

28.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CAROLINA ARCHERY)
 PRODUCTS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 ALPINE ARCHERY INCORPORATED,)
 and KENNETH JANEWAY dba)
 JANEWAY MACHINE and dba)
 JANEWAY MACHINE, INC.,)
)
 Defendants.)

1:03CV00176



MEMORANDUM OPINION

BEATY, District Judge.

I. INTRODUCTION

Plaintiff, Carolina Archery Products, Inc. (“Carolina Archery”), initially filed this action against Alpine Archery Incorporated (“Alpine”), an Idaho corporation, alleging patent infringement in connection with the sale of certain “arrow rests” by Alpine [Document #1]. Plaintiff then amended its Complaint as of right, adding Defendant Kenneth Janeway, doing business as Janeway Machine and Janeway Machine, Inc., and alleging claims of (1) patent infringement and active inducement of infringement; (2) breach of contract; and (3) unfair trade practices under Chapter 75 of the North Carolina General Statutes against Defendant Janeway [Document #3]. Defendant Kenneth Janeway is the owner of a sole proprietorship known as Janeway Machine or Janeway Machine, Inc. (collectively “Janeway”). Plaintiff thereafter dismissed its claims against Alpine, leaving Janeway as the sole Defendant [Document #5]. Janeway then filed a Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Rule 12(b)(2) and for Improper Venue pursuant to Rule

12(b)(3) of the Federal Rules of Civil Procedure [Document #11]. Fed. R. Civ. P. 12(b). Alternatively, Defendant moves to transfer this case to the Northern District of Oklahoma pursuant to 28 U.S.C. § 1404(a) [Document #11]. These motions are now before the Court.

II. FACTUAL BACKGROUND

In the light most favorable to Plaintiff, the relevant facts are as follows: Carolina Archery is a small business in Hillsborough, North Carolina, which holds the patent for a particular type of arrow rest, used in archery and hunting pursuits. U.S. Patent No. 5,896,849 (issued April 27, 1999). Plaintiff's archery rest is a device that attaches to a bow and provides support for the arrow when the bow is moved rapidly while in the drawn position. The arrow rest also provides stability to the arrow when released. Defendant Janeway operates a small business with one location in Sand Springs, Oklahoma. Defendant has never been to North Carolina and does not regularly do business, nor solicit business, in North Carolina.

In early 2001, Stephen Graf, President of Carolina Archery, was notified by a business associate in Oklahoma that Janeway was interested in fabricating arrow rests for Plaintiff at his shop in Oklahoma. The associate, who at that time anodized completed arrow rests for Carolina Archery, told Mr. Graf that he and Janeway were working together to publicize each other's services to their customers. Janeway's associate asked Mr. Graf to consider an offer from Janeway. After repeated requests, Mr. Graf consented to speak with Janeway. Janeway left a message for Mr. Graf at Carolina Archery requesting the opportunity to provide a price quote for the manufacture of the arrow rests. Mr. Graf returned Janeway's call and Janeway provided a price quote to Carolina Archery. After several more phone conversations, Carolina Archery sent a purchase order to Janeway on June 28, 2001, requesting 10,000 arrow rests, each with two parts: a bracket and a

linkage. Janeway sent two packages to Carolina Archery in July 2001 with a limited amount of parts for Carolina Archery's review. After review of those parts, the parties confirmed on July 17, 2001, that Janeway would deliver 1,000 parts per week to Carolina Archery, beginning immediately, until 10,000 parts were delivered.

Over the next few weeks, Carolina Archery became dissatisfied with Janeway's performance of the contract. Janeway was not able to deliver the requested parts on time or within the specifications provided by Carolina Archery. On September 5, 2001, Carolina Archery cancelled their purchase order, and thereafter paid for the roughly 5,000 parts it was able to use and returned the remaining parts to Janeway. Janeway offered to sell the remaining parts to Carolina Archery for a reduced price, but Carolina Archery refused. After Carolina Archery refused the parts, Janeway resold the component parts to two archery companies in Idaho, who then offered them for sale to the public as arrow rests, giving rise to Carolina Archery's claims. Janeway now moves to dismiss Carolina Archery's claims due to lack of personal jurisdiction and improper venue. Alternatively, Janeway moves to transfer this action to the Northern District of Oklahoma pursuant to 28 U.S.C. § 1404(a).

