

# SIMPLIFYING THE CHOICE OF FORUM: A RESPONSE TO PROFESSOR CLERMONT AND PROFESSOR EISENBERG

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## PREFACE

“Kent, District Judge,”

“This is a breach of contract case based on an insurance contract entered into by Plaintiff and Defendant. Now before the Court is Defendant’s October 11, 1996 Motion to Transfer Venue from the Galveston Division to the Houston Division of the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1404(a). For the reasons set forth below, the Motion is DENIED.”

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Daniel Kravets provided extensive research assistance on this article. Carolyn K. Dorman, Cynthia Dunn, and Dina S. Levin also contributed helpful research.

In spite of all of the help that I received, I still may have made some mistakes. I take full responsibility for any errors.

“Defendant’s request for a transfer of venue is centered around the fact that Galveston does not have a commercial airport into which Defendant’s employees and corporate representatives may fly and out of which they may be expediently whisked to the federal courthouse in Galveston. Rather, Defendant contends that it will be faced with the huge “inconvenience” of flying into Houston and driving less than forty miles to the Galveston courthouse, an act that will “encumber” it with “unnecessary driving time and expenses.” . . . Defendant should be assured that it is not embarking on a three-week-long trip via covered wagons when it travels to Galveston. Rather, Defendant will be pleased to discover that the highway is paved and lighted all the way to Galveston, and thanks to the efforts of this Court’s predecessor, Judge Roy Bean, the trip should be free of rustlers, hooligans, or vicious varmints of unsavory kind . . .”

*Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782, 783-84 (S.D. Tex. 1996).<sup>1</sup>

#### INTRODUCTION

Every now and again, an article appears that provides new insights into a familiar topic. The recent *Cornell Law Review* article by Professor Kevin M. Clermont and Professor Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*,<sup>2</sup> is such a rare article.

In defending current transfer practice under section 1404(a) of the Federal

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1. The *Smith* court continued: “Houston’s Hobby Airport is located about equal drive time from downtown Houston and the Galveston courthouse. . . . The Court notes that any inconvenience suffered in having to drive to Galveston may likely be offset by the peacefulness of the ride and the scenic beauty of the sunny isle.” *Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782, 783-84 (S.D. Tex. 1996).

Although the *Smith* opinion cited section 1404(a), the defendant actually was seeking a transfer pursuant to 28 U.S.C. § 1404(b) (1994). Section 1404(b) authorizes transfers between divisions within a single judicial district, such as the transfer sought in *Smith*. Under section 1404(a), a court may transfer a case to a different federal district. *See id.*

However, courts hearing section 1404(b) motions consider the same convenience factors as courts deciding the much more common section 1404(a) transfer motion. *Compare* 15 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3841, at 322 n.3 (1986) (writing that in a section 1404(b) case, “[i]f some party objects to a change of divisions, the standards of § 1404(a) must be met”) with *Hanning v. New England Mutual Life Ins. Co.*, 710 F. Supp. 213, 215 (S.D. Ohio 1989) (“Intradivisional transfers pursuant to 28 U.S.C. § 1404(b) are discretionary transfers subject to the same analysis as under § 1404(a) but apparently judged by a less rigorous standard.”). The *Smith* transfer decision thus involved the same analysis and considerations as a section 1404(a) case.

2. Kevin. M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 *CORNELL L. REV.* 1507 (1995) [hereinafter Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*].

Judiciary Code,<sup>3</sup> Professor Clermont and Professor Eisenberg present a wealth of empirical data. Their findings provide valuable information not only about transfer practice in federal civil cases, but also about forum selection in the federal courts. Professor Clermont and Professor Eisenberg have written a clear and original article. And I disagree with almost all of their conclusions.

According to Professor Clermont and Professor Eisenberg, while plaintiffs win about 58% of non-transferred cases where a court enters a judgment, plaintiffs win only about 29% of such cases after a transfer has occurred.<sup>4</sup> Based largely on these numbers, Professor Clermont and Professor Eisenberg paint the following picture of civil practice in the federal courts. Plaintiffs make aggressive efforts to litigate in districts that are both sympathetic to plaintiffs, and inconvenient for defendants. But prompted by defendants' motions filed pursuant to section 1404(a), courts exorcise plaintiff forum shopping by transferring cases to more neutral forums.<sup>5</sup> The transfer of cases thus leads to more "accurate" outcomes, preventing "unjust" plaintiff victories.<sup>6</sup>

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3. 28 U.S.C. § 1404(a) (1994). The text of section 1404(a) 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." *Id.*

4. Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1512. The data used by Professor Clermont and Professor Eisenberg includes the results of trials, "adjudication," "consent," and "default." *Id.* Of these categories, Professor Clermont and Professor Eisenberg considered "only those cases in which the database indicates a win by plaintiff or defendant, excluding outcomes favorable to both or to an unknown party." *Id.*

5. *See id.* at 1515.

6. *See id.* Professor Clermont and Professor Eisenberg do not discuss the radical implications of their suggestion that transfers lead to more accurate outcomes. Accurate substantive results should be the preeminent goal of litigation. But if the 29% plaintiff win rate in transferred cases is accurate or just, then presumably the 58% win rate in cases that courts do not transfer is inaccurate or unjust. Following this reasoning, courts should consider transferring every case.

The reply to this article written by Professor Clermont and Professor Eisenberg suggests that in most cases, "the plaintiff has chosen a basically fair forum." Kevin M. Clermont & Theodore Eisenberg, *Simplifying the Choice of Forum: A Reply*, 75 WASH. U. L.Q. 1551, 1556 (1997) [hereinafter Clermont & Eisenberg, *A Reply*]. The choice of forum is likely to effect outcome primarily "in the relatively few cases that the courts transfer." *Id.*

As Professor Clermont and Professor Eisenberg observe, in many cases a defendant does not object to the plaintiff's choice of forum. By filing a transfer motion, the defendant registers his objection to the plaintiff's forum choice. Where the defendant has filed a transfer motion, one should be especially suspicious that the plaintiff has engaged in vexatious forum shopping.

As an initial matter, I am skeptical that defendants object to plaintiff choice only in a "relatively few cases." *Id.* Defendant transfer motions occur in almost one of every twenty federal cases. *See* Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1529. Further, the transfer motion is not the only procedure that a defendant may use to object to the plaintiff's forum choice. A defendant may challenge personal jurisdiction, may assert that a court is located in an improper venue, or may invoke the doctrine of *forum non conveniens*. *See, e.g.*, FED. R. CIV. P. 12(b)(2) (providing a motion to dismiss in cases of "lack of jurisdiction over the person"); FED. R.

I disagree with Professor Clermont and Professor Eisenberg on the following points. First, by including cases where courts have entered default judgments, Professor Clermont and Professor Eisenberg exaggerate the effect, if any, that the choice of forum has on the outcome of a case. Second, Professor Clermont and Professor Eisenberg do not demonstrate that transfers lead to more accurate outcomes. Instead, their data only supports the conclusion that a defendant's chance of winning a case improves if the defendant has selected the forum through a transfer motion. Third, Professor Clermont and Professor Eisenberg understate the costs of transfer under the open-ended standard currently employed in section 1404(a) litigation. Fourth, if Professor Clermont and Professor Eisenberg are correct that forum shopping is both pervasive and effects outcomes, Congress or the courts should address this problem directly by limiting the geographic choices available to a plaintiff who files a federal court suit. Such an approach would address any inequities resulting from forum shopping far more universally and efficiently than the case-by-case transfers currently employed under section 1404(a).

#### I. TRANSFERS, OUTCOMES, AND DEFAULT JUDGMENTS

In their comparison of cases that courts have transferred and cases that courts have not transferred, Professor Clermont and Professor Eisenberg include cases that end with a default judgment. By including these cases, Professor Clermont and Professor Eisenberg exaggerate the effects of

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CIV. P. 12(b)(3) (providing a motion to dismiss in cases of improper venue); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247-61 (1981) (discussing motions to dismiss based on the doctrine of *forum non conveniens*). For whatever reasons, defendants frequently object to the plaintiff's choice of forum.

More fundamentally, Professor Clermont and Professor Eisenberg suggest that a plaintiff may increase his chance of winning a case by forum shopping. According to the authors: "The name of the game is forum-shopping." See Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1508 & n.1.

If the plaintiff's choice of forum will effect his chances of victory, why wouldn't a plaintiff's counsel always consider forum shopping? At best, a decision to forego forum shopping would reduce the plaintiff's chance of winning. At worst, a refusal to forum shop would violate the attorney's ethical duty of zealous representation. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1983) (discussing the attorney's duty of zealous representation); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3, Official Comment 1 (1996) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

In short, only two possibilities strike me as plausible. First, forum may affect outcome and plaintiffs may manipulate results through forum shopping. If such manipulation is occurring, Congress or the courts should reduce the forums where a plaintiff initially may file suit. See *infra* text accompanying notes 116-41. Second, the plaintiff's choice of forum may have little effect on outcome. If so, the relatively broad initial forum choice currently available to plaintiffs seems unobjectionable.

In either case, I have difficulty justifying the current approach to forum selection in the federal courts, which relies heavily on transfer motions.

transfers on the outcome of contested cases.

Traditionally, courts have entered default judgments when a defendant failed to file an answer or otherwise respond to a complaint.<sup>7</sup> Today, courts also may enter a default judgment where a party does not respond to discovery orders,<sup>8</sup> or does not participate in court proceedings.<sup>9</sup>

With respect to the study conducted by Professor Clermont and Professor Eisenberg, default judgments have several important characteristics. First, in non-transferred cases, default judgments are surprisingly frequent. According to Professor Clermont and Professor Eisenberg, in 32% of the non-transferred cases where the court enters a judgment, the case concludes with a default judgment.<sup>10</sup>

Second, if patterns that I have observed in reported cases involving default judgments hold true for the sample studied by Professor Clermont and Professor Eisenberg, then plaintiffs won virtually all of the default judgment cases reported in their study. A defendant may obtain a default judgment on a counterclaim, if a plaintiff fails to file an answer in response to the counterclaim or engages in some other misconduct. However, default judgments entered in favor of a defendant are quite rare.<sup>11</sup>

I reviewed seventy-nine default judgment decisions published from 1992 to 1994.<sup>12</sup> In 96% of these cases, a court entered a default judgment in favor

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7. See, e.g., 10 WRIGHT ET AL., *supra* note 1, § 2681, at 399-400 (prior to the adoption of the Federal Rules of Civil Procedure, default judgments were available in cases either where a defendant had failed to appear, or where the defendant had failed to answer or otherwise respond to the complaint).

8. See FED. R. CIV. P. 37(b)(2) (stating that a court may impose a default judgment as a sanction where a party has failed to comply with an order compelling discovery).

9. See FED. R. CIV. P. 16(f). A court may enter a default judgment where a party or her attorney fails to obey a scheduling order. See *id.* A court also may enter a default judgment where a party or her attorney fails to attend, prepare for, or participate in a scheduling conference or a pretrial conference. See *id.*

10. See Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1521.

11. *But cf.* Johnson v. Gudmundsson, 35 F.3d 1104, 1117 (7th Cir. 1994) (affirming a default judgment entered against a plaintiff, who had failed to participate in court proceedings).

12. See *infra* Table I (listing published default judgment decisions).

To find published default judgment decisions, I ran a computer search. I limited the search to decisions published between 1992 and 1994. I then searched for cases using digest key numbers from WEST'S FEDERAL COURT DIGEST (4th ed. 1991 & Supp. 1996). I searched for default judgment opinions under Federal Civil Procedure key numbers 1278, 1451, 1453, 1636, 1639, 2411-23, and 2441-55. In these key numbers, the digest lists the published opinions that entered a default judgment, as well as the published opinions that considered a motion to set aside or vacate a default judgment.

