

The Honorable Kenneth M. Karas
The Hon. Charles L. Briant Federal Building
and United States Courthouse
300 Quarropas Street
White Plains, NY 10601-4150

U.S. ex rel. Cutler v. Cigna Corp.,
No. 17 Civ. 7515

Dear Judge Karas:

As directed, *see* ECF No.54, we are responding to the Relator’s letter (“Letter”), opposing our client’s request to transfer this matter to the Middle District of Tennessee (“M.D. Tenn.”).

I. Personal Jurisdiction

The Letter claims that Relator could not have filed this case in the M.D. Tenn. because personal jurisdiction was lacking. *See* Letter at 1-2. The argument is without merit. The False Claims Act (“FCA”) authorizes nationwide service of process. *See* 31 U.S.C. § 3732(a). Virtually all courts have read that provision to authorize “nationwide personal jurisdiction.” *U.S. ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 409 F. Supp. 2d 43, 47 (D. Mass. 2006).¹ Under this provision, the M.D. Tenn. necessarily would have jurisdiction.

The Relator himself previously recognized that the FCA grants nationwide personal jurisdiction. The Amended Complaint relies on 31 U.S.C. § 3732(a) and alleges “minimum contacts with the United States” because the FCA “authorizes nationwide service of process.” Am. Compl. ¶ 20. The Amended Complaint thus concedes that personal jurisdiction would be appropriate in any federal district court. We are concerned that the Relator is resisting transfer based on arguments that are inconsistent with his pleading in this case.

Further, the cases the Relator has cited are inapposite. The Second Circuit’s decision in *United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.* vacated a dismissal for lack of subject matter, not personal, jurisdiction. 110 F.3d 861, 862 (2d Cir 1997). After remand, the Southern District of New York (“S.D.N.Y.”) evaluated the defendants’ “contacts with the United States as a whole” and found personal jurisdiction over residents of England based on, *inter alia*, travel to Oklahoma and California. *U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 976 F. Supp. 207, 210 (S.D.N.Y. 1997). The cited footnote in *United States v. Universal Fruits & Vegetables Corp.*, 370 F.3d 829, 836 n.13 (9th Cir. 2004), discussed only whether the Court of International Trade can entertain an FCA case. The decisions in *Posven, C.A. v. Liberty Mutual Insurance Co.*, 303 F. Supp. 2d 391 (S.D.N.Y. 2004), and *Kidd v. Cigna Corp.*, No. 3:10-0020,

¹ *Accord U.S. ex rel. Fadlalla v. DynCorp Int’l LLC*, 402 F. Supp. 3d 162, 177-78 (D. Md. 2019); *U.S. ex rel. McFarland v. Fla. Pharmacy Sols.*, 358 F. Supp. 3d 1316, 1324 (M.D. Fla. 2017); *U.S. v. St. Joseph’s Reg’l Health Ctr.*, 240 F. Supp. 2d 882, 886 n.1 (W.D. Ark. 2002); *U.S. ex rel. Smith v. Athena Constr. Grp., Inc.*, No. 1:17-cv-60, 2018 WL 4110743, at *2 (M.D. Pa. Aug. 29, 2018); *U.S. ex rel. Graziosi v. Accretive Health, Inc.*, No. 13-CV-1194, 2017 WL 1079190, at *3 (N.D. Ill. Mar. 22, 2017); *U.S. ex rel. Cook-Reska v. Cmty. Health Sys., Inc.*, No. H-09-1565, 2014 WL 5500710, at *4 (S.D. Tex. Oct. 30, 2014), *aff’d*, 641 F. App’x 396 (5th Cir. 2016).

