

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-60534-CIV-DIMITROULEAS

HOWARD K. STERN,

Plaintiff,

vs.

Magistrate Judge Rosenbaum

JOHN M. O'QUINN and
JOHN M. O'QUINN & ASSOCIATES
PLLC d/b/a The O'Quinn Law Firm,

Defendants.

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION, FORUM NON
CONVENIENS AND IMPROPER VENUE**

THIS CAUSE is before the Court upon Defendants John O'Quinn and John M. O'Quinn & Associates PLLC d/b/a The O'Quinn Law Firm's Motion to Dismiss Plaintiff's First Amended Complaint For Lack of Personal Jurisdiction; Forum Non Conveniens and Improper Venue [DE 80]. The Court has carefully considered the Motion, Defendants' Notice of Supplemental Authority [DE 86], Plaintiff Howard K. Stern's Response [DE 90], Defendants' Reply [DE 105], the arguments of counsel made before the undersigned at the hearing held on June 25, 2008, and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiff filed the initial Complaint in this action for slander and false light invasion of privacy on April 13, 2007 [DE 1]. Plaintiff then filed the Amended Complaint, which is the operative complaint in this action on November 9, 2007 [DE 64]. The Amended Complaint alleges that the Defendant John M. O'Quinn ("O'Quinn"), while representing John M. Quinn & Associates ("the O'Quinn Law Firm"), made false and defamatory public statements conveying

that the Plaintiff, Howard K. Stern murdered Vickie Lynn Marshall, better known as Anna Nicole Smith (“Ms. Smith”) and her son, Daniel Smith, for his own financial gain, and kidnapped Ms. Smith’s daughter, Dannielynn, with the intent to ransom her to Larry Birkhead. Defendants allegedly made these statements during interviews for the national television media. Plaintiff points to eight (8) total interviews in which he believes that Defendant O’Quinn made false and defamatory statements. The interviews at issue were given to Rita Crosby, Greta Van Susteren and Nancy Grace and broadcast nationally, including in the State of Florida.

Plaintiff Howard K. Stern (“Stern”) is a California domiciliary. Stern is an attorney admitted to practice in the State of California. Defendant John M. O’Quinn (“O’Quinn”) resides in Texas. O’Quinn is a Texas resident and is also an attorney admitted to practice in the State of Texas. Defendant the O’Quinn Law Firm is a Texas limited liability company organized as a law firm with its main office in Texas. O’Quinn is the Managing Partner of the O’Quinn Law Firm.

On February 8, 2007 Ms. Smith was found unresponsive at the Seminole Hard Rock Hotel & Casino in Hollywood, Florida. She was pronounced dead later that afternoon. The death of Ms. Smith induced a media frenzy with around-the-clock media coverage regarding the medical and law enforcement investigation of Ms. Smith’s death. After Ms. Smith’s death, Stern, as the nominated executor under Ms. Smith’s Last Will and Testament, filed a petition seeking custody of Ms Smith’s body. Prior to Ms. Smith’s death, Stern was Ms. Smith’s longtime personal attorney, friend and companion. Stern’s petition for custody was opposed by Virgie Arthur (“Arthur”), Ms. Smith’s biological mother.

Defendants represented Arthur, before, during and after court proceedings held here in Broward County Florida in February of 2007. These proceedings surrounded the legal custody of

Ms. Smith's body and parental custody of Ms. Smith's daughter Dannielynn. Shortly after being hired by Arthur, O'Quinn traveled to Florida to assist with the litigation over custody of Ms. Smith's body and to handle media relations for Arthur. Neil McCabe, another attorney with the O'Quinn Law Firm, accompanied O'Quinn. Defendant O'Quinn and the O'Quinn Law Firm represented Arthur on a purely *pro bono* basis and received no compensation from Arthur for their services. Defendants allegedly accepted representation of Arthur as a favor to Arthur's son. Not only did Defendants accept no attorney's fees from Arthur, but they also paid for all expenses related to the litigation out of pocket. These expenses were extensive.