To assess the empirical argument raised by Professor Clermont and Professor Eisenberg, Table I includes only those cases where a plaintiff and a defendant litigated a default judgment. The table excludes default judgments entered on cross-claims, and in third-party actions.

I had some difficulty in deciding whether to limit my review of "published" decisions to opinions appearing in reporters, or also to include unpublished decisions appearing only on the LEXIS and WESTLAW computer networks. In reported cases, judges intend to share their reasoning and results

of the plaintiff.<sup>13</sup>

Third, transferred cases almost never end with a default judgment. As discussed above, courts typically enter default judgments when a defendant either fails to answer a complaint, or refuses to participate in a suit. After a defendant aggressively has challenged the plaintiff's forum choice with a successful transfer motion, the defendant is unlikely to ignore the suit and default. According to Professor Clermont and Professor Eisenberg, courts impose default judgments in about 4% of transferred cases.<sup>14</sup>

Professor Clermont and Professor Eisenberg find that courts enter default judgments in 32% of non-transferred cases, but in only 4% of transferred cases.<sup>15</sup> This 28% difference in default judgment rates is almost identical to the overall 29% difference in plaintiff win rates for non-transferred as opposed to transferred cases.<sup>16</sup>

Professor Clermont and Professor Eisenberg assert that in *contested* cases, a plaintiff's forum choice effects outcome.<sup>17</sup> But as discussed above,<sup>18</sup> a court will enter a default judgment against a defendant only where the defendant does not contest a plaintiff's suit, or where the defendant has engaged in extraordinary misconduct. Because the study conducted by Professor Clermont and Professor Eisenberg includes cases ending in default judgments, the authors may have exaggerated the effect of forum on the outcome of contested cases.

In arguing that the default judgment cases show that forum effects outcome, one might assert that a court chosen by a plaintiff would be more likely to enter a default judgment than a more neutral forum. However, courts repeatedly describe default judgments as severe sanctions, employed

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with the legal community. On the other hand, unpublished cases appearing only on the LEXIS or the WESTLAW network might be more representative of typical default judgment or transfer decisions than opinions appearing in published reporters.

Eventually, I decided to consider only decisions appearing in reporters. In candor, I reached this decision in part to limit my survey to a manageable number of cases.

13. In 79 cases, the court entered a default judgment in favor of the plaintiff. In three cases, the court entered a default judgment in favor of the defendant.

I was not surprised by the relatively small number of published default judgment decisions. Courts often enter a default judgment on an *ex parte* application, when one party has not participated in court proceedings. Such circumstances rarely will raise novel or difficult issues, which a court would discuss in a published opinion.

In many of the decisions cited in Table I, a defendant unsuccessfully attempted to set aside or vacate a default judgment. *See, e.g., Jones v. Phipps*, 39 F.3d 158, 161-66 (7th Cir. 1994).

14. *See* Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1521.

15. *See id.*

16. *See id.* at 1511-12.

17. *See id.*

18. *See supra* notes 7-9 and accompanying text.

only in cases of extreme defendant noncompliance.<sup>19</sup> A review of recent reported cases strongly suggests that all courts indeed hesitate before entering a default judgment. Courts have entered a default judgment where a defendant refuses to participate in litigation after her attorney has withdrawn from the case,<sup>20</sup> or where a defendant or her attorney ignores court deadlines,<sup>21</sup> or where a defendant demonstrates contempt for the court process.<sup>22</sup> In such cases, the forum where the plaintiff has filed the suit will not effect the outcome.

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19. See, e.g., 10 WRIGHT ET AL., *supra* note 1, § 2681, at 402-03 ("Under modern procedure, defaults are not favored by the law and any doubts usually will be resolved in favor of the defaulting party."); 6 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 55.05[2], at 55-28 to 55-31 (2d ed. 1996) (observing that before a court enters a default judgment, the court should consider "the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits"); see also C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1206 (7th Cir. 1984) ("defaults should be entered only when absolutely necessary, such as where less drastic sanctions have proven unavailing"); Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 614 (2d Cir. 1964) ("The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited.").

20. See, e.g., *In re Chalasani*, 92 F.3d 1300, 1305, 1307-08 (2d Cir. 1996) (a bankruptcy court properly entered a default judgment against a debtor, who had failed to participate in discovery both before and after his attorney withdrew from the case); Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996) (a default judgment was appropriate, in light of the defendants' "total failure to participate in the litigation after their counsel withdrew"); McKinnon v. Kwong Wah Restaurant, 83 F.3d 498, 502, 504 (1st Cir. 1996) (The district court properly entered a default judgment against defendants, who had fired at least three attorneys during the litigation. The defendants refused to participate in the lawsuit, and instead simply "hoped that it 'would all go away.'").

21. See, e.g., *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542-43 (11th Cir. 1993) (where the defendants had violated three discovery orders imposed by the court, "defendants richly deserved the sanction of a default judgment"); *Robinson v. United States*, 734 F.2d 735, 739 (11th Cir. 1984) (entering a default judgment against the United States government, where the government did not respond to the plaintiff's complaint for more than six months and "continuously mishandled" the case).

22. See, e.g., *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 851-54 (2d Cir. 1995) (holding that the district court properly entered a default judgment, where the defendant had refused to produce documents, answer interrogatories, answer deposition questions, and comply with an order compelling discovery); *Wanderer v. Johnston*, 910 F.2d 652, 653 (9th Cir. 1990) ("The severe sanction of default was justified by the defendants' repeated and inexcusable obstructions of every type of discovery attempted by the plaintiffs.") (citation omitted).

In several cases, courts have entered default judgments against foreign government departments or foreign corporations. In these cases, the foreign defendants may have failed to participate because the defendants lacked respect for the American court process. See, e.g., *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 460-63 (2d Cir. 1994) (declining to set aside a default judgment entered against the Bolivian Air Force, where the defendant filed a motion to set aside the default judgment more than four years after the court had entered the judgment); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 240, 244 (2d Cir. 1994) (holding that the district court did not abuse its discretion in entering a default judgment against Iraqi banks, which had failed to answer the plaintiff's complaint); *Meadows v. Dominican Republic*, 817 F.2d 517, 519-22 (9th Cir. 1987) (declining to vacate a default judgment entered against the Dominican Republic and a Republic agency after the defendants had failed to respond to a complaint, despite several service attempts by the plaintiffs).

One also might argue that plaintiffs often choose inconvenient forums, in hopes that a defendant would find litigation to be so difficult and expensive that she defaults. Indeed, plaintiffs bringing small cases probably use this strategy to win occasional default judgments. Where the plaintiff seeks a small recovery, a defendant may find the cost of identifying and retaining local counsel in a distant forum to be prohibitively expensive. Even if the plaintiff obtains a default judgment, the plaintiff must travel to the out-of-state defendant's home in order to enforce the judgment.<sup>23</sup>

But in most larger cases, such defendant behavior would not be very rational. Without incurring significant expenses, a defendant could file an answer to the plaintiff's complaint. The defendant then could negotiate a settlement, almost certainly obtaining a better result than the terms imposed by a default judgment. Or the defendant could seek to transfer the case out of the inconvenient district. In short, a plaintiff's forum choice typically will not be the cause of a default judgment.

In their reply to this article, Professor Clermont and Professor Eisenberg acknowledge that the inclusion of default judgment cases affected their results.<sup>24</sup> Although the authors are profoundly unimpressed by my mathematical skills,<sup>25</sup> they acknowledge that after excluding default judgment cases, the effect of transfers on outcomes decreases. Specifically, if one excludes default judgments, plaintiffs win 41% of non-transferred cases and 27% of transferred cases.<sup>26</sup>

This 14% difference in plaintiff win rates between non-transferred and transferred cases is interesting and significant. But in their original article on transfers, Professor Clermont and Professor Eisenberg emphasized a 29% difference in plaintiff win rates,<sup>27</sup> with plaintiffs twice as likely to succeed in

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23. Where a defendant lacks contacts with the forum, the defendant may decline to appear, leading to a default judgment. When the plaintiff later travels to the defendant's home state to enforce the default judgment, the defendant may mount a collateral attack on the judgment. In arguing against the enforcement of a default judgment, the defendant could assert that the issuing court never possessed personal jurisdiction over the defendant. *See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."); RESTATEMENT (SECOND) OF JUDGMENTS § 65 (1982) (stating that "a judgment by default may be avoided" if the court rendering the judgment did not possess territorial jurisdiction over the action that resulted in the default judgment).

24. Clermont & Eisenberg, *A Reply*, *supra* note 6, at 1554-55.

25. *See id.* I never was very good at math. That's one reason why I went to law school.

26. *Id.* at 1554.

27. *See, e.g., Clermont & Eisenberg, Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1507, 1511-12. *But cf. id.* at 1513 ("Thus, although the overall drop from 58% to 29% gives an exaggerated sense of the magnitude of the transfer effect, the effect nevertheless appears to be real.").



non-transferred cases than in transferred cases.<sup>28</sup> The 14% difference in plaintiff win rates that occurs after excluding default judgments is a good deal less dramatic than the 29% difference that occurs when a researcher includes default judgment cases in the sample.

For reasons suggested in the next section, defendants who contest suits may indeed win more transferred cases than non-transferred cases.<sup>29</sup> But by including default judgments in their study, Professor Clermont and Professor Eisenberg exaggerated the effect of transfers on the outcome of contested cases. As the effect of forum on outcome becomes less significant, current transfer practice becomes less plausible.

## II. TRANSFERS AND ACCURACY

Professor Clermont and Professor Eisenberg assert that transfers increase the accuracy of substantive outcomes.<sup>30</sup> This conclusion is central to the authors' endorsement of current transfer practice.<sup>31</sup> But even assuming that Professor Clermont and Professor Eisenberg accurately describe the difference in results between contested cases that are transferred and contested cases that are not transferred, they have not demonstrated that transfers improve the accuracy of outcomes. Instead, their evidence only shows that defendants win more often in transferred cases than in cases that are not transferred.

I was immediately struck by the ironic title of the transfer defense written by Professor Clermont and Professor Eisenberg: *Exorcising The Evil Of Forum-Shopping*. Section 1404(a) permits extensive forum shopping by defendants. A plaintiff seeking to file suit at least is limited to a federal district that possesses personal jurisdiction over all of the defendants named in his complaint, and that is a proper venue for the suit.<sup>32</sup>

The transfer statute requires no analogous plaintiff connection with the districts that a defendant may propose in a transfer motion. The defendant only must demonstrate that an alternative district is more "convenient" than the district chosen by the plaintiff.<sup>33</sup> The defendant may attempt to make this

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28. Professor Clermont and Professor Eisenberg wrote that "the plaintiffs' rate of winning drops from 58% in cases where there is no transfer to 29% in transferred cases." Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1507.

29. See *infra* text accompanying notes 30-54.

30. See Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1515.

31. See *id.* at 1515, 1522.

32. Admittedly, liberal readings of personal jurisdiction and venue allow a plaintiff to choose between a variety of permissible federal districts. See *infra* text accompanying notes 77-82 and 122-41.

33. Under section 1404(a), a court may transfer a case only to a district where the suit "might

showing by citing almost any combination of facts that supports litigation in an alternative district.<sup>34</sup> A defendant may argue that a judge should transfer a suit because the case is governed by the law of another state,<sup>35</sup> or because a

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have been brought." 28 U.S.C. § 1404(a) (1994). In a 1960 decision that remains valid, the United States Supreme Court concluded that a judge could transfer a case only to a district that would have possessed personal jurisdiction over the defendant, and that would have provided a proper venue if the plaintiff originally had filed suit in that alternative district. *See Hoffman v. Blaski*, 363 U.S. 335, 342-45 (1960). The *Hoffman* rule imposes some minimal limitations on a defendant's ability to forum shop through a transfer motion.

