) ("It is not enough for defendant to argue only that plaintiff's choice of forum is inconvenient for the defendant").⁷ Based on this law, as well as the fact that most -- if not all -- of plaintiff's witnesses and relevant documents are located in Ohio, venue in Ohio is proper. Accordingly, for this reason alone, this Court should deny New Vision's motion requesting that the Court dismiss the action, or transfer it to the Northern District of Georgia, on

⁷ New Vision incorrectly asserts that in "assessing convenience of the litigants and parties, the Court should look at the facts in a light more favorable to the party who has not chosen the forum," citing Leroy v. Great W. United Corp., 443 U.S. 173, 99 S.Ct. 2710 (1979). In fact, the case says nothing whatsoever to this effect.

the ground that venue was improper.

The Sixth Circuit has identified several factors to consider in determining whether defendant has met its heavy burden for demonstrating that Ohio is an inappropriate venue:

[I]n ruling on a motion to transfer under § 1404(a), a district court should consider the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of "interests of justice."

Moses v. Business Card Express, Inc., 929 F.2d 1131, 1137 (6th Cir.), cert. denied, 502 U.S. 821, 112 S.Ct. 81 (1991), citing Stewart Org. Inc. v. Ricoh, 487 U.S. 22, 30, 108 S.Ct. 2239, 2244 (1988).

This analysis (which is discussed in detail below) leads to the inescapable conclusion that Ohio is the most appropriate and most convenient venue for this litigation. In fact, the single factor favoring Georgia as a venue is the convenience to the defendant. However, this factor alone cannot defeat plaintiff's choice of forum. As courts have recognized, venue should not "serve merely to shift the inconvenience from one party to the other." Roberts Metals, Inc. v. Florida Properties Marketing Group, Inc., 138 F.R.D. 89, 94 (N.D. Ohio 1991), aff'd, 22 F.3d 1104 (6th Cir. 1994), citing Wright, supra, § 3848 & n.20.

A. The Private Interests Of The Parties Favor Venue In Ohio

The courts in Ohio have identified several factors related to the "private interest" analysis:

Among the private interest factors to be considered are:

1. The location of willing and unwilling witnesses;
2. The residence of the parties;
3. The location of sources of proof; and
4. The location of the events that gave rise to the dispute.

Scott Co. v. Central Garden & Pet Co., No. 2:00-CV-755, 2001 WL 506485, *4-*5

(S.D. Ohio 2001). These factors mandate denial of the defendant's venue motion.

All of Discover Bank's key witnesses are located in the Hilliard, Ohio, Collection Recovery Center operated by Discover Financial. Deter Aff. at ¶ 28. All of the documents relating to Discover Bank's claim against New Vision are also located in Hilliard, Ohio, including voluminous records of the monthly sale of millions of dollars of credit card accounts to New Vision, invoices and other accounting records relating to New Vision, and plaintiff's mitigation efforts. Deter Aff. At ¶29.

Compared with Discover Financial's numerous key witnesses in Ohio, New Vision's sole key witness, its managing director Fred Howard, is located in Georgia. However, there is no evidence that travel to Ohio for trial will pose any substantial difficulty for him. Indeed, Mr. Howard will only need to travel to Ohio if a trial occurs or if he chooses to testify at trial. Since New Vision chose to employ an agent in Ohio to purchase and collect millions of dollars of credit card debt, surely he cannot claim that Ohio is an inconvenient forum. While New Vision states that there are additional witnesses, Mr. Howard has failed to

identify any of them in his moving affidavit. Under these circumstances, the case should not be dismissed nor should venue be transferred to the Northern District of Georgia.⁸

Significantly, the affidavit of Mr. Howard accompanying the defendant's motion offers the Court no guidance as to whether Ohio will actually be an inconvenient forum for New Vision. Indeed, it is devoid of any detail to support its argument that litigation in Ohio would be so inconvenient as to justify denying Discover Bank its chosen forum. There are no allegations in defendant's papers about the location of the relevant files, the location of the relevant witnesses, the number of witnesses, the number of documents or any other facts that would allow a court to determine if Georgia is an appropriate forum (which it cannot possibly be, given that both sides' agents are located in Ohio). In sum, New Vision's vague and conclusory allegations do not come close to rebutting the strong presumption that Ohio is the appropriate forum. Therefore, this Court should not cast aside plaintiff's choice of forum.

B. The Interests Of Justice Favor Venue In Ohio

⁸ New Vision suggests that the Northern District of Georgia would be a convenient location for Discover Bank because it issues credit cards in all 50 states and because its agent, Discover Financial, is registered to do business there. This is an entirely specious argument. None of Discover Bank's witnesses or documents are located within the Northern District of Georgia, and it did not have a single physical contact with the state in connection with this action. In fact, the only Discover Financial location that deals with the sale of charged-off debt is the Hilliard facility. Virtually, everything related to this action took place through the Ohio agent of defendant and the Ohio agent (Discover Financial) of plaintiff.

There are several "public interests" that Ohio courts examine to determine whether a transfer of venue is appropriate (1) whether there is a "possibility of prejudice"; (2) whether one forum would be "more familiar" with the applicable law; and (3) whether the action would be "unduly delayed in either district." Cinemark USA, 66 F. Supp. 2d at 890. These public interests may outweigh the plaintiff's interest in obtaining a speedy resolution of its case. United States v. Northrop Corp., 811 F.Supp. 330, 332 (S.D. Ohio 1992) (refusing to transfer venue because "[b]y not transferring this matter, this litigation will be resolved more promptly"). Moreover, in a contract alleging a breach of contract, there is rarely a public interest to be served by transferring the matter elsewhere. Moses, 929 F.3d at 1139 (no transfer of venue in breach of franchise agreement absent evidence of a "dominating public interest" of the state to which transfer is sought).

New Vision has offered no evidence that any public interest is served by transferring this action to the State of Georgia. First, there is no evidence that Ohio courts or juries would be prejudiced against New Vision. See Hanning v. New England Mut. Life Ins. Co., 710 F. Supp. 213, 215-16 (S.D. Ohio 1989) (not even adverse publicity surrounding case constitutes prejudice sufficient to justify change of venue) Second, Delaware law governs the contract and this Court is just as qualified to apply Delaware law as is a court sitting in Georgia. Third, defendants offer no evidence that the Southern District of Ohio is significantly more congested than the Northern District of Georgia. Fourth, the citizens of

Georgia should not be burdened with jury duty for a case that has ties almost exclusively to Ohio. Indeed, Ohio has a significant interest in this case which is to protect its corporate citizens and regulate companies that do business and enter into contracts in the state. Accordingly, there is no public interest to be served by delaying the resolution of this breach of contract by transferring it to Georgia. For these additional reasons, the motion to transfer venue must be denied.

Conclusion

For the foregoing reasons, Defendant New Vision's motion to discuss or transfer should be denied in its entirety.

Dated: Columbus, Ohio
September 26, 2003

GAMBLE HARTSHORN JOHNSON, LLC

By: Craig A. Smith by Melissa V. Mahoney
Craig A. Smith (0012443)
One East Livingston Avenue
Columbus, Ohio 43215-5700
(614) 221-0922
(614) 365-9741 – Fax
0069507

Of Counsel:

JAFFE & ASHER LLP
600 Third Avenue, 9th Floor
New York, New York 10016
(212) 687-3000