During the course of his representation of Arthur, Defendant O'Quinn began making appearances on nationally-broadcast television shows representing himself to be Arthur's attorney. These television shows were broadcast nationally, including in Florida. O'Quinn was acting as an employee and representative of the O'Quinn Law Firm when he made these media appearances on behalf of Arthur. In the Amended Complaint, Plaintiff alleges that these media interviews contained false and defamatory statements that constitute slander per se. The gist of these statements according to the Amended Complaint is that "Stern is a despicable person worthy of public scorn and contempt, falsely stating that he engaged in a number of crimes and other violent, unsavory and disreputable acts, including, but not limited to, criminal involvement in the death of Daniel Smith; criminal involvement in the death of Ms. Smith; and kidnapping Dannielynn for ransom."

The allegedly slanderous interviews are as follows:

- 1) On February 19, 2007 O'Quinn gave an interview on *Rita Crosby Specials Unit*, a nationally-broadcast cable television show broadcast by MSNBC. O'Quinn was physically present in Fort Lauderdale, Florida when he gave the interview. The interview

was broadcast to Florida residents and Florida residents were able to access the interview later via MSNBC's website.

2) On February 21, 2007, O'Quinn gave an interview on *On the Record with Greta Van Susteren*, a nationally-broadcast cable television show broadcast by Fox News. O'Quinn was physically present in Fort Lauderdale, Florida when he gave the first Greta Van Susteren interview. The interview was broadcast to Florida residents and Florida residents were able to access the interview later via Fox New's website.

3) On March 1, 2007 O'Quinn gave an interview on the *Nancy Grace Show*, a nationally-broadcast cable television show broadcast by CNN Headline News. The interview was broadcast in Florida and Florida residents were able to view and access the transcript and broadcast later via CNN's website.

4) On March 15, 2007, O'Quinn gave a second interview with *On the Record with Greta Van Susteren*, a nationally-broadcast cable television show broadcast by Fox News. The interview was broadcast to Florida residents and Florida residents were able to access the interview and a partial transcript of the interview through the Fox News website.

5) On March 20, 2007 O'Quinn gave a second interview on the *Nancy Grace Show*, a nationally-broadcast cable television show broadcast by CNN Headline News. The interview was broadcast in Florida and Florida residents were able to access both the interview and the transcript on the CNN website.

6) On March 26, 2007, O'Quinn gave a third interview on the *Nancy Grace Show*, a nationally-broadcast cable television show broadcast by CNN Headline News. The interview was broadcast in Florida and Florida residents could later access both the interview and transcript later through the CNN website.

7) On March 27, 2007 O'Quinn gave another interview on the *Nancy Grace Show*, a nationally-broadcast cable television show broadcast by CNN Headline News. The interview was broadcast in Florida and Florida residents could access the interview and transcript on the CNN website.

8) On March 27, 2007, O'Quinn gave another interview on *On the Record with Greta Van Susteren*, a nationally-broadcast cable television show broadcast by Fox News. The interview was broadcast in Florida and Florida residents were able to view this interview as it was originally broadcast.

Accordingly, Plaintiff alleges that during the course of his representation of Arthur, on at least eight (8) occasions, Defendant O'Quinn appeared in nationally televised interviews and

uttered slanderous statements about him. At least two (2) of these interviews were given while the Defendant was physically present in Florida. Other than their representation of Arthur, the Defendants contacts with Florida are minimal. Neither Defendant has an office or agency in Florida, carries on a significant portion of its business in Florida or solicits business in the state of Florida. Defendant O'Quinn is not admitted to practice in the state of Florida and was admitted *pro hac vice* exclusively for Arthur's case.