Although *Hoffman* may present a plausible reading of the "might have been brought" language of section 1404(a), the decision makes little practical sense. The doctrines of personal jurisdiction and venue protect the defendant and, in most contexts, a defendant may waive these objections. *See* FED. R. CIV. P. 12(h)(1) (stating the defense of personal jurisdiction is waived if the argument is not raised in a motion to dismiss, or as an affirmative defense in the defendant's answer); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982) ("[T]he requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue."). Where a defendant has proposed a transfer to an alternative forum, courts should view the section 1404(a) transfer motion as a waiver of any personal jurisdiction or venue objections that the defendant might have raised in the alternative forum. *Cf. Sullivan v. Behimer*, 363 U.S. 355, 361 (1960) (Frankfurter, J., dissenting) (endorsing this interpretation of section 1404(a)).

Commentators have subjected the *Hoffman* decision to harsh criticism. *See, e.g.,* Herbert J. Korb, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 RUTGERS L. REV. 607, 613 (1961) (complaining that the *Hoffman* decision relies on "rather bizarre reasoning," and is unwarranted by "the cryptic language or the sparse legislative history of § 1404(a)"); David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 459-62 (1998) (criticizing the *Hoffman* decision); Michael J. Waggoner, *Section 1404(a), "Where It Might Have Been Brought": Brought by Whom?*, 1988 BYU L. REV. 67, 87 (stating that the statutory interpretation in *Hoffman* "provides no protection to some parties needing protection against transfer, while allowing other parties to veto transfers not objectively harmful to their interests").

Regardless of the wisdom of the *Hoffman* decision, the case has a limited practical effect. A defendant rarely will seek a transfer to a district where the defendant lacks contacts. Most alternative districts proposed by a defendant's transfer motion will meet the *Hoffman* personal jurisdiction and venue requirements. *But cf. Commercial Lighting Prods., Inc. v. United States District Court*, 537 F.2d 1078, 1079-80 (9th Cir. 1976) (holding that the district court erred in transferring the case to Michigan, because Michigan was not a proper venue for the suit); *PI, Inc. v. Ogle*, 932 F. Supp. 80, 84-85 (S.D.N.Y. 1996) (declining to transfer the case to the Middle District of Florida, in part because the defendant failed to demonstrate that a Florida federal court could exercise personal jurisdiction over the defendant).

34. *See, e.g.,* *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (observing that section 1404(a) transfer analysis "calls on the district court to weigh in the balance a number of case-specific factors"); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (in forum non conveniens analysis, a court should consider a long list of private interest factors and public interest factors).

Courts have applied the forum non conveniens factors of *Gulf Oil Corp. v. Gilbert* in section 1404(a) cases. *See, e.g.,* Richard S. Masington, *Venue in the Federal Courts—The Problem of the Inconvenient Forum*, 15 U. MIAMI L. REV. 237, 237-39 (1961) (section 1404(a) analysis evolved out of the related doctrine of forum non conveniens); *see* Waggoner, *supra* note 33, at 69 (same); *see also* Brockman v. Sun Valley Resorts, Inc., 923 F. Supp. 1176, 1178-79 (D. Minn. 1996) (in a § 1404(a) transfer case, the court applies the factors listed in *Gulf Oil Corp. v. Gilbert*); *Icon Indus. Controls Corp. v. Cimatrix, Inc.*, 921 F. Supp. 375, 383 (W.D. La. 1996) (same).

35. Most transfer opinions agree that where the law of another state governs a suit, this fact supports a transfer. *See, e.g.,* *Dunn v. Soo Line R.R. Co.*, 864 F. Supp. 64, 67 (N.D. Ill. 1994) ("one of the most important issues to be considered is the familiarity of the trial court with the law to be applied

purportedly related case is pending in the alternative district,<sup>36</sup> or because courts in the alternate forum manage a relatively light case load,<sup>37</sup> or because some other combination of facts makes litigation elsewhere more convenient.<sup>38</sup>

A rational defendant will not merely seek a transfer to an "accurate" or a "neutral" forum. A defendant will have the best chance of winning his case in a district that both favors defendants, and that is quite inconvenient for the plaintiff.<sup>39</sup> If plaintiffs shop for the most favorable forum when filing a suit, then presumably defendants will engage in similar forum shopping when seeking a transfer.<sup>40</sup>

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in the case"); *Kepler v. ITT Sheraton Corp.*, 860 F. Supp. 393, 399 (E.D. Mich. 1994) (transferring the case to the Middle District of Florida, in part because Florida law governed the plaintiffs' action); *Clisham Management, Inc. v. American Steel Bldg. Co.*, 792 F. Supp. 150, 158 (D. Conn. 1992) (transferring the case to the Southern District of Texas, where "the complexity and novel nature of Texas law in this dispute is particularly significant"). *See also* *infra* note 97 (discussing disagreement in court opinions about the relevance of the applicable law in transfer litigation).

36. Where defendants convincingly assert related litigation is pending in another federal district, courts often transfer cases. *See, e.g.*, *Codex Corp. v. Milgo Elec. Corp.*, 553 F.2d 735, 739 (1st Cir. 1977) ("The pendency of related litigation in another forum is a proper factor to be considered in resolving choice of venue questions"); *Tingley Sys., Inc. v. Bay State HMO Management, Inc.*, 833 F. Supp. 882, 885-88 (M.D. Fla. 1993) (granting the defendant's motion to transfer the case to the District of Massachusetts, where a related case between the parties was pending in Massachusetts.); *Savin v. CSX Corp.*, 657 F. Supp. 1210, 1214 (S.D.N.Y. 1987) (transferring the case to the Western District of Pennsylvania, primarily because a Pennsylvania federal judge had extensive experience with related cases, and related suits remained pending in Pennsylvania).

37. Courts should not transfer cases solely because a court proposed by the defendant currently carries a lighter case load than the court where the plaintiff has filed suit. *See, e.g.*, *In re Scott*, 709 F.2d 717, 721-22 (D.C. Cir. 1983) (reversing a transfer of an *in forma pauperis* case to the Northern District of Georgia, where the district judge relied exclusively on the fact that his docket was overcrowded with *in forma pauperis* cases). But most courts agree that in deciding a transfer motion, a court should compare its docket congestion with the docket conditions in the court proposed by the defendant. *See, e.g.*, *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 445 (2d Cir. 1966) ("the large difference in docket crowding" between the Eastern District of New York and the less congested Eastern District of Tennessee supported the district court's decision to transfer the case); *Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co.*, 844 F. Supp. 1163, 1167 (S.D. Tex. 1994) ("[C]omparative docket congestion, a proper factor for the court to consider, strongly favors a transfer of this case to the District of New Jersey."); *Neff Athletic Lettering Co. v. Walters*, 524 F. Supp. 268, 274 (S.D. Ohio 1981) (granting the defendant's motion to transfer, where "[t]he comparative caseloads render an expeditious hearing of this action more likely in New Hampshire").

38. According to one commentator, 16 different factors may be relevant to a transfer motion. *See* Annotation, *Questions as to Convenience and Justice of Transfer Under Forum Non Conveniens Provision of the Judicial Code* (28 U.S.C. § 1404(a)), 1 A.L.R. FED. 15, 37-38 (1969); *see also* *Eastern Scientific Mktg., Inc. v. Tekna-Seal, Inc.*, 696 F. Supp. 173, 180 n.13 (E.D. Va. 1988) (identifying 20 different factors that may be relevant to a transfer decision).

39. Where a transfer will move a case to such a highly favorable district, a defendant will be most likely to file a transfer motion.

40. In some cases, a defendant has sought to transfer a case to a location very near the court where the plaintiff initially filed suit. A defendant may have sought a transfer because only a court in the alternative district could compel some witnesses to testify. Nonetheless, in such cases defendant forum shopping through transfer motions remains a distinct possibility. *See, e.g.*, *Newcomb v. Daniels*,

Nothing in the transfer statute prevents defense counsel from exercising creativity in choosing the alternative district proposed in a transfer motion. Assume that a plaintiff has filed suit in the Southern District of Florida federal court. A number of defense witnesses, however, reside in and around New York City. The defendant may suggest a transfer to any of four districts—the Southern District of New York, the Eastern District of New York, the District of New Jersey, or the District of Connecticut.<sup>41</sup> Any of these districts arguably would be more convenient than the plaintiff's choice.<sup>42</sup> Particularly where the plaintiff has filed suit in a district that possesses only an attenuated relationship with the case, a defendant seeking a transfer may choose from a large number of alternative districts that appear more convenient.<sup>43</sup>

Professor Clermont and Professor Eisenberg candidly recognize that defendants may attempt to forum shop through transfer motions.<sup>44</sup> But Professor Clermont and Professor Eisenberg write that the district judge will

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Saltz, Mongeluzzi & Barrett, Ltd., 847 F. Supp. 1244, 1246-47 (D.N.J. 1994) (denying a defendant's motion to transfer a case to Philadelphia, Pennsylvania from Camden, New Jersey); Emrick v. Calcasieu Kennel Club, Inc., 800 F. Supp. 482, 484 (E.D. Tex. 1992) (denying a defendant's motion to transfer a case to a Louisiana federal court, located about 50 miles from the Texas federal court where the plaintiffs had filed suit); see also Smith v. Colonial Penn Ins. Co., 943 F. Supp. 782, 783-85 (S.D. Tex. 1996) (discussed in *supra* note 1 and accompanying text).

Litigation in Philadelphia, Pennsylvania typically will not prove more convenient than litigation in Camden, New Jersey. The transfer motions filed in cases such as *Newcomb* suggest either defendant forum shopping, or attempts by defendants to harass plaintiffs.

41. In some cases, such defendant forum shopping will be limited by the requirement that a court may transfer a case only to a district where the suit "might have been brought." 28 U.S.C. § 1404(a) (1994). Under this provision, a court may transfer a case only to a district that would have possessed personal jurisdiction over the defendant, and that would have provided a proper venue if the plaintiff originally had filed suit in the alternative district. *Hoffman v. Blaski*, 363 U.S. 335, 342-45 (1960). See *supra* note 33 (discussing the *Hoffman v. Blaski* ruling).

If a defendant conducts substantial activities in each of several districts, the *Hoffman* requirement would not prevent the defendant from seeking a transfer to any of the districts. Defendants with widespread activities thus may engage in the most extensive forum shopping through transfer motions.

42. With some creativity, the defendant seeking a transfer also might propose the Eastern District of Pennsylvania and the District of Delaware as alternatives. The Eastern District of Pennsylvania federal courthouse in Philadelphia, Pennsylvania is about 91 miles from Manhattan. See *MOBIL ROAD ATLAS* 144 (1993). The District of Delaware federal courthouse in Wilmington, Delaware is about 124 miles from Manhattan. See *id.* at 43, 144.

43. See, e.g., *Fairchild Semiconductor Corp. v. Nintendo Co.*, 810 F. Supp. 173, 174-76 (D.S.C. 1992) (granting the defendants' motion to transfer the case to the Western District of Washington, where some witnesses resided in Washington and no witnesses resided in South Carolina); *VMS/PCA Ltd. Partnership v. PCA Partners Ltd. Partnership*, 727 F. Supp. 1167, 1173-75 (N.D. Ill. 1989) (granting the defendants' motion to transfer the case from the Northern District of Illinois to the Northern District of Texas, even though a federal court in Tulsa, Oklahoma may have been more convenient for important witnesses than the Texas court).