2010 WL 4697986 (M.D. Tenn. Nov. 12, 2010), do not address the FCA at all. The latter held only that Cigna Corporation was not subject to personal jurisdiction in Tennessee in a diversity case alleging a state law tort (invasion of privacy). 2010 WL 4697986, at *5-7.²

In addition, if the FCA did not provide for nationwide personal jurisdiction, then this case would have to be dismissed pursuant to Federal Rule of Civil Procedure Rule 12(b)(2). The Amended Complaint concedes that none of the Cigna defendants is incorporated or headquartered in New York. *See* Am. Compl. ¶¶ 8-17. As a result, it would take “truly ‘exceptional’” circumstances to establish general jurisdiction there. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016). The Amended Complaint does not allege any such circumstances, and it does not try to allege the minimum contacts with New York necessary to assert specific jurisdiction over the Cigna defendants in New York.³ Indeed, the Letter admits that this case has no substantive connection to New York by asserting that Cigna’s 360 program operated in “17 states.” Letter at 2. New York was never one of those states. *See* McKeon Decl. ¶ 11.

II. Convenience of the Parties

The Letter separately argues that this district is a more convenient venue, but this contention also lacks merit. As an initial matter, the Letter incorrectly focuses on the Relator’s personal convenience. The Letter (mistakenly) alleges that the S.D.N.Y. courthouse in White Plains, New York is the closest federal courthouse to the Relator’s residence in Westport, Connecticut. Letter at 3.⁴ The Letter also indicates that Relator would have to join the bar of the S.D.N.Y. before he could obtain *pro hac vice* admission in the M.D. Tenn. *Id.* However, because Relator is not the real party in interest, his personal convenience is not entitled to significant weight. *See U.S. ex rel. Roop v. Arkray USA, Inc.*, No. 1:04 CV 87-M-D, 2007 WL 844691, at *2 (N.D. Miss. Mar. 19, 2007); *U.S. ex rel. Adrian v. Regents of Univ. of Cal.*, No. C 99-3864 TEH, 2002 WL 334915, at *3 (N.D. Cal. Feb. 25, 2002), *aff’d*, 363 F.3d 398 (5th Cir. 2004); *U.S. ex rel. Penizotto v. Bates E. Corp.*, No. CIV.A. 94-362, 1996 WL 417172, at *2 (E.D. Pa. July 18, 1996);

² Although the district court in *United States ex rel. McCarthy v. Straub Clinical & Hospital, Inc.* found personal jurisdiction through a state-specific analysis, 140 F. Supp. 2d 1062, 1071-72 (D. Hawaii 2001), it did so without addressing the majority understanding that the FCA authorizes nationwide personal jurisdiction.

³ The Letter attempts to add new allegations about Cigna entities’ purported connections to New York, but such efforts are irrelevant. The Letter alleges that certain Cigna defendants are licensed to do business and have registered agents in New York, Letter at 2, but the Second Circuit has confirmed that this does not confer jurisdiction. *Chen v. Dunkin’ Brands, Inc.*, 954 F. 3d 492, 498-99 (2d Cir. 2020). The Letter alleges that Cigna Corporation’s stock is traded on the New York Stock Exchange, Letter at 2, but “foreign corporations [have] substantial latitude to list their securities on New York-based stock exchanges ... without thereby subjecting themselves to New York jurisdiction for unrelated occurrences.” *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88, 97 (2d Cir. 2000). The Letter alleges that Cigna attended an arbitration that occurred in New York, Letter at 2, but we are aware of no case “that supports the proposition that a defendant who briefly visits a state for a legal proceeding may be haled to court in that state for alleged torts taking place outside the forum.” *Envtl. Mfg. Sols., LLC v. Fluid Energy Grp., Ltd.*, No. 6:18-cv-156-Orl-40KRS, 2018 WL 6264836, at *4 (M.D. Fla. Nov. 30, 2018). Finally, the Letter alleges that Cigna has established a network of providers in New York and “periodically holds corporate events and seminars in the state.” Letter at 2. The Letter, however, cannot connect those alleged contacts to the subject matter of this dispute. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017).

⁴ The closest federal courthouse to Relator’s address in Westport is the District of Connecticut courthouse in Bridgeport (the Brien McMahon Federal Building).

U.S. ex rel. LaValley v. First Nat'l Bank of Bos., 625 F. Supp. 591, 594 (D.N.H. 1985); *see also In Vivo Research, Inc. v. Magnetic Resonance Equip. Corp.*, 119 F. Supp. 2d 433, 438 (S.D.N.Y. 2000) (“convenience of counsel” not a relevant factor).