II. DISCUSSION

Defendants move to Dismiss the Plaintiff's Complaint for lack of jurisdiction for failure to satisfy the Florida long-arm statute, and for failure to satisfy the minimum contacts requirement of the Due Process Clause. Defendants also move to dismiss for improper venue and to transfer pursuant to the doctrine of *forum non conveniens*, as codified in 28 U.S.C. § 1404(a). The Court will address each argument in turn.

a. Motion to Dismiss Standard

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss should be granted if the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (abrogating Conley v. Gibson, 355 U.S. 41 (1957)). The allegations of the claim must be taken as true and must be read to include any theory on which the plaintiff may recover. See Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992) (citing Robertson v. Johnston, 376 F.2d 43 (5th Cir. 1967)).

b. Personal Jurisdiction

"In a diversity action, a Federal Court may exercise personal jurisdiction over non-resident defendants only to the extent permitted by the forum state's long-arm statute." Jet

Charter Servs., Inc. v. W. Koeck, 907 F.2d 1110, 1112 (11th Cir. 1990). “Since the extent of the long-arm statute is governed by Florida law, federal courts are required to construe it as would the Florida Supreme Court.” Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623, 627 (11th Cir. 1996). Florida’s long-arm statute is to be strictly construed. Id.

“When a District Court does not conduct a discretionary evidentiary hearing on a motion to dismiss for lack of jurisdiction, the plaintiff must establish a prima facie case of personal jurisdiction over a nonresident defendant.” Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990). “A prima facie case is established if the plaintiff presents enough evidence to withstand a motion for directed verdict.” Id. The Court must accept the allegations of the complaint as true, so long as they are not controverted by the defendants affidavits. Id. However, when jurisdiction has been challenged by affidavit or other competent evidence, the plaintiff must sustain its claim by affidavit or other proof and not by mere reiteration of the allegations of the complaint. Dublin v. Peninsular Supply Co., 309 So. 2d 207, 208 (Fla. 4th DCA 1975). If the allegations are contested and the affidavits are conflicting the district court should construe all reasonable inferences in favor of the plaintiff. Abramson v. Walt Disney Co., 132 Fed. Appx. 273, 275 (11th Cir. 2005). “Where the parties’ affidavits cannot be reconciled, the trial court should hold an evidentiary hearing to resolve the jurisdictional issue.” Id. (citing Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 503 (Fla. 1989)). In this case, however, the necessary jurisdictional facts are undisputed.

The determination of personal jurisdiction over a nonresident defendant under Florida law requires a two-part analysis. Id. First the court must determine whether the Florida long-arm statute provides a basis for personal jurisdiction. Sculptchair, 94 F.3d at 626. If so, the court

must then go on to determine “whether sufficient minimum contacts exists between the defendants and the forum state so as to satisfy ‘traditional notions of fair play and substantial justice’ under the Due Process Clause of the Fourteenth Amendment.” Id. (quoting Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 256 (11th Cir. 1996)).

i. Jurisdiction Under Florida’s Long-Arm Statute

Subsection (1) of Florida’s long-arm statute provides that specific jurisdiction “exists when a state exercises personal jurisdiction over a defendant in a suit arising out of or related to defendant’s contacts with the forum.” Ame. Overseas Marine v. Patterson, 632 So. 2d 1124, 1127 (Fla. 1st DCA) (internal citations omitted). The Plaintiff alleges that the following two subsections provide for jurisdiction over the Defendants:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself . . . to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state.

Fla. Stat. § 48.193(1).¹

Section 48.193(1)(a) of Florida’s long-arm statute gives this Court personal jurisdiction over any person who either directly or through an agent, operates, conducts, engages in, or carries on a business or business venture in the state of Florida, or has an office or agency in the state of

¹ Fla. Stat. § 48.193(2) provides for general jurisdiction over any defendant “engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise. . . whether or not the claim arises from that activity.” However, neither party contends that general personal jurisdiction exists in this case. Accordingly, any jurisdiction must be based on the specific jurisdiction provisions of Fla. Stat. § 48.193(1).