44. See Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1508 (suggesting that a defendant's response to a plaintiff's suit "might include some forum-shopping in return, possibly by a motion for change of venue").

prevent a defendant from relocating a case to an advantageous forum. When the defendant files a transfer motion, “[a] relatively objective judge then chooses the forum.”<sup>45</sup>

In ruling on transfer motions, however, district judges do not choose from several possible forums. I have reviewed the section 1404(a) transfer decisions published between 1992 and 1994.<sup>46</sup> In all of the more than 160 published district court opinions where a defendant sought a transfer, courts reached one of two different outcomes. The court either transferred the case to the district proposed by the defendant, or the court denied the transfer motion.<sup>47</sup> In ruling on transfer motions, courts do not decide between a district proposed by the plaintiff and some neutral site. Instead, district judges choose either a district proposed by the plaintiff or a district proposed by the defendant.

Professor Clermont and Professor Eisenberg assert that plaintiffs win about 58% of their cases by filing suit in districts that are favorable for plaintiffs, inconvenient for defendants, or both.<sup>48</sup> After courts have transferred cases to more “accurate” sites, the win rate drops to 29%.<sup>49</sup> This lower success rate occurs in good part because “[p]laintiffs are abandoning their cases following transfer,”<sup>50</sup> a conclusion that does not seem to trouble the authors.

The implication from all of this is quite clear. Professor Clermont and Professor Eisenberg believe that plaintiffs file a significant number of weak cases. Plaintiffs win these cases only because they are able to shop for a favorable forum. Once transfer “removes the plaintiff’s forum advantage,”<sup>51</sup> plaintiffs must abandon these cases that possessed little merit from the start.

However, two other equally plausible accounts might explain why plaintiffs abandon or lose cases after a transfer. First, the district receiving a transferred case may favor defendants to such an extent that a plaintiff sees little reason to pursue his case in the new district. Second, litigation in the

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45. *Id.* at 1515; *see also id.* at 1516 (asserting that “transfer does not shift the choice of forum from plaintiff to defendant, but instead from plaintiff to judge”).

46. *See infra* Table II.

To find published transfer decisions, I ran a computer search. I limited the dates of the search from 1992 to 1994. I then searched for transfer decisions using the WEST’S FEDERAL COURT DIGEST (4th ed. and Supp. 1996). I searched for transfer decisions under Federal Courts key numbers 101-13 and 131-44. *See also supra* note 12 (explaining the methodology used in finding published default judgment decisions).

47. *See infra* Table II.

48. *See* Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1511-13.

49. *See id.* at 1511-12, 1515.

50. *Id.* at 1522.

51. *Id.* at 1515.

alternative district may prove too expensive for the plaintiff. If nothing else, the plaintiff and her witnesses must pay travel costs to testify at a trial in a foreign district.<sup>52</sup>

In short, Professor Clermont and Professor Eisenberg do not explain *why* the plaintiffs' success rate falls after a transfer. This omission is critical. Perhaps plaintiffs are filing weak cases in the hopes of coercing a settlement through forum shopping.<sup>53</sup> After a transfer negates any such forum advantage, many plaintiffs abandon their largely frivolous cases. If this pattern in fact occurs regularly, then Congress or the courts should impose greater restrictions on a plaintiff's initial choice of forum.<sup>54</sup>

But an alternative explanation is equally plausible. Plaintiffs may be filing meritorious cases. But after a transfer, plaintiffs abandon these valid cases because litigation in a distant district appears too expensive, inconvenient, and intimidating. If indeed the costs of litigating a transferred case are forcing plaintiffs to abandon meritorious cases, then the reduction in the plaintiffs' success rate is hardly a reason for celebrating current transfer practice.

The data presented by Professor Clermont and Professor Eisenberg does not explain which of these alternative scenarios actually is occurring. Professor Clermont and Professor Eisenberg simply have not demonstrated that transfers lead to accurate or just results—unless one defines a just result as a case that the plaintiff loses.

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52. Cf. *Micheel v. Haralson*, 586 F. Supp. 169, 173 (E.D. Pa. 1983) (denying the defendant's motion to transfer the case to the Northern District of Alabama, where a transfer would impose travel costs on most of the plaintiff's witnesses); *Crossroads State Bank v. Savage*, 436 F. Supp. 743, 744 (W.D. Okla. 1977) (denying the defendants' motion to transfer the case to the Southern District of Florida, because the plaintiff and its witnesses "would be put to great expense and hardship if they are required to travel to Florida for the determination of this action").

53. Published transfer decisions indicate that some federal court plaintiffs engage in forum shopping. In some cases, both the plaintiff and the defendant are located in the same state. Nonetheless, the plaintiff attempts to bring suit in a federal court located outside of this state. See, e.g., *SAS of Puerto Rico, Inc. v. Puerto Rico Telephone Co.*, 833 F. Supp. 450, 452-53 (D. Del. 1993) (granting the defendant's motion to transfer the case to the District of Puerto Rico, where both parties maintained their principal place of business); *Haworth, Inc. v. Herman Miller, Inc.*, 821 F. Supp. 1476, 1479-81 (N.D. Ga. 1992) (transferring the case to the Western District of Michigan, and noting that both the plaintiff and the principal defendant maintained their principal places of business in Michigan).

However, these transfer opinions do not establish that plaintiff forum shopping is common, or that any plaintiff forum shopping effects outcomes. Cf. Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1508, 1514-15.

54. In their reply to this article, Professor Clermont and Professor Eisenberg conclude that the plaintiffs' "initial choice of forum is currently a little too wide." Clermont & Eisenberg, *A Reply*, *supra* note 6, at 1559. See also text accompanying *infra* notes 116-41 (discussing venue and personal jurisdiction as methods of restricting a plaintiff's choice of forum, and noting that these doctrines currently impose only modest limits on forum choice).

### III. THE COSTS OF TRANSFERS AND TRANSFER REFORM

#### A. Acknowledging Transfer Costs

According to Professor Clermont and Professor Eisenberg, more than one-half of the transfer motions filed each year are unsuccessful. In a review of about 200 reported cases, the authors found that defendants won about 45% of section 1404(a) transfer motions.<sup>55</sup> My own survey suggests a similar rate of success, with defendants winning about 42% of the transfer decisions published from 1992 to 1994.<sup>56</sup> Based on the projection by Professor Clermont and Professor Eisenberg that defendants file about 10,000 transfer motions each year,<sup>57</sup> parties annually litigate at least 5,500 unsuccessful transfer motions.

Unsuccessful transfer motions involve an unconditional waste of resources. The parties must spend money to brief the transfer motion, and the district judge must spend time to decide the motion. When the judge denies the motion, the case continues forward as though the defendant never had filed a motion to transfer.

Why are defendants paying to litigate so many unsuccessful transfer motions? I have only two plausible explanations. I do not find either possibility very comforting.

First, transfer law may be so unclear that a defense attorney often cannot predict whether she will win a particular transfer motion. Second, defendants may file transfer motions that obviously will not succeed as a delaying tactic. A defendant may understand that his transfer motion is a loser. Nonetheless, the defendant may file the motion to increase the time and expense that a plaintiff must face to bring his case to trial.<sup>58</sup> This second category of unsuccessful transfer motions probably includes *Smith v. Colonial Penn*

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55. See Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1529.

56. From 1992 to 1994, district courts published 165 opinions deciding transfer motions filed by defendants. In these published opinions, district judges granted 69 transfer motions and denied 96 motions. See *infra* Table II.

I suspect that my research based solely on published opinions overstates the percentage of successful transfer motions. Courts may be more likely to publish decisions granting transfer motions than decisions denying such motions. If a court grants a transfer, this order will represent a significant decision: The case will move to a new forum. But if a court denies a transfer motion, the decision is inconsequential: The case will proceed as though the defendant never had filed a transfer motion.

My 42% figure may overstate the number of transfer motions that defendants win. However, I have no way to determine whether this suspicion is accurate.

57. See Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1529.

58. See Steinberg, *supra* note 33, at 463-67 (suggesting that a defendant may benefit from the delay caused by his transfer motion).

*Insurance Co.*,<sup>59</sup> the absurd case described in the preface to this article. In *Smith*, the defendant attempted to transfer a case to a courthouse fifty miles away, for no apparent good reason.<sup>60</sup>

Professor Clermont and Professor Eisenberg do not seem particularly troubled by the large number of unsuccessful transfer motions—they devote about two pages to the subject.<sup>61</sup> Although Professor Clermont and Professor Eisenberg write that the large number of transfer motions are not cause for concern,<sup>62</sup> I remain unconvinced by their arguments.

Professor Clermont and Professor Eisenberg contend that “defendants present some [transfer] motions half-heartedly, and plaintiffs contest motions sometimes weakly or not at all.”<sup>63</sup> Some of the 10,000 transfer motions decided each year undoubtedly fit this description.<sup>64</sup> But this generalization seems inconsistent with the authors’ central contention that forum effects outcome. If the results of a transfer motion are likely to determine whether the plaintiff or the defendant wins the case, I would expect the parties to pull out all of the stops in arguing this motion.<sup>65</sup>

Professor Clermont and Professor Eisenberg also assert: “The district courts seem to dispose of transfer motions rather easily, usually focusing on only a couple of factors.”<sup>66</sup> In some ways, transfer motions will not be difficult for judges to resolve. District judges do not apply highly specific or complex legal rules when deciding such motions. Under the applicable standard, a district judge must review all the facts and choose the district that seems most convenient and just.<sup>67</sup>

In addition, transfer decisions are virtually immune from appellate

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59. 943 F. Supp. 782 (S.D. Tex. 1996).

60. *See id.* at 783-84.

61. *See* Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1529-30.

62. *See id.*

63. *See id.*

64. *See supra* note 53 and accompanying text.

65. Professor Clermont and Professor Eisenberg also assert that “the reported transfer cases do not seem to involve the expenditure of a great deal of resources on the parties’ part.” Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1529. But if the authors are correct that the decision on a transfer motion is likely to determine the party who prevails in a case, attorneys should make every effort to win such a motion.

Part I of this essay questions the empirical conclusion of Professor Clermont and Professor Eisenberg that forum effects outcome. *See supra* text accompanying notes 7-28. If the location of a suit will have little effect on whether the plaintiff or the defendant prevails, the casual attitude toward transfer motions described by Professor Clermont and Professor Eisenberg seems more plausible.

66. Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1530.

67. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-10 (1947) (presenting a long list of factors relevant to a forum non conveniens motion). On the relationship between forum non conveniens analysis and section 1404(a) transfer motions, *see supra* note 34.



review.<sup>68</sup> District judges may decide transfer motions free from worries about reversal, and need not justify their transfer rulings in comprehensive opinions.<sup>69</sup>

On the other hand, transfer decisions require district judges to make a number of factual findings. For example, a judge may need to determine whether the plaintiff's suit actually bears a close relationship to another case in a different district identified by the defendant.<sup>70</sup> Or the judge may need to

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68. As a general rule, a party may file an appeal only after the trial court has entered a final judgment on the merits. *See* 28 U.S.C. § 1291 (1994). A final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Because a transfer decision is not a final judgment, a party typically cannot bring an immediate appeal from a transfer ruling.

In theory, a party may challenge a transfer decision after losing on the merits at trial. Such an appeal, however, probably will not succeed. Most courts have concluded that an erroneous transfer ruling is not a reversible error, which would justify setting aside a trial verdict. *See, e.g., Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1139 (6th Cir. 1991) (applying the reversible error standard to the district judge's denial of a transfer motion, challenged after the trial court had entered a final judgment); *Marbury-Pattillo Constr. Co. v. Bayside Warehouse Co.*, 490 F.2d 155, 157-58 (5th Cir. 1974) (affirming a district court decision that denied the defendant's motion to transfer, because the district court did not commit a reversible error or an abuse of discretion).