III. DISCUSSION

A. Defendant's Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Rule 12(b)(2).

Defendant first moves for dismissal of all of Carolina Archery's claims because personal jurisdiction does not exist in this Court. As an initial matter, the Court notes that Federal Circuit, rather than Fourth Circuit, law must be applied to determine personal jurisdiction for patent cases. Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found., 297 F.3d 1343, 1348 (Fed. Cir. 2002); Walter Kidde Portable Equip. v. Universal Sec. Instruments, 304 F. Supp. 2d 769, 771

(M.D.N.C. 2004). Further, where additional state law claims in the action are “intimately involved in the substance and enforcement of the patent right,” federal law should also be applied to determine personal jurisdiction for those claims. Amana Refrigeration v. Quadlux, Inc., 172 F.3d 852, 856 (Fed. Cir. 1999) accord 3D Sys., Inc. v. Aarotech Labs., 160 F.3d 1373, 1377 (Fed. Cir. 1998) (analyzing personal jurisdiction for both patent claims and related state claims under Federal Circuit law). Plaintiff’s state law claims of breach of contract and unfair trade practices under Chapter 75 of the North Carolina General Statutes are based on the same actions that form the basis for Plaintiff’s patent claims, each claim is predicated on Defendant’s unauthorized dissemination of patented materials. Further, Plaintiff’s claim for unfair trade practices under Chapter 75 of the North Carolina General Statutes rests, in part, on allegations that Defendant infringed on Plaintiff’s patent. Therefore, the Court finds such claims are “intimately involved in the substance and enforcement of the patent right” and the existence of personal jurisdiction over Defendant for Plaintiff’s state law claims is properly examined under the law of the Federal Circuit.

Where, as here, the court rules on a 12(b)(2) motion relying on the Complaint, briefs, and affidavits, without conducting an evidentiary hearing, the burden is on the plaintiff to make a prima facie showing that personal jurisdiction exists. Elecs. For Imaging, Inc. v. Coyle, 340 F.3d 1344 (Fed. Cir. 2003). In order to meet this burden, Plaintiff must show first that the North Carolina long-arm statute confers personal jurisdiction, and second that the exercise of personal jurisdiction over Defendant would not violate due process. Genetic Implant Sys. v. Core-Vent Corp., 123 F.3d 1455, 1458 (Fed. Cir. 1977); Walter Kidde, 304 F. Supp. 2d at 771.

The North Carolina Supreme Court has liberally construed the North Carolina long-arm statute to extend the full jurisdictional powers permissible under federal Due Process. Dillon v.

Numismatic Funding Corp., 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977); Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062, 1065 (4th Cir. 1982). “There is a clear mandate that the North Carolina long-arm statute be given a liberal construction, making available to the North Carolina courts ‘the full jurisdictional powers permissible under federal due process.’” Vishay, 696 F.2d at 1065. Therefore, the two-step inquiry collapses into a single issue of whether the due process clause is violated by the exercise of jurisdiction over the defendant. Deprenyl, 297 F.3d at 1350.

Personal jurisdiction is governed by the standard articulated in International Shoe Company v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and its progeny, which established a two prong test for determining whether the exercise of jurisdiction comports with due process. The first prong requires the plaintiff to show that the defendant has established minimum contacts with the forum. Id. “The second prong of the due process test affords the defendant the opportunity to defeat jurisdiction by presenting a compelling case that other considerations render the exercise of jurisdiction so unreasonable as to violate ‘fair play and substantial justice.’” Deprenyl, 297 F.3d 1343, 1351 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–77, 105 S. Ct. 2174, 2179, 85 L. Ed. 2d 528 (1985)).