Florida. See Fla. Stat. § 48.193(1)(a). Defendants argue that the representation of Arthur in the state of Florida is insufficient to satisfy Section (1)(a) of the Florida long-arm statute because they represented Arthur on a purely *pro bono* basis and therefore reaped no “pecuniary benefit” from that representation in Florida.

The Eleventh Circuit has stated that “[i]n order to establish that a defendant is ‘carrying on business’ for the purposes of the long arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit.” Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A., 421 F.3d 1162, 1167 (11th Cir. 2005) (quoting Future Tech Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000)). Relevant, but not dispositive, factors in determining whether a defendant engaged in a general course of business include: (1) the presence and operation of an office in Florida; (2) the possession and maintenance of a license to do business in Florida; (3) the number of Florida clients served; and (4) the percentage of overall revenue gleaned from Florida clients. Id. at 1167 (internal citations and quotations omitted). Because neither Defendant maintains an office in Florida or solicits business here, because Defendant O’Quinn was only admitted in Florida *pro hac vice* for Ms. Arthur’s representation, and because neither Defendant received any pecuniary benefit for representing Arthur, Defendants argue that they cannot be subjected to the personal jurisdiction of this Court under section (1)(a) of Florida’s long-arm statute. The Court disagrees.

The possession and maintenance of a license to do business in Florida is one important non-dispositive factor to be considered. Id. Although it appears to be an issue of first impression under Florida law, the Court finds that when an attorney is admitted *pro hac vice* on a case in Florida, and the alleged illegal conduct “arises from” that representation, the attorney has

submitted himself to personal jurisdiction in Florida under the long-arm statute regardless of whether the attorney defendant has reaped any financial benefit from that representation. This finding, however, is unnecessary to this Court's exercise of jurisdiction because personal jurisdiction also exists under Fla. Stat. § 48.193(1)(b) of the Florida long-arm statute.

The Florida Supreme Court has held that "in order to 'commit a tortious act' in Florida, a defendant's physical presence is not required." Wendt v. Horowitz, 822 So. 2d 1252, 1260 (Fla. 2002). The Wendt court went on to hold that "'committing a tortious act' in Florida under section 48.193(1)(b) can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida." Id.; see also Silver v. Levinson, 648 So. 2d 240, 244-45 (Fla 4th DCA 1994) (finding that allegedly defamatory letters sent to the Plaintiff in Florida were sufficient to satisfy the Florida long-arm statute); JB Oxford Holdings, Inc. v. Net Trade, Inc., 76 F. Supp. 2d 1363, 1366 (S.D. Fla. 1999) ("a defendant who commits a tort that causes injury in Florida is subject to personal jurisdiction under subsection (1)(b) no matter where the act that caused the injury actually was completed."); Posner v. Essex Ins. Co., Ltd., 178 F.3d 1209, 1217 (11th Cir. 1999) (same). Under Florida law, the tort of defamation or slander occurs wherever the allegedly false material is circulated. Madara, 916 F.2d at 1515 ("The tort of libel is generally held to occur wherever the offending material is circulated. Florida courts subscribe to this rule."); Stepanian v. Addis, 782 F.2d 902, 903 (11th Cir. 1986); see also Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 (1984) ("The tort of libel is generally held to occur wherever the offending material is circulated."). Accordingly, because the allegedly false information in

this case was circulated in Florida, the tort at issue in this case occurred in Florida.²

This determination, however, does not end the inquiry under state law. The Florida long-arm statute specifically requires that the cause of action “arise from” the alleged tortious communications. Fla. Stat. § 48.193(1)(b); Wendt, 822 So. 2d at 1260. In this case, because the allegedly defamatory statements were contained in the interviews that were circulated, aired, and therefore published in Florida the connexity requirement is satisfied. Accordingly, so long as minimum contacts are satisfied this Court has long-arm jurisdiction under Fla. Stat. § 48.193(1)(b).