A party conceivably could receive immediate appellate review of a transfer order through a writ of mandamus. But in such a proceeding, a party cannot succeed simply by demonstrating a district court error. Instead, the party must show that the district judge committed an abuse of discretion. *See, e.g., Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 146 (10th Cir. 1967) (observing that a party must make "a clear showing of abuse of discretion" to succeed on a mandamus appeal); *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 445 (2d Cir. 1966) (concluding that a mandamus appeal is appropriate "only to redress a clearcut abuse of discretion").

Because a district court possesses such broad discretion in deciding a transfer motion, appellate courts will find that a transfer decision constituted an abuse of discretion only in extraordinary circumstances. *See, e.g., Howell v. Tanner*, 650 F.2d 610, 616 (5th Cir. 1981) (limiting appellate review in transfer cases, "because it serves little purpose to reappraise such an inherently subjective decision"); *cf. Sunbelt Corp. v. Noble, Denton & Assocs., Inc.*, 5 F.3d 28, 30-33 (3d Cir. 1993) (issuing a writ of mandamus to reverse a district court decision transferring a case from the Eastern District of Pennsylvania to the Southern District of Texas, because the Southern District of Texas was not a district where the suit "might have been brought"); *In re Scott*, 709 F.2d 717, 719 (D.C. Cir. 1983) (reversing a district court decision through a writ of mandamus, where the district judge had ordered a transfer primarily because his civil docket contained too many in forma pauperis cases); *see generally Steinberg, supra note 33*, at 472-78 (explaining that appeals courts rarely review transfer decisions).

69. I agree with Professor Clermont and Professor Eisenberg that transfer motions do not impose a substantial burden on appellate courts. *See* Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping, supra note 2*, at 1530. From 1992 to 1994, district courts published 176 opinions deciding transfer motions. During that same time period, appellate courts published nine opinions addressing section 1404(a) transfers. *See infra* Table II.

Professor Clermont and Professor Eisenberg, however, argue that "there is room for reform by imposing even stricter limits" on the appealability of transfer orders. Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping, supra note 2*, at 1530. This suggestion seems odd. Professor Clermont and Professor Eisenberg maintain that a transfer ruling is likely to determine the party who ultimately will win the case. If so, the loser in the district court should have the protection of appellate review.

70. *See* cases cited *supra* in note 36.

assess the plaintiff's argument that she will find litigation in another forum to be onerous.<sup>71</sup>

A court could employ an evidentiary hearing to reach accurate decisions on such factual issues. At the hearing, the district judge could assess the credibility of the parties and their witnesses by observing direct testimony and cross-examination.<sup>72</sup> But such a hearing only would add to the delay and the expense that normally accompanies transfer litigation.

In addition to understating the costs imposed by transfer motions, Professor Clermont and Professor Eisenberg also fail to account for the very real prejudice that a transfer may impose on a plaintiff. When filing suit against a defendant, a plaintiff may choose only those districts that both possess personal jurisdiction over the defendant, and that provide a proper venue for the case.

No similar doctrine protects the plaintiff facing a motion to transfer.<sup>73</sup> The defendant may seek to transfer the case to virtually any district that purportedly is more convenient than the place where the plaintiff originally

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71. See, e.g., *Vartanian v. Monsanto Co.*, 880 F. Supp. 63, 73 (D. Mass. 1995) (denying the defendant's motion to transfer the case to the Eastern District of Missouri, where the costs imposed on the plaintiff, "an individual retiree, would be considerable"); *Rothman v. Emory Univ.*, 828 F. Supp. 537, 543 (N.D. Ill. 1993) (denying the defendant's motion to transfer the case to the Northern District of Georgia, in part because the plaintiff's epileptic condition "would make transfer of the case to Georgia particularly burdensome"); *Sanders v. State Street Bank & Trust Co.*, 813 F. Supp. 529, 535 (S.D. Tex. 1993) (denying the defendant's motion to transfer the case either to Boston or to Chicago because after a transfer "the cost and burden to the Plaintiffs would be excruciating").

72. According to a leading treatise: "A hearing is not necessarily required on every transfer motion but is desirable if the evidence and arguments for and against transfer are in doubt." 15 WRIGHT ET AL., *supra* note 1, § 3844, at 338; accord *Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir. 1988) (stating that "generally a hearing is desirable" prior to a transfer decision); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756 (3d Cir. 1973) ("We do not hold that a hearing is necessarily required on every transfer motion, but where, as here, the evidence and arguments supporting a transfer were in doubt, a hearing or conference would have been desirable before the district court decided the motion.").

No empirical evidence is available to determine the percentage of transfer cases where district courts hold evidentiary hearings. Reported cases, however, suggest that such hearings are common. See, e.g., *Hustler Magazine, Inc. v. United States District Court*, 790 F.2d 69, 70-71 (10th Cir. 1986) (reversing a district court order that denied a transfer motion, because the trial court had not afforded "the parties a full and adequate hearing on the subject"); *Blankenship v. Allis-Chalmers Corp.*, 460 F. Supp. 37, 37-38 (N.D. Miss. 1978) (transferring the case from the Northern District of Mississippi to the Western District of Tennessee, after the court held a hearing on the transfer motion); *Library Publications, Inc. v. Doubleday & Co.*, 414 F. Supp. 1185, 1186-87 (E.D. Pa. 1976) (after a hearing, the court denies a motion to transfer the case from the Eastern District of Pennsylvania to the Eastern District of New York). Cf. *Contraves Inc. v. McDonnell Douglas Corp.*, 889 F. Supp. 470, 471 (M.D. Fla. 1995) (transferring the case from the Middle District of Florida to the Southern District of New York without a hearing, where the parties had agreed that an evidentiary hearing was not needed).

73. See Steinberg, *supra* note 33, at 462 ("A plaintiff's lack of contacts with a state in no way prevents a transfer to a court in that state."); Waggoner, *supra* note 33, at 71 (expressing concern that section 1404(a) currently "provides no protection to a local plaintiff suing an interstate defendant").

filed suit.<sup>74</sup> For a poor and unsophisticated plaintiff, litigating in a distant district may be a daunting task. The costs faced by the plaintiff and his witnesses in traveling to the new district may make small cases impractical and large cases too risky.

Professor Clermont and Professor Eisenberg reject such arguments as "stereotypical thinking," which ignores the reality that "the casting of the aggrieved in the role of plaintiff or defendant may be rather arbitrary."<sup>75</sup> Professor Clermont and Professor Eisenberg correctly note that small defendants sometimes successfully may use the transfer motion to thwart forum shopping by well-financed plaintiffs.<sup>76</sup> However, these professors fail to acknowledge that transfers will have different effects on different types of plaintiffs. A well-financed plaintiff will possess sufficient resources to prosecute a case effectively anywhere in the United States. The brunt of the hardship resulting from transfers will fall on poor plaintiffs with small cases.

Finally, and perhaps most significantly, although Professor Clermont and Professor Eisenberg describe plaintiff forum shopping as "evil," this description is difficult to reconcile with a federal system that often allows a plaintiff to choose between several permissible locations for her suit. Under the most important federal venue statute, section 1391, venue is proper in any "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."<sup>77</sup> The "events or omissions" language was added by amendment in 1990, and courts have not yet settled on a definitive construction of the phrase. Nonetheless, some court decisions have suggested that the "events or omissions" language allows a plaintiff to establish a proper venue in any federal district with some modest relationship to the underlying dispute.<sup>78</sup> If plaintiff forum shopping actually were an "evil" that

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74. Admittedly, a court may transfer a case only to a district where the suit "might have been brought." 28 U.S.C. § 1404(a) (1994). In other words, the defendant may argue successfully for a transfer only if the alternative district would have possessed personal jurisdiction over the defendant, and would have provided a proper venue if the plaintiff originally had filed suit in that district. *Hoffman v. Blaski*, 363 U.S. 335, 342-45 (1960).

As a practical matter, the *Hoffman* rule imposes only a limited restriction on defendant forum shopping through transfer motions. Regardless of the "might have been brought" requirement, a defendant typically would have little reason for seeking a transfer to a district where the defendant lacked contacts. *See supra* note 33.

75. Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1516.

76. *See id.*

77. 28 U.S.C. §§ 1391(a)(2), 1391(b)(2) (1994).

78. *See, e.g., Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 866-68 (2d Cir. 1992) (finding the Western District of New York federal court was a proper venue, when the plaintiff debtor had moved from Pennsylvania to New York and the United States Postal Service had forwarded the defendant's collection letter to the plaintiff's New York address.); *Sidco Indus., Inc. v. Wimar Tahoe Corp.*, 768 F. Supp. 1343, 1345-47 (D. Or. 1991) (concluding that the District of Oregon was a proper venue for a trademark infringement action brought against a Nevada corporation, which had sent some direct mail

produces harmful results, then one would expect Congress to enact a more restrictive venue statute.<sup>79</sup>

Like the federal venue statute, the constitutional doctrine of personal jurisdiction often allows a plaintiff to choose from a number of permissible forums. As Professor Clermont and Professor Eisenberg accurately note in their reply to this article, the Supreme Court's personal jurisdiction opinions are not entirely consistent.<sup>80</sup> In recent years, the Justices occasionally have rejected lower court attempts to exercise personal jurisdiction over out-of-state defendants.<sup>81</sup> Nonetheless, several cases have upheld personal jurisdiction, even though a defendant possessed only a weak connection with

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brochures into several states, including Oregon, and had advertised in a publication distributed throughout the United States); see also John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 775 (1991) ("[T]he curious effect of the new venue criteria is a substantial expansion of venue choices, especially in diversity cases, and hence the encouragement of even wider-ranging forum shopping than had been the case."); David D. Siegel, *Changes in Federal Jurisdiction and Practice under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 71-72 (1991) (stating that the 1990 amendments to the venue statute will increase the number of districts where venue is proper).

Several cases have noted that the liberal venue statute will generate transfer litigation. If plaintiffs rely on the "events or omissions" language and file suit in districts that have an attenuated connection to the underlying disputes, defendants will respond with transfer motions. See, e.g., *Big Baby Co. v. Schecter*, 812 F. Supp. 442, 445 n.3 (S.D.N.Y. 1993) (predicting that with the amendment of the venue statute, defendants will assert objections about the proper location of a suit as § 1404(a) transfer motions); *In re New York Trap Rock Corp.*, 158 B.R. 574, 576 (Bankr. S.D.N.Y. 1993) ("The expansion of venue options places more importance on discretionary transfer for convenience pursuant to 28 U.S.C. § 1404(a) as a device to select the most appropriate site for litigation and to avoid forum abuse.").

79. Further, if plaintiff forum shopping is really an "evil", one would expect state legislators to limit a plaintiff's choice of forum. State lawmakers, however, have exhibited little concern about plaintiff forum shopping in state courts.

States could discourage forum shopping through narrow long-arm statutes, which would prevent state courts from exercising personal jurisdiction when the defendant or the underlying dispute possessed little connection with the state. But in the majority of states, long-arm statutes authorize personal jurisdiction to the maximum extent permitted by the United States Constitution. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 1982) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); 42 PA. CONS. STAT. § 5322(b) (1981) (the personal jurisdiction exercised by the Pennsylvania courts shall extend "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States"); UTAH CODE ANN. § 78-27-22 (1996) (providing that the Utah courts shall exercise personal jurisdiction "to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.").

