IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WADE E. JENSEN and DONALD D. GOFF, individually and on behalf of all others similarly situated, Plaintiffs, vs. SOLVAY AMERICA, INC., SOLVAY CHEMICALS, INC., and SOLVAY AMERICA COMPANIES PENSION PLAN, Defendants.	Case No. 06-CV-0273

ORDER DENYING DEFENDANTS' MOTION TO TRANSFER VENUE

This matter came before the Court on defendants' Motion to Transfer Venue. The Court, being fully advised in the premises, and after careful consideration of the written materials and oral arguments, **FINDS** and **ORDERS** as follows:

BACKGROUND

The defendants in this matter have filed a Motion to Transfer Venue under 28 U.S.C. § 1404(a), and are asking this Court to transfer this case to the United States District Court for the District of Texas, Houston Division. Plaintiffs oppose the Motion.

The underlying suit is a class action under the Employee Retirement Income Security Act of 1974 (ERISA) and a representative action under the Age Discrimination in Employment Act of 1964 (ADEA). Plaintiffs set forth several grounds on which they allege that defendants have violated the statutes.

LEGAL FRAMEWORK

28 U.S.C. § 1404 states: "for the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district court or division where it might have been brought." A courts decision to transfer venue is within its sound discretion, and the determination is made "according to an individualized, case-by-case consideration of convenience and fairness." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991).

"The party moving to transfer a case pursuant to § 1404(a) bears the burden of establishing that the existing forum is inconvenient." *Chrysler*, 928 F.2d at 1516. The burden is high, for "unless the balance is strongly in favor of the movant the plaintiff's choice of forum should rarely be disturbed." *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992) (citing *William A. Smith Contracting Co. v. Travelers Indem. Co.*, 467 F.2d 662, 664 (10th Cir. 1972)).

In its decision in *Dworkin v. Hustler Magazine, Inc.*, 647 F.supp. 1278 (D. Wyo.

1986), this Court set forth the factors that a court must consider in determining the propriety of transferring venue. These three factors include: (1) the convenience of parties; (2) the convenience of witnesses; and (3) the interests of justice. In considering the convenience of parties, a court should look to residence, preference, expense of attendance in that forum, and location of the books and records. In considering the convenience of witnesses, the court should look to the expense in time and money of attendance in that forum and the importance of the witness. In considering the interests of justice, a court should look to several sub-factors, including the plaintiff's choice of forum, applicable law, docket congestion, efficient judicial administration, and location of counsel.

ANALYSIS

In support of its Motion to Transfer Venue, the defendants argue that almost all of the potential witnesses reside in Houston, Solvay Chemical and Solvay America both maintain their headquarters in Houston, the Plan is administered in Houston, the official Plan-related documents are kept in Houston, more plan participants reside in Texas than in Wyoming, Wyoming is a more expensive and inconvenient forum for travel, the people with knowledge regarding the plan are in Houston, a plaintiff's choice of forum in a class action is entitled to less deference, all material events in the allegations took place in Houston, and the Houston court could more easily compel the live testimony of a Texas witness.

In opposition to defendants' Motion to Transfer Venue, the plaintiffs argue that ERISA has a broad venue provision because Congress intended to give ERISA participants easy access to the federal courts, a plaintiff's choice of forum is entitled to significant deference, especially in an ERISA case, merely shifting the inconvenience from one side to the other does not justify a change of venue, the parties' relative ability to litigate in a distant forum militates toward venue in Wyoming because plaintiffs do not have the resources to litigate in a distant forum, the location of the documents should not be determinative because they can be easily shipped, the named plaintiffs live in Wyoming, more than 300 employees work in the Green River facility, and the convenience and location of counsel should not be a controlling factor.

At hearing the parties hinted at two separate impending disputes in this case that are related to factors the Court must consider in deciding whether to transfer venue. First, the defendant explained that because in its estimation, this case is not appropriately brought as a class action, it will oppose the certification of a class when the time comes. Second, the parties are not in agreement regarding whether this case will require live testimony or whether it will be tried on the record. The plaintiff expects the former, the defendant, the latter.

In the Court's estimation, if defendant were to prevail on both of the above arguments,

then what the parties are left with is a suit brought by two individuals from Wyoming on an ERISA claim that stems from their employment in Wyoming that will be litigated on the record without any witnesses. If that were the case, then defendants' argument that venue should be transferred is greatly weakened.