ii. Minimum Contacts under the Due Process Clause

The “minimum contacts” analysis under the Due Process Clause requires the Court to determine whether the Defendants have such “minimum contacts” with Florida that maintenance of the action will not offend “traditional notions of fair play and substantial justice.” Sea Lift, Inc. v. Refinadora Costarricense DePetroleo, S.A., 792 F.2d 989 (11th Cir. 1986) (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). In order to show minimum contacts under the Due Process Clause of the Fourteenth Amendment, the following three factors must be satisfied: “(1) purposeful availment of the forum state; (2) the cause of action arising out of the activities of which you purposefully availed yourself . . . , and (3) reasonable foreseeability that a defendant should reasonably anticipate being haled into court there.” Future Tech., 218 F.3d at 1250-51. “The touchstone of sufficient contacts is that the defendant ‘purposefully directed’ its

² While the Defendants argue that no injury took place in the state of Florida, because the Plaintiff is not a Florida resident, the Court disagrees. Simply because the Plaintiff may have suffered *more* injury in his home state does not mean that no injury was suffered in Florida. As the Supreme Court held in Keeton, 465 U.S. at 777, “[t]he reputation of the libel victim may suffer harm even in a State in which he has hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff’s previous reputation was, however small, at least unblemished.”

activities at residents of the forum state.” JB Oxford Holdings, 76 F. Supp. 2d at 1366 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-74(1985)).

In this case, the Court agrees with the Plaintiff that the Defendants activities in the state of Florida were more than sufficient to satisfy the minimum contacts requirements of the Due Process Clause. According to the allegations of the Amended Complaint, O’Quinn, as a representative of the O’Quinn Law Firm, traveled to Florida to engage in the legal representation of Arthur. Defendants chose to avail themselves of this representation in the state, and sought and obtained admission *pro hac vice* in Florida. The Defendants participated in this representation from start to finish, and during the Course of the representation, O’Quinn appeared on several nationally broadcast cable television shows where he made allegedly defamatory statements about the Plaintiff.³ In fact, at least some of these statements were made while Defendant O’Quinn was physically present in Florida. These contacts with the state of Florida were neither attenuated nor fortuitous and considering the extent of these activities, Defendants had sufficient notice that they could be haled into court in Florida with regards to this representation. See Sun Bank v. E.F. Hutton & Co., Inc., 926 F.2d 1030, 1034 (11th Cir. 1991) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Burger King, 471 U.S. at 474-75).

In the cases relied on by the Defendants, such as Madara, 916 F.2d 1510, and Hoeschst Celanese Corp. v. Nylon Eng’g, Inc., 896 F. Supp. 1190 (M.D. Fla. 1995), the contacts with

³ Defendants rely heavily on the fact that the Plaintiff was not the publisher or producer of the television broadcasts at issue, nor a paid contributor to them. However, financially taking advantages of the Florida market is only one way of satisfying the purposeful availment requirement of the Due Process Clause. The Court finds that the other activities the Defendants engaged in while representing Arthur in Florida state court are sufficient to satisfy the constitutional requirement of purposeful availment.

Florida were much more attenuated. It is true that both of these cases held that national publication, that happened to include publication in the forum state, was insufficient to support jurisdiction consistent with the Due Process Clause. However, in both of these cases the statements were made outside of Florida, and the defendants had no other significant contacts to the forum state.⁴ In contrast, in the case at hand, several of the defamatory statements were made while O'Quinn was physically present in Florida, and concerned Florida-related events that Defendants had participated in. As the Supreme Court held in Burger King, "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there. . ." 471 U.S. at 476. Further, the Supreme Court in Calder v. Jones, 465 U.S. 783, 788-89 (1984), considered the fact that the allegedly defamatory statements centered on events and circumstances that had occurred in the forum state to be significant. Accordingly, the Court finds cases such as Madara and Hoeschst to be distinguishable based on the limited contact that the defendants in those cases had with the forum state. Because the Court finds that the Defendants have sufficient contacts with the state of Florida to satisfy the Due Process Clause, the Court has personal jurisdiction over both Defendants in this action and the Motion to Dismiss for Lack of Personal Jurisdiction must be denied.⁵

