



## I BACKGROUND.

Sylvain A. Maggard, a resident of Virginia, doing business as Orleans Management Group, LLC, filed this action against Essar Global Limited, a multinational company based in India, and six of its affiliated or subsidiary corporations, seeking to recover a commission for his services in relation to the acquisition in 2010 by one of the Essar subsidiaries, Essar Minerals, Inc., of a coal mining company named Trinity Coal, located in West Virginia. The alleged purchase price was \$660 million and Maggard seeks a commission under this contract of “no less than” \$8.6 million. (Am. Compl. ¶ 75.) Jurisdiction is based upon diversity of citizenship and amount in controversy. 28 U.S.C.A. § 1332 (West 2006 & Supp. 2012).

In response, the defendants have filed a Motion to Transfer or, in the Alternative, to Dismiss the Amended Complaint. The motion has been briefed and argued, and is ripe for decision.

## II MOTION TO TRANSFER.

The defendants have first moved, pursuant to 28 U.S.C.A. § 1404(a) (West Supp. 2012) to transfer this action to the Southern District of New York, arguing that it is a substantially more convenient forum than the Western District of Virginia. I disagree.

That statute provides, “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.”<sup>1</sup> “Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (internal quotation marks and citation omitted). The movant bears “a heavy burden of showing that the balance of interests weighs strongly in [its] favor in a motion to transfer.” *Arabian v. Bowen*, No. 91-1720, 1992 WL 154026, at \*1 (4th Cir. July 7, 1992) (unpublished) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)). In deciding a motion to transfer venue, the court should consider the plaintiff’s choice of venue, convenience to the witnesses and parties, and the interest of justice. *Alpharma, Inc. v. Purdue Pharma L.P.*, 634 F. Supp. 2d 626, 632-33 (W.D. Va. 2009).

A plaintiff’s choice of forum deserves substantial weight, except when “(1) the plaintiff chooses a foreign forum, and (2) the chosen venue has little connection to the cause of action.” *Id.* at 633 (quoting *Gen. Creation LLC v. LeapFrog Enters., Inc.*, 192 F. Supp. 2d 503, 504-05 (W.D. Va. 2002)). When the

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<sup>1</sup> The parties do not dispute that this action could have been filed in the Southern District of New York. At the least, “a substantial part of the events . . . giving rise to the claim occurred” in that district such that venue is also appropriate there. *See* 28 U.S.C.A. § 1391(b)(2) (West Supp. 2012).

plaintiff has chosen to file suit in his home forum, the defendant must demonstrate that the choice is overwhelmingly inconvenient in order to satisfy its burden of showing transfer to be proper. *Id.*

In this case, it is undisputed that the Western District of Virginia is the plaintiff's home forum. The defendants maintain, however, that the plaintiff's choice to litigate here is not entitled to deference because "there is little to connect the chosen forum with the cause of action." *Glamorgan Coal Corp. v. Ratners Grp. PLC*, 854 F. Supp. 436, 438 (W.D. Va. 1993). The facts alleged in the Amended Complaint, however, belie this assertion. A representative of the defendants, Madhu Vuppuluri, reached out by telephone to the plaintiff at his home in this district, seeking to recruit the plaintiff's services in locating a coal mining acquisition for Essar. (Am. Compl. ¶ 18.) The Amended Complaint avers that the plaintiff and Vuppuluri reached an agreement for the plaintiff's services in this conversation. (*Id.*) The plaintiff alleges that representatives of the defendants thereafter came to the this district to visit coal mines here with the plaintiff (Am. Compl. ¶ 27) and the plaintiff continued to provide coal consulting services here. (Am. Compl. ¶ 30.) These contacts illustrate that there is more than a "little to connect the chosen forum with [this] cause of action." *Glamorgan*, 854 F. Supp. at 438. At minimum, these contacts demonstrate that the plaintiff's choice of his home forum is still entitled to deference.