In contrast, the “convenience of the witnesses is probably the single most important factor in the transfer analysis.” *Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 329 (E.D.N.Y. 2006). There is no real dispute that the home of Cigna’s Medicare Advantage business has been the Nashville area since the acquisition of HealthSpring in 2012. *Compare* Am. Compl. ¶¶ 11-12, *with* McKeon Decl. ¶¶ 5-6.⁵ Relator asserts that only two witnesses are located there, *see* Letter at 2, but, in truth, the clear majority of knowledgeable witnesses are to be found in Nashville, as that is where the business units responsible for the 360 Exam program are located. *See* McKeon Decl. ¶¶ 6-7.⁶ To the extent that Cigna employees in other locations (e.g., Phoenix or Houston) are identified as witnesses, Nashville is a more convenient, accessible location than New York. *See id.* ¶ 10. Perhaps most tellingly, Relator cannot identify a single witness in New York.⁷

Document discovery also favors transfer. Relator contends that relevant documents will include data submitted to CMS, internal Cigna emails, communications with contractors, “as well as the 360 Forms themselves.” Letter at 2. Those categories of documents were largely generated in Nashville and are maintained there. *See* McKeon Decl. ¶¶ 8-9.

Finally, the Letter seeks to avoid transfer by invoking the COVID-19 pandemic. Letter at 3. However, the current administrative order in the M.D. Tenn. allows for proceedings by telephone or video, and it includes additional protections for attorneys or parties who are at high risk. Administrative Order No. 209 (Sixth Amended) ¶¶ 7-8, *In re Court Operations Under the Exigent Circumstances Created by COVID-19* (M.D. Tenn. Aug. 19, 2020). There is no basis to speculate that the judges of the M.D. Tenn. will be insufficiently attentive to the risks posed by COVID-19. We, of course, will cooperate in ensuring appropriate precautions. Further, if the pandemic persists and in-person appearances are necessary, at trial, for instance, the importance of avoiding transporting multiple Cigna witnesses from Nashville to this district would strongly argue for transfer to the M.D. Tenn.

⁵ Citing a website, the Letter wrongly asserts that there is “no basis in fact” to assert that Cigna’s Medicare Advantage business is operated out of Tennessee. *See* Letter at 1-2 & Ex. B. In our view, this is misleading as it singles out Cigna Corporation, the publicly traded parent company headquartered in Connecticut. But, as Relator concedes, Cigna Corporation only offers health insurance products “through its subsidiaries.” Am. Compl. ¶ 8. Exhibit B to Relator’s Letter similarly states that all “products and services are provided exclusively by or through operating subsidiaries of Cigna Corporation, and not by Cigna Corporation.” Letter Ex. B at 1. Cigna Corporation is in no way “the architect,” Letter at 1, of any Medicare Advantage plan or the 360 Exam program. *See* McKeon Decl. ¶¶ 6-9.

⁶ The fact that Cigna-HealthSpring’s operations are based in Tennessee is further confirmed by the contract that Relator’s company signed with HeathSpring Life & Health Insurance Company, Inc., a Cigna-HealthSpring indirect subsidiary. Relator is a former part owner of a company called Texas Health Management, LLC (“THM”), which was a vendor that performed in-home 360 Exams in Texas and Arizona. The contract was governed by the law of Tennessee. *See THM v. HealthSpring Life & Health Ins. Co.*, No. 05-18-01036-CV, 2020 WL 3071729, at *11 (Tex. Ct. App. June 10, 2020) (“Tennessee law, which governs the contract”).

⁷ The Letter confuses the issue by pointing to Cigna Corporation executives in Bloomfield, Connecticut. *See* Letter at 2-3 & Ex. D. This ignores the difference between Cigna Corporation, the publicly traded parent, and the subsidiaries that actually operate Medicare Advantage plans and arrange for in-home 360 Exams. *See supra* n.5.

Respectfully submitted,

/s/ Eamon P. Joyce

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