⁴ Other cases relied upon by Defendants also concern defendants with far more attenuated contacts to the forum states than O'Quinn and the O'Quinn Law Firm. See e.g. Sun Bank, N.A., 926 F.2d at 1034 (holding that two telephone calls into the state of Florida that allegedly contained fraudulent misrepresentations were insufficient to satisfy minimum contacts with the state);

⁵ The Court notes that it has also determined that the exercise of personal jurisdiction in this case will not offend "traditional notions of fair play and substantial justice." In making this determination the court has considered (1) the burden on the Defendants; (2) Florida's interest in the litigation; (3) the Plaintiff's interest in obtaining relief; (4) the "interstate judicial system's interest in obtaining the most efficient resolution of controversies," and; (5) the "shared interest of the several States in furthering fundamental substantive social

c. Venue

Defendants next argue that venue is improper in the state of Florida. The venue provision of the U.S. Code provides that:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may. . . 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 (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a). The Court agrees with the cases cited by the Plaintiff holding that venue is proper under 28 U.S.C. § 1391(a)(2) in the jurisdiction where the defamatory statements were uttered and published. See e.g. Wachtel v. Storm, 796 F. Supp. 114, 116 (S.D.N.Y. 1992) (holding venue to be proper in the jurisdiction where the defamatory statements were published); Cummings v. W. Trial Lawyer's Ass'n, 133 F. Supp. 2d 1144, 1150 (D. Ariz. 2001) (finding venue proper in the jurisdiction where the defendant had directed at least four of the allegedly defamatory letters). Because the defamation was published here in Broward County, and therefore a substantial portion of the events giving rise to the claim occurred here, the Court holds that venue is proper and the case is properly before this Court.

d. Forum Non Conveniens (Transfer Pursuant to 28 U.S.C. § 1404(a))

Finally, Defendants argue that Florida is an inconvenient forum because neither Party to this case resides here and therefore this case should be transferred to the Southern District of Texas pursuant to 28 U.S.C. § 1404(a). The District Court has broad discretion in determining whether to transfer a case to another district pursuant to § 1404(a). See Thermal Tech., Inc., v.

policies.” Asahi Metal Insud. Co. v. Superior Ct. of Cal., 480 U.S. 102, 113 (1987).

Dade Serv. Corp., 282 F. Supp. 2d 1373, 1375 (S.D. Fla. 2003). Nevertheless, the moving party bears the burden of demonstrating to the Court that transfer of venue is proper. Cent. Money Mortgage Co., Inc. vs. Holman, 122 F. Supp. 2d 1345, 1346 (M.D. Fla. 2000).

The law governing the transfer of venue is found in 28 U.S.C. § 1404(a), which provides that for the “convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a). The purpose of § 1404(a) is to provide for an “individualized, case-by-case consideration of convenience and fairness,” Van Dusen v. Barrack, 376 U.S. 612, 622 (1964), in order to “prevent the waste ‘of time, energy and money’ and ‘to protect litigants, witnesses and the public against unnecessary inconvenience and expense.’” Id. at 616 (internal citations omitted). The statute calls for a two-step inquiry. See Meterlogic, Inc. v. Copier Solutions, Inc., 185 F. Supp. 2d 1292, 1299 (S. D. Fla. 2002). First, the court must consider whether the action “might have been brought” in the proposed transferee court and second, whether various factors are satisfied so as to determine if a transfer to the transferee forum is more convenient and just. Id. In this case both parties agree that the case “might have been brought” in the Southern District of Texas, therefore the only remaining question is whether a transfer would be convenient and just.

In order to determine whether transfer is appropriate pursuant to § 1404(a), courts consider a variety of factors including: “(1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to the presence of unwilling witnesses; (5) the cost of obtaining the presence of the witnesses; and (6) the public interest.” Jewelmasters, Inc. v. May Dep’t Stores Co., 840 F. Supp. 893, 895 (S.D.