The convenience of the parties and witnesses factor does not weigh heavily in the defendants' favor. Although it is true that many of the potential witnesses who are employees of the defendants are located in New York, the defendants have already demonstrated their ability to conveniently travel to the Western District of Virginia when their representatives flew here to tour coal mines. Essar Global Limited is a conglomerate employing 75,000 people in twenty-five countries. See Essar Home Page, *Corporate Profile*, [http://www.essar.com/section\\_level1.aspx?cont\\_id=SD7sjPUVBkw=](http://www.essar.com/section_level1.aspx?cont_id=SD7sjPUVBkw=) (last visited Feb. 20, 2013). The parent company's global reach indicates that it will not be substantially inconvenient for representatives of the defendants to travel to this district to litigate an issue involving their acquisition of a company in a neighboring state. Given these facts, the convenience of the parties does not substantially weigh in favor of transfer.

Finally, the interests-of-justice factor appears to favor litigation of the case in this district. Both New York and Virginia have policy interests in protecting the rights of their citizens. This balance, however, may weigh slightly in favor of Virginia, since the defendants reached out to the plaintiff in his home here to begin their business relationship. Moreover, in comparison to the Southern District of New York, the defendants agree that a speedier disposition in this case is more likely in this district because of its relative docket size.

Given the deference the court should accord to the plaintiff's choice of his home forum, as well as the fact that it will not be substantially inconvenient for the defendants to litigate in the Western District of Virginia, the defendants' motion to transfer venue must be denied.

### III STATUTE OF FRAUDS.

The defendants have also moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Amended Complaint. They assert that the plaintiff has failed to state claims upon which relief can be granted because the New York Statute of Frauds applies, barring any recovery on either contract or quantum meruit theories.<sup>2</sup>

Federal pleading standards require that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). In order to survive this motion, the plaintiff must state "a plausible claim for relief" that permits "the court to infer more than the mere possibility of [liability]" based upon its "judicial

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<sup>2</sup> Under the New York statute, a contract to pay compensation for services rendered in assisting in the purchase of a business must be in writing. N.Y. Gen. Oblig. Law § 5-701(a)(10) (McKinney 2012); *Gutkowski v. Steinbrenner*, 680 F. Supp. 2d 602, 612-13 (S.D.N.Y. 2010).

experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In evaluating a pleading, the court accepts as true all well-pled facts and construes those facts in the light most favorable to the plaintiff. *Id.* at 680.

The Statute of Frauds is an affirmative defense. Fed. R. Civ. P. 8(c)(1). As the Fourth Circuit has held,

[A] motion to dismiss filed under Federal Rule of Procedure 12(b)(6) . . . generally cannot reach the merits of an affirmative defense. . . . But in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6). This principle only applies, however, if all facts necessary to the affirmative defense “clearly appear[] *on the face of the complaint.*”

*Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (emphasis in original) (quoting *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993)).

The Fourth Circuit recently applied this principle in *Greenbelt Ventures, LLC v. Washington Metropolitan Area Transit Authority*, 481 F. App’x. 833, 837 (4th Cir. 2012) (unpublished). The court determined that a motion to dismiss should be granted where the plaintiff had alleged an oral agreement for the sale of land with the Washington Metropolitan Area Transit Authority, which, as a governmental agency, was immune from certain claimed exceptions to the Statute of Frauds. *Id.* Because the Statute of Frauds was obviously applicable to the alleged agreement and, equally obviously, no exceptions to it could be available,

the plaintiff's complaint did not state a plausible claim for relief. Moreover, the court determined that the plaintiff was not entitled to pursue discovery in order to locate a writing that would satisfy the statute of frauds, having provided no colorable basis for its assertion that discovery would yield such a writing. *Id.* at 837 n.1.

In contrast, in *T.G. Slater & Son, Inc. v. The Donald P. and Patricia A. Brennan LLC*, the Fourth Circuit concluded that a motion to dismiss a claim for breach of contract for failure to pay a commission should not have been granted based on the Virginia Statute of Frauds. 385 F.3d 836, 841-42 (4th Cir. 2004). The plaintiff alleged sufficient facts indicating that certain exceptions to the statute of frauds may be available, making his claim plausible on its face. Moreover, the plaintiff sent "several written documents" to the defendants and "[a]fter discovery, [he] may be able to produce a document signed by a [defendant] . . . sufficient to satisfy the statute of frauds." *Id.*

Applying these principles to this case would require the court to determine which state's law, and therefore which state's Statute of Frauds, governs the alleged commission agreement. The plausibility of a claim on an agreement that is subject to the Statute of Frauds, as well as the availability of any exceptions to the statute, will depend on the governing law.