Minimum contacts, as required by the first prong, may be shown in the context of “general jurisdiction” or “specific jurisdiction.” “General jurisdiction” applies where the events giving rise to the cause of action are not related to the defendant’s activities in the forum. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). This test requires the Plaintiff to prove that the Defendant’s contacts are “continuous and systematic.” Id. Carolina Archery does not contend that general jurisdiction over Janeway exists. “Specific

jurisdiction” may be shown if the events giving rise to the cause of action are related to Defendant’s activities in the forum state. For specific jurisdiction, the plaintiff must show that the defendant has established minimum contacts with the forum by “purposefully direct[ing] his activities at residents of the forum.” Burger King, 471 U.S. at 471-77, 105 S. Ct. at 2179–85; accord Inamed Corp. v. Kuzmak, 249 F.3d 1356, 1360 (Fed. Cir. 2001). In examining minimum contacts, “[j]urisdiction . . . may not be avoided merely because the defendant did not physically enter the forum State.” Burger King, 471 U.S. at 476, 105 S. Ct. at 2184.

The aforementioned considerations have been combined by the Federal Circuit into a three-factor test encompassing the pertinent Supreme Court jurisprudence. Akro Corp. v. Luker, 45 F.3d 1541, 1544–1549 (Fed. Cir. 1995). The three factors for determining whether the exercise of personal jurisdiction over an out-of-state defendant comports with due process are: (1) whether the defendant “purposefully directed” its activities at residents of the forum; (2) whether the claim “arises out of or relates to” the defendant’s activities in the forum; and (3) whether the exercise of jurisdiction is “reasonable and fair.” Inamed, 249 F.3d at 1360 (quoting Akro, 45 F.3d at 1545). “The first two factors correspond with the ‘minimum contacts’ prong of the International Shoe analysis, and the third factor corresponds with the ‘fair play and substantial justice’ prong of the analysis.” Id.

Carolina Archery argues that jurisdiction is proper because Janeway established minimum contacts with North Carolina by virtue of numerous telephone and facsimile communications, shipments of goods into the jurisdiction, the ongoing relationship contemplated by the contract between the parties and Janeway’s solicitation of Carolina Archery’s business. Carolina Archery claims those actions constitute “purposefully directed” activities towards residents of the forum

state. In addition, Plaintiff contends that the exercise of jurisdiction over Janeway would not offend traditional notions of fair play and substantial justice because the potential burden on Defendant of litigation in North Carolina would be no greater than the burden on Plaintiff would be in a different forum.

Janeway, however, argues that minimum contacts with this jurisdiction do not exist. Janeway denies that the phone calls, facsimiles and shipments made to Carolina Archery represent sufficient “purposefully directed” activity to meet the minimum contacts requirement. Defendant notes that Mr. Janeway has never been to this jurisdiction, Janeway does not purposefully target advertising here and Janeway has not sold any arrow rests in this jurisdiction, other than those sold to Plaintiff.

Obviously, there is a genuine dispute as to whether personal jurisdiction exists over Janeway on these facts. As discussed below, however, the Court has determined that the venue issues raised by Defendant are controlling in this matter. The Court’s transfer of venue would not be affected by the determination of personal jurisdiction and transfer of venue may be appropriate regardless of whether personal jurisdiction exists. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962) (“The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not.”); Datasouth Computer Corp. v. Three Dimensional Techs., Inc., 719 F. Supp. 446, 449 (W.D.N.C. 1989) (holding that the court could transfer venue pursuant to 28 U.S.C. § 1404 without deciding personal jurisdiction). Although for the purposes of the venue discussion below, the Court will assume personal jurisdiction exists, Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction is moot in light of the Court’s decision on Defendant’s Motion to Dismiss for Improper Venue and Motion to

Transfer.

B. Defendant's Motion to Dismiss Pursuant to Rule 12(b)(3).

“When an objection to venue has been raised under Rule 12(b)(3), the burden lies with the plaintiff to establish that venue is proper in the judicial district in which the plaintiff has brought the action.” Plant Genetic Sys. v. Ciba Seeds, 933 F. Supp. 519, 526 (M.D.N.C. 1996) (citing Bartholomew v. Va. Chiropractors Ass'n, 612 F.2d 812, 817 (4th Cir. 1979)). “Generally, venue must be established for each separate claim in a complaint.” Hsin Ten Enter. USA v. Clark Enters., 138 F. Supp. 2d 449, 462 (S.D.N.Y. 2000). The Court will examine separately whether venue is appropriate for Plaintiff's state law claims and Plaintiff's patent claims.