In short, the Court was left with several paradoxical arguments by the defendant. First the defendant argued that the numerous witnesses that will need to come to Cheyenne from Houston make Texas a more convenient venue, but then it argued that the whole case should be tried on the record without any witnesses. Then the defendant argued that the putative class representative's choice of forum is entitled to little or no deference, but then went on to explain that it will oppose class action certification. The Court does not fault defendant for arguing zealously on its behalf, or for arguing in the alternative. The Court merely notes this paradox to illustrate that the defendant has not met its burden in showing that litigating in Wyoming is inconvenient. The Court does not have any other information in regarding potential witnesses, and the parties were not able to offer any specifics at hearing that could guide the Court's decision. Without concrete information on which to makes its determination, the Court finds that transferring venue would be inappropriate.

Regardless of what ultimately occurs in later stages of this litigation regarding class action certification and litigating on the record or via witness testimony, the Court finds that

the defendant has not met its high burden of showing that Wyoming is an inconvenient forum.

Convenience of the Parties and the Witnesses

First, as mentioned above, it is entirely unclear at this juncture whether any witnesses at all will be called, and if so, who they will be. The parties both acknowledged that ERISA cases generally require little live testimony. In addition, the Court finds unavailing the defendants' argument that Houston is less expensive and has more lodging available. Cheyenne has its own airport, is located only an hour and a half from Denver International Airport, and has plenty of affordable lodging. Thus if the end result is that Solvay executives and witnesses will need to travel to Wyoming, the burden is not as great as defendants make it out to be.

The fact that boxes of documents will have to be shipped to Wyoming is of little moment. Indeed, the documents must be sifted through, organized, catalogued, bound, and transported regardless of whether their final destination is the federal courthouse in Houston or the federal courthouse in Cheyenne. The only difference is the shipping cost. *See Scheidt*, 956 F.2d 963 (upholding district court's denial of Motion to Transfer Venue where, among other things, "Defendant never attempted to explain, let alone substantiate, why these documents could not be sifted through (at his Florida offices) and the probative ones shipped

at relatively minor cost to Oklahoma for trial.")

Another district court within this circuit has also considered the "parties' relative ability to litigate in a distant forum." *Meek and Associates v. First Union Ins. Group*, 2001 WL 58839 *2 (D. Kan. 2001); *see also Victor Co. v. Ortho Organizers, Inc.*, 932 F.Supp. 261, 263-64 (D. Kan. 1996). While more witnesses may have to travel to Cheyenne from Houston then would have had to travel to Houston from Cheyenne, the Court agrees with plaintiff's argument that defendants have not claimed that they are unable to withstand the expense of litigating in the District of Wyoming. In contrast, litigating this case in the Southern District of Texas would impose considerable expenses upon the plaintiffs, who may not have the resources to litigate in a distant forum. While not conclusive, this is just one more factor thrown into the mix.

The law is very clear in the Tenth Circuit that "merely shifting the burden from one party to the other . . . obviously is not a permissible justification for a change of venue." *Scheidt v. Klein*, 956 F.2d at 966 ("Undoubtedly, Defendant was inconvenienced somewhat by trial of action in Oklahoma, as Plaintiffs would have been had the case been transferred to Florida."); *see also Dworkin v. Hustler Magazine*, 647 F.Supp. 1278, 1282 (D. Wyo. 1986) ("It is well established that a shift of inconveniences does not justify . . . transferring a case.") While Houston is unquestionably more convenient for the defendants, Wyoming is

unquestionably more convenient for the plaintiffs. If the "convenience of the parties" and the "convenience of the witnesses" factors are a draw, the "interests of justice" factor is the tie-breaker.

The Interests of Justice

In considering this factor, the Court notes that the docket in the District of Wyoming is less congested than that in the Southern District of Texas, Houston Division. With a less congested docket, this matter will likely be resolved in Wyoming more quickly than it would be in Texas. The Court also notes that the plaintiff has chosen to file this suit in Wyoming, and that in the Tenth Circuit, "unless the balance is strongly in favor of the movant the plaintiff's choice of forum should rarely be disturbed." *Scheidt*, 956 F.3d at 965. On a related note, as the plaintiffs have suggested, this lawsuit it a matter of no small significance in Wyoming, which is home to more than 300 of defendants' employees.

The Court finds that the defendant has not met its burden of establishing that the existing forum is inconvenient. At this point in the proceeding, the nuts and bolts of trying this case have yet to be determined, including whether it will proceed as a class action, and who (if anyone) will actually testify. At this point the Court is left with the conclusion that to transfer the forum here would be nothing more than shifting the inconvenience from one party to another. In the Tenth Circuit, that "obviously is not a permissible justification for a

change of venue." Without more, the Court can only come to the conclusion that it must deny the defendants' Motion.

Dated this 14th day of June, 2007.

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ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE