UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Open Solutions Imaging Systems, Inc., plaintiff	:	
	:	
v.	:	**3:03cv2077 (JBA)**
	:	
Jeffrey Horn, defendant.	:	

Ruling on Motion to Dismiss or Transfer [Doc. #19]

Defendant Jeffrey Horn moves pursuant to Fed. R. Civ. P. 12(b)(2) and (3) and 28 U.S.C. § 1406 to dismiss the verified complaint of plaintiff Open Solutions Imaging Systems, Inc. ("Imagic") on the grounds of lack of personal jurisdiction and improper venue and, in the alternative, pursuant to 28 U.S.C. §§ 1404(a) and 1406(a) for transfer to the Northern District of Texas, Lubbock Division. The Court holds that this suit is not properly located in the District of Connecticut under 28 U.S.C. § 1391(a) and that it is in the interest of justice pursuant to 28 U.S.C. § 1406(a) to transfer this case to the Northern District of Texas, Lubbock Division. Accordingly, Horn's motion to transfer [Doc. #19] is GRANTED.

I. Fed. R. Civ. P. 12(b)(3) Facts[1]

A. Background

Imagic is a wholly owned subsidiary of Open Solutions, Inc. ("OSI"), is incorporated in Delaware, and has its principal place of business in Glastonbury, Connecticut. Horn currently resides in Lubbock County, Texas located in the "Panhandle" of Texas. Horn was raised in the Texas Panhandle, graduated from high school in Lubbock, Texas, and attended universities in the Texas Panhandle. In fact, other than brief periods of his childhood, Horn has always been a Texas resident.

Imagic is a single source provider of flexible image-enabled item processing software and non-image POD software systems specifically designed to serve the needs of community financial institutions. It provides its imaging services in both "In-house Delivery Mode" and "Service Bureau Delivery Mode." Such services allow financial institutions the option to conduct image processing either in-house at their own facilities or to outsource the work to a service bureau. McCoy Myers & Associates, Inc. ("McCoy Myers"), is a Texas bank service corporation with its principal place of business in Amarillo, Texas, was once an Imagic client and, thereafter, a direct

[1] As developed more fully below, because this motion is decided without an evidentiary hearing, the facts are those of Imagic's verified complaint, affidavit of Kevin Fahey, a Senior Vice President of Imagic who was during the time period covered by Imagic's verified complaint Imagic's General Manager, and affidavit of Horn where it does not factually conflict with either the verified complaint or Fahey's affidavit.

competitor. It provides in-house data processing systems and service bureau solutions for community banks throughout the southwest United States. From April through November 2003, McCoy Myers licensed Imagic's imaging software for its own use in its four Texas service bureaus, where it conducts image processing for approximately sixty financial institutions, and resold Imagic's software to approximately twenty-five financial institutions for in-house check imaging services.

On November 21, 2003, McCoy Myers informed Imagic that it would no longer license Imagic's imaging software but would be exclusively licensing software from AudioTel Corporation ("AudioTel"). In anticipation of McCoy Myers' decision to transfer business to AudioTel, senior management of OSI convened to develop a strategy to minimize the negative impact of McCoy Myers' departure, including identifying needs of current and future customers, developing new imaging products and services, enhancing quality of existing imaging products and services, and developing pricing and marketing strategies and techniques. In its verified complaint, Imagic terms such planning the "Strategic Plan" and claims it as confidential and proprietary.

B. Horn and Imagic, OSI, and Myers

In August 1999, Horn was hired by a company called Techniflex to sell hardware maintenance to Texas customers, and

eventually rose to the position of Senior Sales Consultant, all while residing and working in the Texas Panhandle. In May 2001, Horn laterally transferred to a Senior Sales Consultant position with Imagic, which was then owned by the same group of investors as Techniflex and had its operations center in Marietta, Georgia. Horn had responsibility for selling check imaging systems, which "provide in-house item processing systems for banks that use imaging technology for processing checks and delivery of imaged statements for bank customers." Horn Aff. ¶ 3. While employed by Imagic (when it was associated with Techniflex), Horn continued to live and work in Texas to service Texas clients, including McCoy Myers.

On December 14, 2001, OSI acquired Imagic as its wholly owned subsidiary. Horn became Imagic's Area Vice President of Sales with a total annual compensation over $100,000, and was tasked with marketing and selling Imagic's products and services in all of Texas, Oklahoma, and New Mexico, and managing Imagic's relationship with McCoy Myers.

After OSI's acquisition of Imagic, Horn in Texas was given a non-competition agreement and advised from Connecticut that acceptance of employment with Imagic was conditioned on Horn's agreement to the non-compete's terms. The agreement contained confidentiality provisions obligating the employee to keep in confidence and not use or disclose proprietary and confidential

information of Imagic/OSI, and a non-competition provision precluding the employee for a year following termination of employment from soliciting, diverting, or attempting to solicit or divert Imagic's clients, customers, or business. Having reviewed the agreement, Horn refused to sign unless Imagic offered him additional compensation to do so. Imagic refused. On January 5, 2002, Horn not having return a signed agreement to Imagic, Imagic sent a memorandum to Horn requesting that he return the signed agreement immediately. However, due to Imagic's refusal of additional compensation, Horn never signed the agreement, notwithstanding OSI's and Imagic's multiple requests that he do so. Nonetheless, Imagic alleges that "by accepting employment with Imagic, Horn was bound to the terms in the [employment agreement]," Verified Compl. [Doc. #1] ¶ 17, and that Horn would not have been provided Imagic's "Strategic Plan" and other proprietary information had he not entered into the employment agreement. All negotiations in connection with the agreement occurred while Horn was in Texas.[2]

In connection with his work as Area Vice President of Sales, Horn was included in planning meetings with senior management regarding Imagic's "Strategic Plan," and was given access to Imagic's proprietary and financial business information, including pricing strategies, profit margin information,

[2] An employee handbook provided to Horn contained confidentiality provisions similar to the employment agreement he was asked to sign.

marketing plans, service plans and product development plans, on all of which Imagic had expended time and resources. Other than Horn, the "Strategic Plan" was disclosed to only three others, Kevin Fahey, Imagic's Senior Vice President and Group Manager, Michael Nicastro, OSI's Senior Vice President, and Richard Talentino, Imagic's Vice President of Sales and Marketing.[3] In addition, other than these three and Horn, Imagic's proprietary business information was disclosed only to two or three others within OSI and Imagic. Imagic's proprietary financial and business information was generated and developed in Connecticut and all related documents are housed in Connecticut. There are no allegations in Imagic's verified complaint or statements in Fahey's affidavit identifying the locus of Horn's receipt of Imagic's proprietary and confidential information.

In fulfilling his responsibilities, Horn primarily operated from his home office in Lubbock, Texas. Horn participated in monthly employee meetings via conference call originating from Connecticut, during which Horn would receive employee updates on the status of the business unit. Horn telephoned Connecticut twice per week to report to either Nicastro or Fahey on the status of his sales accounts. Horn also used a company e-mail account located on Imagic's Connecticut-based server to

[3] Horn disputes Imagic's claim that he was provided with any strategic plan in response to McCoy Myers' defection. However, at this initial stage of litigation, the Court must accept Imagic's version of this contested fact issue.

communicate with Nicastro and Fahey approximately ten times per week regarding client accounts. In addition, Horn visited OSI's Glastonbury, Connecticut headquarters quarterly for sales meetings and to update his sales accounts.

At some point in 2002, McCoy Myers decided to offer its own ancillary services and products to its clients instead of referring them to Imagic and, towards that goal, hired research and development personnel, sales personnel, and installation personnel for those tasks. On November 26, 2003, McCoy Myers offered Horn a sales position. The position allowed Horn to continue to live and work in Lubbock, to expand the scope of his sales activities to add additional ancillary products to check imaging systems, and did not require West Coast travel. Horn accepted the position and resigned from Imagic without notice on November 28, 2003.[4] Nicastro instructed Horn to package and return Imagic's materials and Horn did so.

After leaving his position with Imagic, Horn has had no contact with Connecticut. His occupational responsibilities for McCoy Myers are limited to conducting business in Texas and his supervisors and co-workers are residents of Texas. Horn will miss work and incur significant expense if required to travel

[4] Horn disputes that he resigned without warning, claiming he offered to provide two weeks notice during a telephone conversation with Nicastro but that Nicastro declined the offer.

from Texas to Connecticut to defend the present litigation.[5]

Imagic alleges five causes of action against Horn: misappropriation of confidential business information in violation of Conn. Gen. Stat. §§ 35-50 et. seq., breach of fiduciary duty, breach of employment agreement, unjust enrichment, and conduct in violation of Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a et. seq. With respect to each cause of action, Imagic focuses on Horn's alleged breach of the non-compete provisions of the employment agreement he was asked to sign and the potential for Horn to use and disclose Imagic's proprietary information, including the Strategic Plan, in the context of his work for McCoy Myers in a position substantially similar to the one he held with Imagic.

II. 12(b)(3) and 28 U.S.C. § 1391(a) Standards

Fed. R. Civ. P. 12(b)(3) permits the defense of improper venue to be asserted by motion prior to responding to a plaintiff's complaint. Horn's Rule 12(b)(3) motion charges venue is improper because Imagic has failed to comply with the

[5] Other Connecticut connections with Horn's employment with Imagic include: OSI's human resources personnel responsible for maintaining employee files, including Horn's, work in OSI's Connecticut office; Horn's $100,000 annual salary and expense account reimbursements were paid from a Connecticut bank account; Horn's benefits package, including health insurance, life insurance, and a 401(k) plan, was administered out of Connecticut and utilized Connecticut based companies; and Horn's compensation included a stock option agreement, which contained a choice of law provision stating that Connecticut law governs all disputes arising thereunder. All employee files and related documents, the documents and data pertaining to Horn's salary and expenses, all documents related to Horn's benefits package, and all documents and data pertaining to Horn's stock option agreement are housed in Connecticut.

requirements of 28 U.S.C. § 1391. In opposition, Imagic contends venue is proper in Connecticut pursuant to subsection (a)(2) of 28 U.S.C. § 1391, see Opp'n [Doc. #22] at 14, which provides,

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in ... (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred ....

28 U.S.C. § 1391(a)(2)(emphasis added). This subsection was amended in 1990 to its current form.

There is disagreement about whether Rule 12(b)(3) places the burden on the plaintiff to establish that the chosen district is proper or on the objecting defendant to establish that venue is improper. See 15 Wright, Miller, and Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3826, at 259 (1986 & Supp. 2004)("15 Federal Practice"); 5A Wright and Miller, Federal Practice and Procedure: Civil 2d § 1352, at 263-64 (1990 & Supp. 2004)("5A Federal Practice").[6] Some commentators suggest the better view is that the burden be on the plaintiff: "The latter view [burden on plaintiff] seems correct inasmuch as it is plaintiff's obligation to institute his action in a permissible forum, both in terms of jurisdiction and venue. There seems to be little justification for distinguishing between the two in

[6] The majority and dissenting opinions in Myers v. American Dental Assn., 695 F.2d 716 (3d Cir. 1982) contain exhaustive discussion regarding the strengths and weaknesses of both positions. Imagic's opposition reflects internal confusion on this issue, conceding initially that "the burden is on the plaintiff to establish that venue is proper," Opp'n [Doc. #22] at 7, but subsequently concluding that defendant has failed "to establish that Connecticut is an improper forum," id. at 15.

determining the placing of the burden." 5A Federal Practice § 1352, at 265.[7] The parties have not cited and the Court has not found Second Circuit precedent on this issue. The Second Circuit, however, places the burden on the plaintiff to show proper jurisdiction in the Rule 12(b)(2) context and has applied that procedure in the context of a motion to dismiss based on a forum selection clause even thought it declined to determine whether such a motion is brought pursuant to Rule 12(b)(3). See New Moon Shipping Co. v. Man B&W Diesel AG, 121 F.3d 24, 28-29 (2d Cir. 1997). The Court concludes that the better view is that which imposes on plaintiff the initial burden of demonstrating proper venue for its civil action. While the Court is permitted to consider facts outside Imagic's verified complaint, including Horn's affidavit, see 5A Federal Practice at § 1352, at 334 (Supp. 2004), the facts must be viewed in the light most favorable to Imagic and conflicts resolved in its favor, see id.; Home Ins. Co. v. Thomas Indus., Inc., 896 F.2d 1352, 1355 (11th Cir. 1990); see also New Moon Shipping, 121 F.3d at 29. Even so, the Court concludes that Imagic has not made its requisite showing.

Bates v. C&S Adjusters, Inc., 980 F.2d 865 (2d Cir. 1992) directs that the venue inquiry under § 1391(b)(2), which contains

[7] See also 15 Federal Practice at § 3826 at 259 ("...the clear weight of authority is that, when objection has been raised, the burden is on the plaintiff to establish that the district he chose is a proper venue.").

the identical language at issue here, be primarily on where the relevant events central to the harms alleged took place.[8] After surveying the historical federal venue inquiry, the Supreme Court's decision in Leroy v. Great Western United Corp., 443 U.S. 173 (1979), and the legislative history underlying the 1990 amendment, which changed the language "the judicial district ... in which the claim arose" to "the judicial district in which a substantial part of the events or omissions giving rise to the claim occurred," Bates concluded that the "marginal expansion" made by the 1990 amendment requires primary focus on the location where events occurred, and that historically important factors of convenience of the defendant and the location of evidence and witnesses are of "less significance." Bates found proper venue in a Fair Debt Collection Practices Act ("FDCPA") action in the district where a debtor resided and to whom the defendant bill collector's demand for payment was forwarded because receipt of the defendant's collection notice was central to a cause of action under the FDCPA and the very harm against which Congress legislated, and, even though the evidence supporting defendant's bona fide error defense was not located in that district, the alleged FDCPA violations turned largely on the content of the

[8] Bates interpreted 28 U.S.C. § 1391(b)(2), the statutory venue provision for actions in which jurisdiction is not based solely on diversity of citizenship, but the interpreted language ("in which a substantial part of the events or omissions giving rise to the claim occurred") is identical to 28 U.S.C. § 1391(a)(2).

collection notice, which was located in that district.

In a closely analogous employment breach of contract case, the Eleventh Circuit, applying venue principles consistent with Bates, concluded venue was improper under 28 U.S.C. § 1391(a)(2) in the plaintiff employer's home district and affirmed transfer to the district where the alleged breach of non-compete agreement events had taken place. See Jenkins Brick Co. v. Bremer, 321 F.3d 1366 (11th Cir. 2003). The Alabama-based plaintiff Jenkins Brick Company ("Jenkins") had tapped defendant Bremer, a native of Savannah, Georgia with extensive experience in the brick business, to sell brick and block in a sales territory delineated as a fifty-mile radius surrounding Savannah. The president of Jenkins presented Bremer with an agreement that prohibited his competition with Jenkins within a fifty mile radius of any Jenkins office or plant for two years following conclusion of Bremer's employment and his solicitation of business from any existing or prospective customer with whom Bremer had contact during his tenure as a Jenkins employee. The agreement was presented in Savannah and Bremer was told that his signature was a necessary condition to continued employment. Bremer signed the agreement. Bremer subsequently voluntarily resigned and immediately began work for a Savannah competitor in violation of the non-compete agreement. Jenkins filed suit in the Middle District of Alabama, and Bremer moved to dismiss for lack of

venue or, in the alternative, for transfer to the Southern District of Georgia. The Eleventh Circuit affirmed the transferee Georgia District Court's conclusion that the Middle District of Alabama was an improper venue for suit as "beyond the scope of reasonable debate."[9] Jenkins interpreted the statutory language at issue here as meaning: "Only the events that directly give rise to a claim are relevant. And of the places where the events have taken place, only those locations hosting a 'substantial part' of the events are to be considered. ... We think this analytical framework, which considered as relevant only those acts and omissions that have a close nexus to the wrong, is a good interpretation of a statute." Jenkins, 321 F.3d at 1366. The Jenkins court identified such acts as those giving rise to Jenkins' breach of contract claim - - the presentation to Bremer and signing of the non-compete agreement in Georgia, the intent that the non-compete agreement be performed primarily in Savannah (reflected by Bremer's sales territory having been Savannah and surrounding environs), and Bremer's breach by working for a Savannah competitor. The Jenkins court explicitly rejected venue as proper in Alabama based on the facts that Bremer attended sales and training meetings in Alabama, received

[9] The Alabama District Court had transferred the case to the Southern District of Georgia pursuant to 28 U.S.C. § 1404(a), thereby implicitly finding that venue was proper in Alabama. The Georgia District Court disagreed, concluding venue improper and therefore applied Georgia substantive law and not the law of the transferor court. This was critical as Bremer's non-compete agreement was not enforceable under Georgia substantive law but was under that of Alabama.

salary and benefits from Alabama, and received the agreement from Alabama, stating "these facts do not have a close nexus with the cause of action for breach of contract, and are therefore irrelevant." Id. at 1372-73.