1. Plaintiff's Claims Under North Carolina State Law.

Although the arguments of the parties focus largely on proper venue for Plaintiff's patent claims, a brief discussion of venue for Plaintiff's state law claims is warranted. Plaintiff's claims of breach of contract and unfair trade practices under Chapter 75 of the North Carolina General Statutes are governed by the general venue statute, 28 U.S.C. § 1391. Subpart (b) of that section provides that:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, 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 a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). Defendant does not contend that this Court is an improper venue for Plaintiff's state law claims, and the Court finds that this is an appropriate venue for Plaintiff's state

law claims claims under 28 U.S.C. § 1391(b).¹

2. Plaintiff's Patent Claims.

Defendant's Motion to Dismiss for Improper Venue is primarily directed toward Plaintiff's claims of patent infringement and active inducement of patent infringement, which are governed by a separate and more restrictive statute than 28 U.S.C. § 1391(b) which governs venue in general cases. Venue in patent cases is governed by 28 U.S.C. § 1400(b) which states:

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

The second clause of this statute is conjunctive, requiring that both conditions be met. Stevenson v. Doyle Sailmakers, Inc., No. H-86-883, 1988 WL 50721, at *2 (D. Md. Apr. 3, 1988). Thus, the statute provides two ways in which proper venue may be established. Either a claim for patent infringement must be brought in the jurisdiction where the defendant resides, or the claim must be brought where the defendant both committed the infringing acts and had a regular place of business. Because Plaintiff does not contend that Janeway maintained a regular and established place of business in North Carolina, the second clause cannot provide a basis for venue in this case even if Plaintiff has alleged that the infringing acts were committed in North Carolina. Therefore, the only

¹ Although venue is proper over Plaintiff's state law claims, the Court notes that the exercise of pendent venue to assert venue over Plaintiff's patent claims would not be appropriate in this case because the patent venue statute is more restrictive than the general venue statute governing Plaintiff's state law claims and because state law claims generally cannot provide a basis for pendent venue over federal claims. Lengacher v. Reno, 75 F. Supp. 2d 515, 519 (E.D. Va. 1999) (holding that when determining whether pendent venue should apply to two claims governed by different venue provisions, the claim governed by a less restrictive venue provision cannot be the basis for pendent venue over a claim governed by a more restrictive venue provision); Sadighi v. Daghighfekr, 36 F. Supp. 2d 267, 278 (D.S.C. 1999) ("case law does not support an assertion of venue over the principal, federal law claim pursuant to the doctrine of 'pendent venue' based upon a finding of proper venue over the pendent state law claims").

applicable question for purposes of venue is whether Janeway “resides” in North Carolina, thereby providing appropriate venue under the first clause of 28 U.S.C. § 1400(b).

28 U.S.C. § 1400(b) does not define the term “resides.” However, in general, an individual is deemed to reside where he maintains a “personal presence at some place of abode with no present intention of definite and early removal and with a purpose to remain for an undetermined period, not infrequently but not necessarily combined with a design to stay permanently.” T. P. Labs. v. Huge, 197 F. Supp. 860, 865 (D. Md. 1961). The undisputed evidence presented by Defendant is that he has never been physically present in North Carolina. Thus, Janeway, individually, cannot be considered to reside in North Carolina as required by 28 U.S.C. § 1400(b).

However, Plaintiff has filed this action not only against Kenneth Janeway individually, but against Kenneth Janeway doing business as Janeway Machine and also doing business as Janeway Machine, Inc. Plaintiff argues that venue should not be examined as it would for Janeway the individual, but as it would for a business entity. Specifically, Plaintiff argues that although Janeway is not formally incorporated, the business should be considered a corporation for the purpose of determining venue.