The law governing a contract is a matter of the choice-of-law rules of the forum. A federal district court sitting in diversity will apply the substantive law of the forum state. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). The substantive law of the forum state for purposes of *Erie* includes its choice-of-law rules. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). Therefore, I should apply Virginia's choice-of-law rules. In Virginia, "[t]he nature, validity and interpretation of contracts are governed by the law of the place where made." *Woodson v. Celina Mut. Ins. Co.*, 177 S.E.2d 610, 613 (Va. 1970) (quoting *C.I.T. Corp. v. Guy*, 195 S.E. 659, 661 (Va. 1938)). The law of the place of performance governs all questions related to the performance of the contract. *Arkla Lumber & Mfg. Co. v. W.Va. Timber Co.*, 132 S.E. 840, 842 (Va. 1926).

In this case, the Amended Complaint alleges the existence of a contract for consulting services between the plaintiff and the defendants. (Am. Compl. ¶ 71.) The plaintiff has pled a number of facts relating to both the formation and performance of this agreement. For example, the plaintiff alleges that he was contacted at his home in Virginia about providing services to the defendants. (Am. Compl. ¶ 18.) He alleges he further negotiated the terms of his agreement with the defendants when he subsequently traveled to New York to begin his work. (Am. Compl. ¶ 23.) The plaintiff also asserts that a representative of the defendants emailed a draft contractual agreement to him several months later, after the

plaintiff had already performed the majority of the services owed under the agreement. (Am. Compl. ¶ 63.) Finally, the plaintiff has pled that he performed services relating to this agreement in Virginia, West Virginia, Tennessee and Kentucky. (Am. Compl. ¶ 41.)

The plaintiff has pled sufficient facts to plausibly state a claim that the defendants have breached an agreement to compensate him for his services. The Amended Complaint, however, does not present sufficient facts to establish where the parties entered into this agreement and where they intended the agreed-upon services to be performed. Therefore, the court does not have sufficient facts before it to determine with certainty that the Statute of Frauds of New York should apply to bar the claims. Accordingly, I cannot say with certainty that a defense based on the Statute of Frauds “clearly appear[s] on the face of the complaint.” *Goodman*, 494 F.3d at 464 (internal quotation marks and citation omitted). For that reason, the plaintiff has stated a plausible claim for relief, and the defendants’ motion to dismiss the Amended Complaint on this ground will be dismissed.

#### IV GROUP PLEADING.

Finally, the defendants assert that the structure of the plaintiff’s Amended Complaint fails to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a). They contend that the plaintiff’s pleadings only generally allege

facts against seven distinct corporate entities without specifying the relevant conduct of each defendant and without defining the party ultimately liable under the alleged agreement. The defendants argue that this “group pleading” is improper and ask the court to order that the plaintiff amend his complaint to specify the proper entities.

Contrary to the defendants’ assertion, however, the plaintiff has pled specific facts regarding six of the defendants. The plaintiff has specifically alleged the dates that he met with and provided consulting services to executives from Essar Global Limited, Essar, Inc., Essar Americas, Inc., Essar Minerals, Inc., Essar Steel Algoma, Inc., and Essar Steel Minnesota, LLC. (Am. Compl. ¶¶18, 22, 30, 37, 58, 61.) He has also identified which entities paid his expenses or monthly retainers. (Am. Compl. ¶ 62.) Finally, the plaintiff has stated which specific corporate subsidiary ultimately purchased the coal company, fulfilling the purpose for which the plaintiff alleges the defendants sought his services. (Am. Compl. ¶ 68.) At this point in the case, at least, all of these interactions are reflective of the existence of an agreement between these defendants and the plaintiff.

The plaintiff, however, has failed to plead any specific facts regarding the involvement of defendant Essar Steel Algoma, Inc., USA. The plaintiff has therefore not sufficiently pleaded a claim against this defendant and it will be dismissed from this action.

V CONCLUSION.

For the foregoing reasons, it is **ORDERED** that Defendants' Motion to Transfer Venue or in the Alternative to Dismiss the Amended Complainant (ECF No. 20) is DENIED, except that as to defendant Essar Steel Algoma, Inc., USA, the Motion to Dismiss is GRANTED and said defendant is DISMISSED.

ENTER: February 27, 2013

/s/ James P. Jones  
United States District Judge