80. Clermont & Eisenberg, *A Reply*, *supra* note 6, at 1559 n.43.

81. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-99 (1980) (an Oklahoma court could not exercise personal jurisdiction over an auto distributor and an auto retailer, where a single car sold by the defendants had become involved in an accident in Oklahoma); *Shaffer v. Heitner*, 433 U.S. 186, 213-17 (1977) (a Delaware court could not exercise personal jurisdiction over the defendants, where the defendants' ownership of stock in a Delaware corporation constituted their principal contact with the state).

the forum.<sup>82</sup> The liberal forum choice permitted by recent personal jurisdiction decisions seems difficult to explain unless plaintiff forum shopping is far more innocuous than Professor Clermont and Professor Eisenberg suggest.

In short, the general policy endorsed by the federal venue statute and the law of personal jurisdiction permits broad forum choice. But under current transfer law, courts sporadically replace the plaintiff's forum choice with a forum designated by the defendant, based on some combination of factors suggesting that litigation in the alternative forum is more "convenient" and "just." For courts to upset a plaintiff's forum choice, I would require a more specific and compelling justification.

### *B. Proposals For Transfer Reform*

In an article published in the *Notre Dame Law Review*, I suggested that Congress should change transfer practice primarily through two reforms.<sup>83</sup> Following an earlier proposal by Michael Waggoner,<sup>84</sup> I argued that Congress should amend section 1404 so that courts could not transfer cases to districts where the plaintiff lacked minimum contacts.<sup>85</sup> This limitation would prevent defendants from seeking transfers to distant districts where the plaintiff had no connection, and thus would limit the hardship that a transfer could impose on a plaintiff. In addition to this practical benefit, the proposal would provide an analytic symmetry. If a plaintiff may file a federal court

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82. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion) (stating that a court may exercise personal jurisdiction over a defendant, if the defendant receives personal service while he is physically present in the forum for a brief period of time); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) (holding a New Hampshire court could exercise personal jurisdiction over a defendant in a libel action, where the defendant had delivered a small percentage of the allegedly libelous magazines to vendors located in New Hampshire); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985) (permitting a Florida court to exercise personal jurisdiction over a Michigan franchise owner, even though the defendant never had visited Florida).

Where an alien defendant raises a personal jurisdiction objection, this argument is more likely to succeed than if an American defendant raises the argument. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987) (barring the exercise of personal jurisdiction by a California state court over a Japanese corporation sued in an indemnity action by a Taiwanese corporation, even though the Taiwanese corporation's action arose out of a California motorcycle accident involving products manufactured by both corporations); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-19 (1984) (holding that the Texas state courts could not exercise personal jurisdiction over a Colombian corporation sued in a wrongful death action, where the action resulted from a helicopter crash that had occurred in Peru).

83. See Steinberg, *supra* note 33, at 512-14, 516-17.

84. See Waggoner, *supra* note 33, at 76 (advocating transfers under § 1404(a) only to districts "in which personal jurisdiction and venue would have been satisfied for a hypothetical action on the same subject matter brought by the true defendant against the true plaintiff").

85. Steinberg, *supra* note 33, at 516-17.

civil suit against a defendant only in a state where the defendant possesses minimum contacts, then a defendant should be able to transfer a federal case only to a state where the plaintiff possesses minimum contacts.<sup>86</sup>

In a second and more controversial proposal, my article recommended a new methodology for deciding transfer motions. Congress should amend the transfer statute so that a court typically would not review the myriad of factors currently considered in transfer litigation. Except in special circumstances, a court would decide a transfer motion solely based on the location of the relevant witnesses and documents.<sup>87</sup>

As an illustration of how this second proposal would operate in practice, consider the following example. A plaintiff files suit in the Southern District of Florida. This district qualifies as a proper venue, and the courts in this district possess personal jurisdiction over the defendant. Now assume that the defendant moves to transfer the hypothetical case to the District of Connecticut, where the plaintiff possesses minimum contacts.

If most of the witnesses and documents are located in the Southern District of Florida, the court denies the motion. If most of the witnesses and documents are located in the District of Connecticut, the court grants the motion. What if the plaintiff's documents and witnesses are located in the Southern District of Florida, but the defendant's documents and witnesses are located in the District of Connecticut? The court denies the motion. The defendant has failed to demonstrate that the plaintiff's presumptively valid choice of forum is unreasonable, or the result of pernicious forum

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86. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a state court typically may exercise personal jurisdiction over a defendant only if the defendant possesses "minimum contacts" with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal citation omitted); *accord Calder v. Jones*, 465 U.S. 783, 788 (1984) (applying the minimum contacts standard).

The United States Supreme Court has not determined whether the Due Process Clause of the Fifth Amendment imposes limits on the territorial reach of the federal courts, similar to the limits imposed on the state courts by the Due Process Clause of the Fourteenth Amendment. Nonetheless, a federal court typically exercises the same jurisdictional reach as the courts in the state where the federal court is located. *See infra* text accompanying notes 124-26 (comparing the territorial limits imposed by the Due Process Clause of the Fourteenth Amendment and the limits, if any, imposed by the Due Process Clause of the Fifth Amendment).

87. *See Steinberg, supra* note 33, at 512-14. My proposal, however, assumes a case that involves a large number of documents, stored in no more than a few locations. If a case involves few documents that a party easily may transport, the location of these documents will not be important in transfer litigation. Similarly, where the parties have stored documents in a computer data base that is easily accessible throughout the United States, the location of the original documents will have little relevance to a transfer decision. In such situations, courts typically would decide transfer motions solely based on the location of the relevant witnesses.

shopping.<sup>88</sup>

It will not always be that easy. Plaintiffs and defendants sometimes engage in heated disputes as to whether particular witnesses and documents really are relevant.<sup>89</sup> The proposal offers no bright-line solution where an alternative district suggested by the defendant contains a few more witnesses and documents than the district where the plaintiff has filed suit. Nonetheless, my proposal dramatically would reduce the number of factors relevant to a transfer decision. By narrowing the inquiry, the proposal would make transfer motions easier for courts to decide.

Under my proposal, courts would consider factors other than the location of the witnesses and the documents only in special circumstances. Regardless of where the witnesses and documents are located, a court could order a transfer if litigation in the forum would impose a hardship on the defendant because of his physical, financial, or other condition.<sup>90</sup> Or a court could order a transfer where two sophisticated commercial parties had negotiated a reasonable forum selection clause, mandating that any litigation must proceed in a particular forum.<sup>91</sup> But in deciding transfer motions, courts

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88. The plaintiff's choice of forum is presumptively valid because the forum possesses personal jurisdiction over the defendant, and is a proper venue for the plaintiff's suit.

89. *See, e.g., Arrow Elec., Inc. v. Ducommun, Inc.*, 724 F. Supp. 264, 266-67 & n.1 (S.D.N.Y. 1989) (granting the defendant's motion to transfer the case to the Central District of California, where the defendant argued that the important witnesses were located in California, but the plaintiff argued that the important witnesses were located in and around Manhattan.); *Karrels v. Adolph Coors Co.*, 699 F. Supp. 172, 174-77 (N.D. Ill. 1988) (granting the defendants' motion to transfer the case to the Southern District of Indiana, where the parties disagreed about whether the important witnesses were located in Illinois or in Indiana.); *Saminsky v. Occidental Petroleum Corp.*, 373 F. Supp. 257, 260 (S.D.N.Y. 1974) (granting the defendants' motion to transfer cases to the Central District of California, after the court concluded that the testimony of the plaintiffs' New York witnesses "would appear to be considerably less important" than the testimony of the defendants' California witnesses).

90. *See, e.g., Comptroller of the Currency v. Calhoun First Nat. Bank*, 626 F. Supp. 137, 140 (D.D.C. 1985) (granting a defendant's motion to transfer the case to the Northern District of Georgia, where "it would be extremely disruptive to the [defendant] bank's business and thus inconvenient to try the case in this district"); *SEC v. Page Airways, Inc.*, 464 F. Supp. 461, 463 (D.D.C. 1978) (granting the defendant's motion to transfer the case to the Western District of New York, where the defendant's business "would be substantially disrupted" by litigation in the District of Columbia); *Ross v. Tioga Gen. Hosp.*, 293 F. Supp. 209, 210 (S.D.N.Y. 1968) (transferring the case to the Northern District of New York, where the defendant was a small, isolated hospital, and a distant trial could disrupt medical services in a rural area). Similarly, a court could deny a transfer that would impose an unreasonable hardship on the plaintiff.

91. *See, e.g., Pendleton Enter., Inc. v. Iams Co.*, 851 F. Supp. 1503, 1506 (D. Utah 1994) (finding a forum selection clause to be a "significant factor" that supported the transfer of the case to the Southern District of Ohio); *Detroit Coke Corp. v. NKK Chem. USA, Inc.*, 794 F. Supp. 214, 219 (E.D. Mich. 1992) (granting the defendant's motion to transfer the case to the Western District of Pennsylvania, and observing that a forum selection clause "is to be given 'significant' weight"); *Advent Elect., Inc. v. Samsung Semiconductor, Inc.*, 709 F. Supp. 843, 846-47 (N.D. Ill. 1989) (transferring the case to the Northern District of California, and emphasizing that the parties had agreed to a forum selection clause).

would look beyond the location of the witnesses and the documents only in special circumstances. Where a plaintiff had filed suit in a permissible location, a defendant could not seek a transfer based on some assortment of facts suggesting that another location would be more convenient.

My proposal recognizes that the federal courts should retain the ability to transfer cases. No matter how clearly the law defined the appropriate location for a plaintiff's suit, some transfer mechanism would remain appropriate.<sup>92</sup> Unanticipated cases will arise. In these cases, a clever plaintiff's attorney may bring suit in an inconvenient district where litigation would impose a genuine hardship on the defendant. If so, a court should be able to transfer the case.<sup>93</sup>

However, I *would* like to reduce the large number of unsuccessful transfer motions that clog the court system, to the detriment of plaintiffs who have complied with personal jurisdiction and venue requirements. With most transfer decisions based solely on the location of the relevant witnesses and documents, a defendant could easily ascertain whether a transfer motion would succeed. Defendants would stop wasting resources on unsuccessful motions. Courts could identify unmeritorious transfer motions, filed solely to make litigation more expensive and more difficult for plaintiffs. Judges could sanction the defendants responsible for any such motions.

Professor Clermont and Professor Eisenberg present two objections to my proposal. According to Professor Clermont and Professor Eisenberg, a transfer decision may well effect the outcome of a case. Courts are more likely to reach an accurate transfer decision "under a discretionary,

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The United States Supreme Court has concluded that federal courts should enforce forum selection clauses in non-commercial cases. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590-97 (1991) (holding that cruise passengers could bring a personal injury suit against a cruise line only in Florida, where a Florida forum selection clause appeared on the back of the passengers' tickets). A number of commentators, however, have criticized the enforcement of the forum selection clause in *Carnival Cruise Lines*. See, e.g., Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 730 (1992) (arguing that courts should not enforce forum selection clauses in consumer contracts, because "consumers reasonably do not read or understand the terms of their contracts" and the "concepts of personal jurisdiction and venue remain elusive . . . to the average layperson"); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEXAS INT'L L.J. 323, 325 (1992) ("[I]n spite of their persistently touted virtues, forum-selection clauses can be unfair and insidious.").

92. See Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 139 (1965) ("No general [venue] provisions can cover all individual cases with complete fairness.").

93. In their reply to this article, Professor Clermont and Professor Eisenberg now assert that the plaintiffs' "initial choice of forum is currently a little too wide." Clermont & Eisenberg, *A Reply, supra* note 6, at 1559. The authors do not explicitly discuss the role that transfers would play if greater restrictions were imposed on a plaintiff's forum choice. See *id.*



individualized, all-things-considered standard," as opposed to a more rule-like approach that only looks to the location of the witnesses and the documents.<sup>94</sup> In deciding transfer motions, Professor Clermont and Professor Eisenberg conclude that courts always should consider any and all facts that might have some bearing on the convenience of alternative forums.<sup>95</sup>

Although this argument carries significant force, ultimately I am not persuaded. While increasing the efficiency of transfer litigation, my proposal would preserve accurate transfer decisions. A federal district that contains the majority of the relevant witnesses and documents almost always will provide the most convenient location for litigation. In those rare situations where this is not the case, courts could consider special circumstances and look beyond the location of the witnesses and the documents.

In addition, results under the current discretionary transfer standard often seem highly arbitrary. One quickly finds cases with very similar fact patterns, where district judges have reached different results in deciding transfer motions.<sup>96</sup> Inconsistent transfer decisions are not surprising, because courts do not even agree on the factors that judges should consider in transfer analysis.<sup>97</sup> With no legal rules to guide them, judges must decide transfer

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94. See Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra*, note 2, at 1511 n.13.

95. See *id.*

96. Compare *Karrels v. Adolph Coors Co.*, 699 F. Supp. 172, 175 (N.D. Ill. 1988) (granting the defendants' motion to transfer the case to the Southern District of Indiana, even though the plaintiff was confined to a wheelchair and contended that "travel to Indiana would be burdensome physically, emotionally and financially") and *Lappe v. American Honda Motor Co.*, 857 F. Supp. 222, 229-31 (N.D.N.Y. 1994), *aff'd*, 101 F.3d 682 (2d cir. 1996) (refusing to reconsider the transfer of a case from the District of New Jersey to the Northern District of New York, although the plaintiff's physical disability and limited financial resources would make travel to New York difficult) with *Rothman v. Emory Univ.*, 828 F. Supp. 537, 543 (N.D. Ill. 1993) (denying the defendant's motion to transfer the case from the Northern District of Illinois to the Northern District of Georgia, even though most of the witnesses probably resided in Georgia, because the plaintiff suffered from epilepsy and would find travel burdensome) and *Sanders v. State St. Bank & Trust Co.*, 813 F. Supp. 529, 535 (S.D. Tex. 1993) (denying the defendant's motion to transfer the case to Boston or Chicago, and observing that after a transfer "the cost and burden to the Plaintiffs would be excruciating").

97. For example, most cases treat the location of significant numbers of documents as an important factor in transfer analysis. See, e.g., *Jewelmasters, Inc. v. May Dept. Stores Co.*, 840 F. Supp. 893, 896 (S.D. Fla. 1993) (concluding that the location of relevant documents was a significant factor favoring transfer, where the majority of the documents arising out of the parties' 14-year relationship were located in California); *Polin v. Conductron Corp.*, 340 F. Supp. 602, 606 (E.D. Pa. 1972) (concluding that the location of the relevant documents was an important factor that supported a transfer of the case to the Eastern District of Missouri). Other cases have held that the location of documents should not be a relevant factor, since the parties easily may photocopy and transport important documents. See, e.g., *O'Brien v. Goldstar Tech., Inc.*, 812 F. Supp. 383, 386 (W.D.N.Y. 1993) (denying the defendant's motion to transfer the case to the Northern District of California, in part because "[d]ocumentary evidence can readily be transported to Western New York, if necessary"); *Bianco v. Texas Instruments, Inc.*, 627 F. Supp. 154, 165 (N.D. Ill. 1985) (asserting that the location of relevant documents should not be a "compelling factor" in transfer analysis, "given the

motions based on little more than their own individualized conceptions about forum shopping and fairness.

If forum shopping actually is as prevalent and as significant as Professor Clermont and Professor Eisenberg assert,<sup>98</sup> then such subjective decisions should prove troubling. Assume that a plaintiff has managed to file her suit with a judge who is very sympathetic to plaintiffs, in a federal district that is very inconvenient for the defendant. Under the current discretionary regime, the greater the judge's pro-plaintiff inclinations, the less likely the judge will be to transfer the case.

In their reply to this article, Professor Clermont and Professor Eisenberg present a second objection to my suggestions for transfer reform. The authors argue that my proposal "is almost equivalent to amending the venue statute to require plaintiffs to bring every suit in the one court with the preponderance of relevant witnesses and documents."<sup>99</sup>

Not so. In the typical situation where the plaintiff's witnesses and the defendant's witnesses are divided between two districts, my proposal would not authorize a transfer. My proposal would require a court to grant a defendant's transfer motion only where most of the witnesses and the documents were located in an alternative district, where the plaintiff possessed minimum contacts with that district, and where the plaintiff could not demonstrate any special circumstances that should preclude a transfer. In these situations, transferring a plaintiff's case to the district where most of the witnesses and the documents are located hardly seems oppressive.

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ready availability of photocopying and the relative ease with which documents may be selectively shipped around the country").

Some opinions similarly disagree about the relevance of the applicable law in transfer decisions. Most decisions have concluded that the applicability of a foreign state's law favors a transfer, because federal judges sitting in the foreign state will be most familiar with the relevant law, and thus better able to apply it. *See, e.g.,* Gundle Lining Const. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994) (concluding that the applicability of New Jersey law "weighs heavily in favor of transferring venue"); *Environmental Serv., Inc. v. Bell Lumber and Pole Co.*, 607 F. Supp. 851, 855 (N.D. Ill. 1984) (concluding that the applicability of Minnesota law strongly supported a transfer, "because issues of local law are best construed by courts most familiar with them"). Other opinions, however, assert that transfer decisions should not consider whether the law of another state applies, because a federal district judge easily may apply any such body of law. *See, e.g.,* Sanders v. State St. Bank & Trust Co., 813 F. Supp. 529, 536-37 (S.D. Tex. 1993) (if defense counsel is able to understand and apply a foreign state's law, then the court also will be able to understand this body of law); *Ayers v. Arabian Am. Oil Co.*, 571 F. Supp. 707, 710 (S.D.N.Y. 1983) (denying the defendant's motion to transfer, and observing that "applying the law of another jurisdiction within the United States poses no particular problem to any federal forum"). Previously, I concluded that the applicability of a foreign state's law should not be a relevant factor in transfer analysis. *See* Steinberg, *supra* note 33, at 494-500.

98. *See* Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1508 ("The name of the game is forum-shopping.").

99. Clermont & Eisenberg, *A Reply*, *supra* note 6, at 1558.

At any rate, a court employing current transfer analysis almost certainly would transfer such a case.<sup>100</sup> As proponents of the current transfer regime, Professor Clermont and Professor Eisenberg should have little difficulty with an aspect of my proposal that merely replicates current practice.

Despite my disagreements with Professor Clermont and Professor Eisenberg, the differences between my proposal and current transfer analysis are relatively modest. Under the current method of deciding transfer motions, courts typically consider the inconvenience to the plaintiff that will result from a transfer.<sup>101</sup> The location of the witnesses and the documents is a very important factor in current analysis, and already decides many transfer motions.<sup>102</sup>

I like to believe that my proposals would make transfer litigation more efficient, inexpensive, and uniform than current practice. But in reality, my suggestions probably would produce only a modest change in the status quo. If Professor Clermont and Professor Eisenberg are correct in asserting that plaintiff forum shopping is both pervasive and effects outcome, more extensive reforms may be appropriate.

#### IV. SIMPLIFYING THE CHOICE OF FORUM

##### A. *The Pre-Trial Bureaucracy*

In endorsing current transfer practice, Professor Clermont and Professor Eisenberg adopt a position that is entirely consistent with the mainstream approach to procedural reform. Under this approach, problems often are addressed by adding a bureaucratic exercise to the pre-trial process.<sup>103</sup>

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100. See cases cited in *infra* note 102.

101. See, e.g., *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 821 F. Supp. 962, 966 (D. Del. 1993) (declining to transfer a case from the District of Delaware to the District of Utah, where "a transfer to Utah would clearly be unduly burdensome for [Plaintiff] Critikon and its witnesses"); *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 815 F. Supp. 1403, 1407 (D. Colo. 1992) (denying a motion to transfer a class action from Colorado to either Kansas or Missouri, where the plaintiff class members were "financially weak" and travel would have imposed an "undue burden" on these class members); *Doe v. Connors*, 796 F. Supp. 214, 222 (W.D. Va. 1992) (declining to transfer a class action to the District of Columbia federal court, where travel to Washington would be difficult for the "elderly and sick" plaintiffs).

102. See, e.g., *Insuracorp, Inc. v. American Fidelity Assurance Co.*, 914 F. Supp. 504, 506 (M.D. Ala. 1996) ("The most important factor in passing on a motion to transfer under § 1404(a) is the convenience of the witnesses."); *Frasca v. Yaw*, 787 F. Supp. 327, 331 (E.D.N.Y. 1992) ("The convenience of both the party and non-party witnesses is probably the single-most important factor in the analysis of whether a transfer should be granted."); *Buckley v. McGraw-Hill, Inc.*, 762 F. Supp. 430, 440 (D.N.H. 1991) ("The most important factor in deciding whether to transfer an action is the convenience of witnesses.")

103. See generally Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil*

Because too many attorneys file frivolous pleadings and motions, courts must consider sanctions motions.<sup>104</sup> Because attorneys engage in excessive discovery, attorneys must prepare a discovery plan.<sup>105</sup> And if plaintiffs engage in unreasonable forum shopping, courts should address this problem through a transfer motion.

The cumulative effect of these exercises is to emphasize pre-trial proceedings, while increasing the time and expense necessary to reach a trial.<sup>106</sup> In 1995, eighteen months elapsed between the filing of the complaint and a trial in the median federal civil case.<sup>107</sup> In just five years, the average time to trial had increased by 28% from the fourteen month median figure of 1990.<sup>108</sup> In some districts, the delay is considerably longer. In the federal

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*Process*, 1994 WIS. L. REV. 631, 639 (asserting that in 1938, the Federal Rules of Civil Procedure "interposed a number of new steps between the commencement of litigation and trial, each of which could yield a judicial ruling and thus require judicial time").

104. Under the 1983 amendments to Rule 11, a court was required to sanction an attorney or a party if the attorney filed a signed paper that was not "well grounded in fact," that was not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," or that was "interposed for any improper purpose." FED. R. CIV. P. 11 (1983).

Rule 11 was amended in 1993. Under the new version of the rule, attorneys may not file a sanctions motion until an adversary has received 21 days to withdraw a potentially sanctionable paper. See FED. R. CIV. P. 11(c)(1)(A) (1994). This "safe harbor" provision was intended in part to reduce the large volume of sanctions litigation that parties had initiated in the federal courts. See, e.g., William W Schwarzer, *Rule 11: Entering a New Era*, 28 LOYOLA L.A. L. REV. 7, 20 (1994) (asserting that the Rule 11 safe harbor provision "reflects a widely held view that much costly and time-consuming litigation activity could be avoided if lawyers talked to each other before they acted"); *Developments in the Law -- Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1640-41 (1994) (reporting that although the safe harbor provision may "drastically decrease the amount of satellite litigation generated by Rule 11," the provision also could generate litigation by tempting attorneys "to argue everything imaginable").

105. See FED. R. CIV. P. 26(f). The mandatory discovery plan was one of a number of discovery reforms added to the Federal Rules of Civil Procedure in 1993. Under amended Rule 26, judges in each federal district decide whether their district will require a discovery plan. See Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 777 (1995) (noting that many federal districts have not adopted some or all of the 1993 amendments to Federal Rule 26, including the mandatory discovery plan).

Some of the 1993 discovery reforms streamlined the discovery process. For example, the 1993 amendments provided that a party cannot serve more than 25 interrogatories on an adversary. See FED. R. CIV. P. 33(a).