If Defendant is considered a corporation as Plaintiff requests, Defendant would be subject to a much broader venue provision. 28 U.S.C. § 1400(b) does not discuss how the term “resides” relates to corporations or other business forms. However, the determination of where corporations reside under the general venue statute, 28 U.S.C. § 1391, has been read into the patent venue statute and is applicable to the determination of corporate residence under the patent venue statute, 28 U.S.C. § 1400(b). VE Holding Corp. v. Johnson Gas Appliance, 917 F.2d 1574, 1583–1584 (Fed. Cir. 1990); Plant Genetic, 933 F. Supp. at 526. The general venue statute, 28 U.S.C. § 1391(c),

provides that “[f]or the purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.” Restated, this provision establishes that if a corporation is subject to personal jurisdiction in a particular judicial district, then the corporation “resides” there and venue is proper in that district. Assuming, as previously discussed, the existence of personal jurisdiction in this matter, venue would be proper if Janeway were a corporation, because it would be deemed to “reside” in North Carolina for the purposes of venue under 28 U.S.C. § 1400(b).

The Court, however, cannot assume that Janeway is a corporation, particularly when Carolina Archery itself has not alleged that Janeway is a corporation. Instead, in its First Amended Complaint, Carolina Archery alleges that “Janeway Machine is Kenneth Janeway, individually, doing business as Janeway Machine and also doing business as ‘Janeway Machine, Inc.’” [Document #3]. Therefore, accepting Plaintiff’s admission of this fact, Defendant cannot be considered a corporation for the purpose of determining venue, but must be viewed as an individual, or a sole proprietorship. Nevertheless, as discussed more fully below, Plaintiff argues that the reach of 28 U.S.C. § 1391(c) has been extended beyond corporations and can be applied to analogous entities. Plaintiff asserts that Janeway, even as a sole proprietor, is such an analogous entity, and should be treated as a corporation for venue purposes under 28 U.S.C. § 1391(c). While the Court agrees that 28 U.S.C. § 1391(c), which is read into 28 U.S.C. § 1400(b), has been interpreted to apply to business that are not corporations, the issue before the Court is whether such interpretations are broad enough to encompass Janeway, a sole proprietorship.

Plaintiff cites to several cases that have expanded the types of organizations that can be governed by 28 U.S.C. § 1391(c) beyond a “corporation,” which is the only business form explicitly

mentioned in the statute. One case particularly relied on by Plaintiff is Denver and Rio Grande Western Railroad v. Brotherhood of Railroad Trainmen, 387 U.S. 556, 87 S. Ct. 1746, 18 L. Ed. 2d 954 (1967). In Denver, the Supreme Court expanded 28 U.S.C. § 1391(c) to apply to a labor union when determining where the labor union resided for venue purposes. Id. at 562, 87 S. Ct. at 1750. In doing so, the Court stated, “[w]e think it most nearly approximates the intent of Congress to recognize the reality of the multi-state, unincorporated association such as a labor union and to permit suit against that entity, like the analogous corporate entity, wherever it is ‘doing business.’”² Id.

Since Denver, courts have continued to expand 28 U.S.C. § 1391(c) to include additional unincorporated business entities. For example, the Fifth Circuit Court of Appeals has applied the corporate residence provision of 28 U.S.C. § 1391(c) to a partnership. Penrod Drilling Co. v. Johnson, 414 F.2d 1217 (5th Cir. 1969) (holding the residence of a “multistate unincorporated business organization” under the Jones Act is governed by 28 U.S.C. § 1391(c)). The court in Injection Research Specialists v. Polaris Industries, 759 F. Supp. 1511(D. Colo. 1991) reached the same conclusion, holding that partnerships should be treated as corporations for purposes of venue under 28 U.S.C. § 1391(c) and 28 U.S.C. § 1400(b). Further, 28 U.S.C. § 1391(c) has been expanded to include such non-corporate organizations as a charitable trust of a university as in Kingsepp v.

² The Court in Denver was construing the law as it existed before the 1988 amendment to 28 U.S.C. § 1391(c). Prior to the 1988 amendment, 28 U.S.C. § 1391(c) read that a corporation could be sued in the judicial district “in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.” As discussed in Injection Research Specialists v. Polaris Industries, 759 F. Supp. 1511 (D. Colo. 1991), the subsequent changes in 28 U.S.C. § 1391(c) have not altered the portion of the Court’s analysis in Denver relevant to this case, namely the examination of what business entities are covered by the statute.