III. Analysis

Applying the principles of Bates and Jenkins to Imagic's version of events as supplemented by non-contradictory portions of Horn's affidavit, it is clear that a substantial part of the events giving rise to Imagic's claims did not occur in Connecticut. All five of Imagic's causes of action turn largely, if not exclusively, either on Horn's alleged stealing of Imagic's business or on Horn's alleged use and disclosure or potential use and disclosure of Imagic's proprietary information - - events which occurred or will occur, if at all, in Texas. Horn's alleged breaches of his employment agreement are central to all five causes of action, and it is undisputed that any agreement as alleged by Imagic, was received by Horn in Texas, was negotiated by Horn in Texas, was "executed" by Horn's continued employment in Texas after being informed him that his immediate signature on the agreement was required, was primarily intended to be performed in Horn's specifically designated sales area: Texas, Oklahoma, and New Mexico, and will, if at all, be breached in Texas by solicitation of Imagic's Texas clients or by use and

disclosure of Imagic's proprietary information while employed by McCoy Myers.

The only possible nexus between Connecticut and Imagic's causes of action (as distinguished from Horn's employment in general) is the causal link between the feared harm - Horn's unauthorized use and disclosure of Imagic's proprietary information - and his receipt of that information to the extent such receipt occurred in Connecticut, a fact not alleged in Imagic's verified complaint but which a charitably broad reading might conclude. This nexus, to the extent it exists, is not sufficient to demonstrate proper venue. First, it is not alleged that Horn's receipt of Imagic's proprietary information was in any way improper. To the contrary, Imagic's pleadings state that Horn received the information as a necessary part of his employment with Imagic. While the receipt of the information is obviously a link in the chain of events leading to disclosure or potential disclosure, it is not closely aligned to the alleged harms complained of by Imagic, namely improper use and disclosure of proprietary information in Texas. The portion of Connecticut's statutory misappropriation cause of action that fits Imagic's complaint emphasizes disclosure and use of proprietary information (versus Horn's receipt of it).[10] Second,

[10] See Conn. Gen. Stat. § 35-51(b)(Misappropriation is defined as "(2) disclosure or use of a trade secret of another without express or implied consent by a person who ... (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was ... (ii) acquired

the relatively small amount of Horn's communications with Imagic occurring in Connecticut - quarterly meetings - compared to the volume of Horn's activity in Texas, including performing his daily job functions and receiving information by telephone and e-mail multiple times per week, could not support the conclusion that a substantial amount of Horn's receipt of proprietary information occurred in Connecticut. The remaining purported connections with Connecticut, including matters related to Horn's compensation, employee files, stock option agreement, benefits package, and expense account, see supra note 5, and the quarterly sales meetings in Connecticut (to the extent not related to receipt of confidential information) simply are not facts that give rise to Imagic's alleged causes of action but relate to Horn's employment only in a general manner and sound more in the nature of a minimum contacts analysis.[11]

IV. Disposition

Venue having been found to be improper, 28 U.S.C. § 1406(a) directs the Court to dismiss this case or, if in the interest of justice to do so, to transfer the case to any district in which

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under circumstances giving rise to a duty to maintain its secrecy or limit its use....").

[11] Finally, the factors Bates says remain but to which "less significance" is to be attached post 1990 amendments to 28 U.S.C. § 1391 weigh in favor of Horn. Similar to Bates, the location of evidence and witnesses related to the critical alleged harm, use and disclosure of Imagic's proprietary information, is Texas. In addition, the convenience of individual defendant Horn clearly favors Texas.

it could have been brought.[12] Regarding this decision, it has been commented:

> It is not surprising that in most cases of improper venue the courts conclude that it is in the interest of justice to transfer to a proper forum rather than to dismiss. The reasons for doing this are especially compelling if the statute of limitations has run, so that dismissal would prevent a new suit by plaintiff, or if defendant has misled plaintiff on the facts about venue, but these are far from being the only reasons for transfer rather than dismissal and it is enough simply that the court thinks transfer is in the interest of justice. ... The usual procedure should be transfer rather than dismissal.

15 Federal Practice § 3827, at 268-74. Horn does not here insist on dismissal but moves in the alternative for transfer to the District Court for the Northern District of Texas, where this suit could have been brought pursuant to 28 U.S.C. § 1391(a)(1). Accordingly, as the Court believes transfer is in the interest of justice, Horn's motion to transfer [Doc. #19] is GRANTED and the clerk is directed to transfer this case to the Northern District of Texas, Lubbock Division.

IT IS SO ORDERED.

/s/

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Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 27th day of July, 2004.

[12] The Court is permitted to consider venue before personal jurisdiction, see Leroy, 443 U.S. at 180, and has the authority to transfer venue even if it lacks personal jurisdiction over the defendant, see Fort Knox Music, Inc. v. Baptiste, 257 F.3d 108, 111-12 (2d Cir. 2001).