Fla. 1993). This list is not exhaustive, but serves as a guide as to which factors may be relevant in a particular case. The most relevant factors that have been briefed by the parties are discussed below.

1. Plaintiff's Choice of Forum

One factor generally considered is the plaintiff's choice of forum. While it is true that the "plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations," Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996) (quoting Howell v. Tanner, 650 F.2d 610, 616 (5th Cir. 1981)), it is also true that where the Plaintiff has chosen a forum that is not their home forum and has little or no connection to the litigation, the defendant seeking transfer will have less difficulty meeting this burden. Thermal Techn., 282 F. Supp. 2d at 1375-76. However, even in such a situation, less deference is not equal to no deference. See e.g., Murray v. British Broad. Corp., 81 F.3d 287, 290 (2d Cir. 1996) ("some weight must still be given to a foreign plaintiff's choice of forum."); Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) ("less deference is not the same thing as no deference."). Especially here, where the foreign Plaintiff's chosen forum is the site of many of the facts and circumstances underlying the claim, see Bixy, Inc. v. KBI Holdings, LLC, 2007 WL 3407623, at *2-3 (N.D. Ga. Oct. 31, 2007), the Court finds that this factor weighs in favor of the Plaintiff.

2. Convenience of the Parties

Litigation in the Southern District of Florida appears to be equally inconvenient to both the Plaintiff and the Defendant, as each is a resident of a different state. While this factor is relevant, the Eleventh Circuit has cautioned courts to be wary of transfers that simply seek to shift inconvenience from defendants onto plaintiffs. Robinson, 74 F.3d at 260. The Court

therefore finds that either this factor does not favor either Party, or weighs slightly in favor of the Plaintiff.

3. Convenience of Non Party Witnesses; Cost of Obtaining the Presence of Witnesses and Ease of Access to Sources of Proof

The convenience of non-party witnesses is an important, if not the most important, factor in determining whether a motion for transfer should be granted. See Meterlogic, 185 F. Supp. 2d at 1301. While the Plaintiff identifies numerous witnesses who reside in the state of Florida, the Defendants, in contrast, have simply stated in a conclusory fashion that the majority of the relevant witnesses reside outside the state of Florida. The Court agrees with the Plaintiff that it is likely that many of the necessary trial witnesses and much of the evidence in this case reside here in the state of Florida. This factor too then weighs in the Plaintiff's favor.

4. The Public Interest

Avoiding waste of judicial resources is in the public interest. Among the factors considered under the "interests of justice" analysis are "access to evidence, availability of witnesses, the cost of obtaining witnesses, the possibility of a jury view [of relevant premises], and all other practical problems that make trial of a case easy, expeditious and inexpensive." Moore v. McKibbon Bros., Inc., 41 F. Supp. 2d 1350, 1357 (N.D. Ga. 1998). Further, there is a local interest in having local controversies decided at home. Gulf Oil Cop. v. Gilbert, 330 U.S. 501, 508-09 (1947). Accordingly, this factor weighs in favor of the Plaintiff's chosen forum.

Upon review of these relevant factors, the Court finds that the Defendants have not carried their burden of "making a strong case for transfer" Colondy v. Iverson, Yoakum, Papiano & Hatch, 1994 WL 150835 at *2 (M.D. Fla. April 14, 1994), and therefore the Defendant's

Motion to Dismiss pursuant to Forum Non Conveniens must be denied.

III. CONCLUSION

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendants John O'Quinn and John M. O'Quinn & Associates PLLC d/b/a The O'Quinn Law Firm's Motion to Dismiss Plaintiff's First Amended Complaint For Lack of Personal Jurisdiction; Forum Non Conveniens and Improper Venue [DE 80] is hereby **DENIED**;

2. Plaintiff Howard K. Stern's Motion for Leave to File Declaration of L. Lin Wood and Supplemental Authority [DE 135] is hereby **DENIED as untimely**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 11th day of July, 2008.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record