Wesleyan University, 763 F. Supp. 22 (S.D.N.Y. 1991), and a multiemployer pension benefit plan as in Pepsico, Inc., v. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund, No. 87 Civ. 3968, 1988 WL 64869, at *2 (S.D.N.Y. June 13, 1988).

While the Court acknowledges the broad scope of organizations that may be treated as “corporations” within the meaning of 28 U.S.C. § 1391(c), the Court has not found, and Defendant has not cited, any case in which an individual, sole proprietorship, or any other small business has been treated as a corporation for venue purposes. Rather, many of the courts applying 28 U.S.C. § 1391(c) to non-corporate entities have done so because of their large size and multi-jurisdictional business operations. For example, the Denver Court explicitly stated that application of 28 U.S.C. § 1391(c) was the way Congress intended to treat “multi-state” labor unions. Denver, 387 U.S. at 562, 87 S. Ct. at 1750. Similarly, in Penrod, the court noted that the defendant partnership was an “industrial Goliath” of “immense proportions,” employing over seven-hundred people. Penrod, 414 F.2d at 1223. Finally, the Court in Injection Research stated that the defendant partnership was a “global business corporation in all respects except its choice of legal structure” and held that it would create an “anomalous result” to find that corporations were subject to venue in situations where “potentially larger economic entities doing business as partnerships” were not. Injection Research, 759 F. Supp. at 1515. Each of these cases expanding 28 U.S.C. § 1391(c) to a non-corporate business organization relied upon the large size and multi-jurisdictional nature of the business as a basis for the decision that it should be treated like a corporation for the purposes of venue.

Conversely, there are numerous cases in which other courts have found that small businesses and sole proprietorships similar to Janeway are not subject to treatment as corporations under 28

U.S.C. § 1391(c). For example, in Hsin Ten Enterprises USA v. Clark Enterprises, 138 F. Supp. 2d 449 (S.D.N.Y. 2000), the plaintiff attempted to bring claims including trademark and patent infringement in a New York Federal Court against an unincorporated sole proprietorship with its principal place of business in Kansas. In refusing to apply 28 U.S.C. § 1391(c) to the defendant, the court noted “although [defendant] does business in forty-seven states, it still is not the type of unincorporated business entity that has been included in the definition of corporation.” Id. at 459. The court added that “between July 8, 1999 and October 17, 2000, [defendant] sold 1,855 Exercise Machines. Although this is impressive for a sole proprietorship, it is hardly remarkable. Nor does it convert Clark to the functional equivalent of a corporation.” Id. The court went on to note that “expanding the definition of ‘corporation’ to include sole proprietorships would be overly burdensome and inconvenient to sole proprietors, most of whom would be unable to afford the expense of litigating in distant states.” Id.

In another such case, the plaintiff brought a patent infringement action in the Eastern District of Louisiana against a sole proprietorship with its principal place of business in Massachusetts. Kabb, Inc. v. Sutera, No. 91-3551, 1992 WL 245546, at *1 (E.D. La. Sept. 4, 1992). The Kabb court held that 28 U.S.C. § 1391(c) did not apply to the sole proprietorship defendant. In so doing, the court stated, “[a] sole proprietorship, unlike a partnership . . . is an individual doing business under a trade name. The rationales for applying Section 1391(c) to partnerships, discussed in Penrod, do not apply to sole proprietorships.” Kabb, 1992 WL 245546, at *2. Other jurisdictions who have considered the issue have also found 28 U.S.C. § 1391(c) inapplicable to sole proprietorships and individuals. See, e.g., Blue Compass Corp. v. Polish Masters of Am., 777 F. Supp. 4 (D. Vt. 1991) (holding the defendant’s sole proprietorship mobile car detailing business was

not a corporation within the meaning of 28 U.S.C. § 1391(c)); PKWare, Inc. v. Meade, 79 F. Supp. 2d 1007 (E.D. Wis. 2000) (The defendant owned and operated a business specializing in translating and reselling software under the name “Ascent Solutions.” The defendant entered into agreement with the plaintiff one year before incorporating his business. Thus, the defendant was a sole proprietorship and not a corporation within the meaning of 28 U.S.C. § 1391(c), rendering venue improper for the plaintiff’s claims, including patent infringement.).

Defendant Janeway is a small business with one location in Sand Springs, Oklahoma. Janeway employs approximately 10–20 people and maintains only one location. Janeway cannot be analogized to the “industrial Goliath” of “immense proportions” at issue in Penrod, 414 F.2d at 1223, nor the “global business corporation in all respects except its choice of legal structure” considered in Injection Research, 759 F. Supp. at 1515. As such, these cases are distinguishable from the instant case. As Plaintiff alleged in his Complaint, Janeway is not a corporation. Based upon the Court’s analysis, Janeway is much more akin to the sole proprietorships in Hsin Ten, Kabb, Blue Compass and PKWare. The Court finds the reasoning in these cases to be persuasive and agrees that “[t]he rationales for applying Section 1391(c) to partnerships, discussed in Penrod, do not apply to sole proprietorships.” Kabb, 1992 WL 245546, at *2. As such, the Court finds that Janeway cannot be treated as a corporation under 28 U.S.C. § 1391(c). Viewing Janeway as a corporation under 28 U.S.C. § 1391(c) is the only way Janeway could be found to reside in North Carolina for the purpose of determining venue. Therefore, even assuming *arguendo* that Janeway is subject to personal jurisdiction in North Carolina, as previously discussed, venue is improper. Since Plaintiff cannot show that Defendant should be treated as a corporation, or that Janeway can be said to “reside” in this district, the Court finds that venue for Plaintiff’s patent claims is proper only

where Janeway resides, which in this instance would be in the Northern District of Oklahoma, not North Carolina.

C. Transfer of Plaintiff's Claims for Patent Infringement Pursuant to 28 U.S.C. § 1406.

Given that the Court has determined that venue for Plaintiff's patent claims is appropriately exercised only in the Northern District of Oklahoma, Defendant further requests that the Court fully dismiss Carolina Archery's patent claims upon a finding that venue is improper in North Carolina. However, 28 U.S.C. § 1406(a) provides that: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). The Fourth Circuit Court of Appeals has interpreted this statute to "[authorize] the transfer of a case to any district, which would have had venue if the case were originally brought there, for any reason which constitutes an impediment to a decision on the merits in the transferor district but would not be an impediment in the transferee district." Porter v. Groat, 840 F.2d 255, 258 (4th Cir. 1988). Further, "[i]n addressing the issue of proper venue in the context of a possible dismissal of the action, the usual procedure should be transfer rather than dismissal." Davis Media Group v. Best Western Int'l, 302 F. Supp. 2d 464, 470 (D. Md. 2004). Because it is "in the interest of justice" for the Plaintiff to have his day in court, and the Court sees no reason why the matter should be dismissed rather than transferred, the Court finds that it is more appropriate to transfer Plaintiff's patent claims to the Northern District of Oklahoma rather than to dismiss them as Defendant requests. See Porter, 840 F.2d at 258 (transferring case because it was "in the interest of justice for plaintiffs to have their day in court" and there were no "countervailing reasons to deny transfer").

D. Transfer of Plaintiff's State Law Claims Pursuant to 28 U.S.C. § 1404.

As previously noted, in addition to its patent claims, Carolina Archery's state law claims of breach of contract and unfair trade practices under Chapter 75 of the North Carolina General Statutes are also the subject of Janeway's Motion to Transfer. Defendant requests that the Court transfer these state law claims, for which venue is otherwise proper in North Carolina, to the Northern District of Oklahoma pursuant to 28 U.S.C. § 1404.

28 U.S.C. § 1404(a) 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." When considering a motion to transfer under 28 U.S.C. § 1404(a), the following discretionary factors should be considered:

(1) the plaintiff's initial choice of forum; (2) relative ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing and unwilling witnesses; (4) possibility of a view of the premises, if appropriate; (5) enforceability of a judgment, if one is obtained; (6) relative advantage and obstacles to a fair trial; (7) other practical problems that make a trial easy, expeditious, and inexpensive; (8) administrative difficulties of court congestion; (9) local interest in having localized controversies settled at home; (10) appropriateness in having a trial of a diversity case in a forum that is at home with the state law that must govern the action; and (11) avoidance of unnecessary problems with conflicts of laws.

Brown v. Flowers, 297 F. Supp. 2d 846, 850 (M.D.N.C. 2003); accord Plant Genetic Sys. v. Ciba Seeds, 933 F. Supp. 519, 527 (M.D.N.C. 1996).

In reviewing the enumerated factors, the Court notes that several factors, namely (1) the plaintiff's initial choice of forum and (10) appropriateness in having a trial of a diversity case in a forum that is at home with the state law that must govern the action, weigh against transferring Plaintiff's remaining state law claims. However, certain factors indicate that a transfer of such claims

is appropriate, in particular, factors (5) enforceability of a judgment, if one is obtained, (7) other practical problems that make a trial easy, expeditious, and inexpensive. The remaining factors do not weigh in favor of either this Court or the Northern District of Oklahoma. Instead, the Court finds that factors (2) the relative ease of access to sources of proof, (8) administrative difficulties of court congestion and (9) local interest in having localized controversies settled at home, all weigh evenly in favor of both jurisdictions. Further, there is no evidence in the record that factors (3) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing and unwilling witnesses, (4) possibility of a view of the premises, if appropriate, (6) relative advantage and obstacles to a fair trial, and (11) avoidance of unnecessary problems with conflicts of laws are likely to be relevant in this case.

The Court finds factor (7), that is, other practical problems that make a trial easy, expeditious, and inexpensive, to be the strongest factor that the Court must weigh in determining whether to transfer Plaintiff's state law claims, particularly in light of the previously discussed transfer of Plaintiff's patent claims. "In deciding what 'the interests of justice' require, avoiding a multiplicity of litigation is an important factor." Wood v. Barnette, Inc., 648 F. Supp. 936, 940 (E.D. Va. 1986) (citing Continental Grain Co. v. Barge, 364 U.S. 19, 20–21, 80 S. Ct. 1470, 1471–1472, 4 L. Ed. 2d 1540 (1960)). The transfer of Plaintiff's patent law claims, without the simultaneous transfer of Plaintiff's state law claims, would create two proceedings that concern the same series of events and many of the same factual determinations. Requiring two proceedings would create unnecessary burden and expense for both the Court and the parties. After balancing the enumerated factors relevant to a motion to transfer filed pursuant to 28 U.S.C. § 1404(a), it is the judgment of the Court that the "convenience of parties and witnesses" and the "interest of

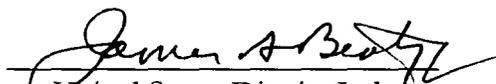
justice” would be best served by transferring Plaintiff’s remaining state law claims to the Northern District of Oklahoma pursuant to 28 U.S.C. § 1404(a), in conjunction with the Court’s transfer of Plaintiff’s patent claims.

IV. CONCLUSION

In summary, Defendant’s Motion to Dismiss for Improper Venue pursuant to Federal Rule of Civil Procedure 12(b)(3) [Document #11] is granted as to Plaintiff’s first claims for patent infringement and inducement of patent infringement because Defendant does not reside in this jurisdiction as required by 28 U.S.C. § 1400(b). These claims are to be transferred to the Northern District of Oklahoma, where Defendant resides, pursuant to 28 U.S.C. § 1406.

As to Plaintiff’s second claim for breach of contract and third claim for unfair trade practices under Chapter 75 of the North Carolina General Statutes, Defendant’s 12(b)(3) Motion for Improper Venue [Document #11] is denied. However, Defendant’s Motion to Transfer pursuant to 28 U.S.C. § 1404 [Document #11] is granted as to Plaintiff’s second claim of breach of contract and third claim of unfair trade practices because such transfer furthers both the “convenience of parties and witnesses” and the “interest of justice.” These claims are also transferred to the Northern District of Oklahoma. Finally, Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) [Document #11] is denied as to all claims because the Motion has been rendered moot by the Court’s decision on Defendant’s other Motions with respect to proper venue. An Order consistent with this Memorandum Opinion shall be filed contemporaneously herewith.

This, the 15th day of June, 2004.


United States District Judge