106. In recent years, the number of federal cases that reach trial has declined steadily. See, e.g., Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 U.C.L.A. L. REV. 833, 839 (1990) (reporting that in the federal courts, "the percentage of civil cases terminated by trial has dropped by more than fifth-five percent over the past twenty years"); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 521 n.118 (1986) (determining that while 13.5% of federal cases reached trial in 1945, only 5% of federal cases reached trial in 1984).

107. See STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1995 FEDERAL COURT MANAGEMENT STATISTICS 167 (1996) [hereinafter cited as 1995 FEDERAL COURT MANAGEMENT STATISTICS].

108. See *id.*

courts of Manhattan and Chicago, the average trial did not occur until about twenty-seven months after the plaintiff had filed her complaint.<sup>109</sup>

Even with the most streamlined civil process, much of this backlog would remain. Congress repeatedly has expanded the federal courts' subject matter jurisdiction in civil cases,<sup>110</sup> without a proportionate increase in the number of federal judges.<sup>111</sup> The time demands imposed by federal criminal cases also have increased dramatically.<sup>112</sup> In addition, the Speedy Trial Act<sup>113</sup> ensures that criminal cases take priority over pending civil actions. Given the presence of these extrinsic elements that inherently slow the progress of civil cases, a cumbersome pre-trial process further decreases the chance that a civil case ever will reach trial.

In civil cases, the move from trial adjudication to pre-trial resolution has a number of important implications, many of which receive able discussion elsewhere.<sup>114</sup> One of these implications, however, deserves special emphasis.

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109. See *id.* at 48 (citing data for the Southern District of York); *id.* at 101 (citing data for the Northern District of Illinois).

110. A number of relatively recent federal statutes provide new civil actions. See, e.g., Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994) (prohibiting discrimination against individuals with disabilities, and providing for federal civil actions to enforce this prohibition); Civil Rights Act of 1991, codified in part at 42 U.S.C. § 1981a (1994) (prohibiting discrimination in contracting based on religion, gender, or national origin); Civil Rights Remedies for Gender Motivated Violence Act, 42 U.S.C. § 13981 (1994) (providing a federal civil cause of action for injuries resulting from a violent crime, where the crime was motivated by the plaintiff's gender); see also William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 653 (1994) ("It is beyond argument that, for a variety of reasons, Congress has increasingly looked to the federal courts as the place to attack problems it regards as having national significance.").

111. See, e.g., Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 48 n.178 (1992) (noting an increase in the number of federal civil cases filed per judge); Michael L. Seigel, *Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion*, 22 HOFSTRA L. REV. 567, 589 (1994) ("In 1950, for instance, litigants filed approximately 254 new cases per judge; by 1980, the number had risen to 327; and in 1990, the figure was 381.").

112. See, e.g., Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 990 (1995) ("As the federal criminal caseload has grown, the federal courts have performed a necessary triage. Criminal cases have been receiving priority under the dictates of the federal Speedy Trial Act, and judicial resources have been diverted from civil to criminal cases."); David L. Cook et al., *Criminal Caseload in U.S. District Courts: More Than Meets The Eye*, 44 AM. U. L. REV. 1579, 1581 (1995) (concluding that although the number of criminal cases pending in the federal district courts has remained fairly constant, "[f]ederal judges today are spending a disproportionate amount of their time on criminal cases, due to the increase in defendants, trials, motions, hearings, and sentencings"); cf. Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1046 (1995) ("[S]heer numbers of criminal cases do not appear to be a primary cause of perceived federal workload pressures.").

113. 18 U.S.C. §§ 3161-3174 (1994).

114. See, e.g., Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 754 (1989) (suggesting that one should be "uneasy with shifting the focus of adjudication further away from the traditional common law [trial] model"); Resnik, *supra* note 106, at 526-39 (discussing concerns about the future

In my opinion, the change in focus from trial adjudication to pre-trial resolution reduces the legitimacy of the civil process. Parties are in court to resolve some substantive issue. Parties litigate civil suits to determine whether the defendant has engaged in some illegal activity—such as a breach of contract, a tort, or unlawful discrimination.

But pre-trial litigation often focuses on ancillary procedural issues, such as the proper geographic location for a federal civil case. Although faculty members like Professor Clermont and Professor Eisenberg and myself spend our time thinking about the proper forum for civil suits, this is not an issue that brings parties to court. As ancillary procedural issues dominate over substantive issues, parties lose connection with their own litigation.<sup>115</sup>

It does not have to be this way. Counter to recent trends, reform could focus on simplifying pre-trial procedure. As pre-trial disputes became less common, less time-consuming, and less expensive, more cases would proceed to trial. Courts would spend their time deciding the issues that actually concerned the parties, and not the ancillary procedural points raised by their attorneys.

As compared to some other pre-trial issues, litigation about the proper location for a federal civil suit may not be extraordinarily difficult or time-consuming. Nonetheless, the proper location for a civil suit in the federal system often presents a complex question, requiring attorneys to consider personal jurisdiction, the federal venue statute, and the transfer provision. If one wishes to simplify federal pre-trial procedure, the method of determining the proper location for a civil suit would be a good place to start.

### *B. Toward Clear Rules Of Forum Location*

As indicated above, I am not convinced that any plaintiff forum shopping regularly results in the pernicious consequences suggested by Professor

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viability of adjudicatory procedure). See also McMunigal, *supra* note 106, at 837 (A “[l]ack of trial experience in a legal and ethical system premised on adjudication threatens the effective functioning and ethical conformity of litigating lawyers.”).

115. See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 97 (1990) (worrying that in some cases, arguments and appeals about the proper forum for a civil suit consume more time and energy than litigating the underlying dispute); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1426 (1992) (increasingly complex procedural rules in federal courts “make it more difficult to ascertain the truth and to reach the merits of disputes, diminishing the quality of justice secured”); Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 837 (1993) (“With the inevitable and unending growth in the volume and complexity of the substantive law, our courts are intimidating enough to the average citizen without our adding to the problem by erecting additional procedural hurdles.”).

Clermont and Professor Eisenberg.<sup>116</sup> But if, as Professor Clermont and Professor Eisenberg contend, plaintiffs are indeed manipulating outcomes in federal civil cases by forum shopping, the federal government should address the problem head-on.<sup>117</sup> Specifically, Congress or the courts could simplify forum selection by formulating clear rules that narrowed the permissible geographic locations where a plaintiff might file suit.<sup>118</sup>

Such an approach would prove far more efficient and less costly than the current system. If clear rules limited the permissible locations for a suit, plaintiffs would have to abide by those rules. Parties could litigate suits in convenient courts without the expense of transfer litigation, or the need for court intervention.<sup>119</sup> Courts could respond to any unreasonable plaintiff forum shopping with quick dismissals.

This proposal is not unprecedented. As early as 1965, Edmund Kitch recommended that Congress replace the transfer motion with strict venue rules, which would reduce the possible locations where a plaintiff could file suit.<sup>120</sup> Professor Clermont and Professor Eisenberg acknowledge that “[t]here is nothing necessarily wrong with Kitch’s proposal to tighten the initial choice of forums.”<sup>121</sup>

Congress or the courts could clarify and reduce the locations available to federal court plaintiffs by revising either the federal venue statute or the constitutional requirement of personal jurisdiction. But for better or worse,

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116. See *supra* text accompanying notes 7-54.

117. The following section is premised on the assertion by Professor Clermont and Professor Eisenberg that plaintiff forum shopping is pervasive and effects outcome. If plaintiff forum shopping does not result in undesirable consequences, then courts might continue to allow plaintiffs a broad choice of forum. In addition, Congress should adopt the proposals that I have suggested for transfer reform. Alternatively, Congress might limit transfers to cases where the forum chosen by the plaintiff will impose a hardship on the defendant.

118. In their reply to this article, Professor Clermont and Professor Eisenberg write that in this part of my essay, “Professor Steinberg, for the sake of argument, switches sides to accuse us of timidity.” Clermont & Eisenberg, *A Reply*, *supra* note 6, at 1558. I would not “accuse” Professor Clermont and Professor Eisenberg of anything, except writing informative and thoughtful scholarship.

However, two approaches to forum choice in the federal courts strike me as particularly coherent. If plaintiffs are manipulating results through forum shopping, then Congress or the courts should impose more substantial limits on the forums available to a plaintiff. If plaintiffs are not manipulating results through forum shopping, then I see little reason to interfere with a plaintiff’s forum choice, through a transfer motion or some other mechanism.

119. See Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 710 (1995) (“Allowing the parties to select the venue rather than the judge saves systemic resources.”).

120. See Kitch, *supra* note 92, at 138; accord David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 309 (1969) (advocating that Congress should enact a more narrow venue provision, and should abolish section 1404(a) transfers).

121. Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1510 n.10. Professor Clermont and Professor Eisenberg conclude that “transfer would still have a role” even if Kitch’s proposal were accepted. See *id.*

the current law of venue and personal jurisdiction often allows plaintiffs to choose from a number of permissible forums. As already noted, the most important federal venue statute provides that venue is proper in any district where "a substantial part of the events or omissions giving rise to the claim occurred."<sup>122</sup> In many cases, a plaintiff may choose from several different federal districts that satisfy the events or omissions standard.

Even if Congress retains a broad venue statute, courts could limit forum choice through the constitutional doctrine of personal jurisdiction. However, the implementation of more restrictive personal jurisdiction rules would present problems not associated with venue reform. Originalist evidence raises serious questions about whether the United States Constitution was intended to impose significant limits on a plaintiff's choice of forum.<sup>123</sup>

Questions about the constitutional limits on personal jurisdiction are magnified in federal court cases. While the United States Supreme Court has read the Due Process Clause of the Fourteenth Amendment as limiting the territorial reach of the state courts,<sup>124</sup> it is unclear whether the Due Process Clause of the Fifth Amendment imposes similar limits on the federal courts.

Today, federal courts typically exercise the same jurisdictional reach as state courts.<sup>125</sup> However, commentators disagree about whether and to what extent the Fifth Amendment imposes constitutional limits on the reach of the federal courts, or whether any territorial limits result primarily from self-restraint by the federal courts.<sup>126</sup>

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122. 28 U.S.C. §§ 1391(a)(2), 1391(b)(2) (1994). See *supra* text accompanying notes 77-79.

123. See, e.g., Borchers, *supra* note 115, at 88 ("[A]s an historical matter, the phrases 'due process of law,' and its Magna Carta equivalent 'law of the land,' did not connote any limitation on personal jurisdiction."); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 835 (1981) ("By incorporating the traditional, sovereignty-based, international territorial rules of jurisdiction into the due process clause of the fourteenth amendment, the [Supreme] Court exceeded the boundaries of the most general principle incorporated into that amendment."); cf. John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591, 685 (1995) (concluding that the personal jurisdiction doctrine appropriately makes "traditional common-law principles of territorial jurisdiction part of the constitutional mandate of due process of law").

124. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (under the Due Process Clause of the Fourteenth Amendment, state courts may exercise personal jurisdiction over a defendant only if the defendant possesses "minimum contacts" with the state).

125. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-87 (1985) (applying Fourteenth Amendment personal jurisdiction decisions in a federal court case, based on diversity jurisdiction and a federal statute); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-81 (1984) (applying minimum contacts analysis in a federal court case, based on diversity jurisdiction); 4 WRIGHT ET AL., *supra* note 1, § 1075, at 479 (noting that as a general rule, the limits imposed on the jurisdictional reach of the state courts "apply with equal force to the United States district courts in the absence of a federal statute extending or contracting the jurisdiction of the federal courts").

126. Discussions of the limitations imposed by the Fifth Amendment on the territorial reach of the



Similar to the liberal forum choice permitted by the federal venue statute, recent United States Supreme Court opinions frequently have rejected personal jurisdiction arguments that would restrict a plaintiff's forum choice, at least where the defendant is located somewhere in the United States.<sup>127</sup> For example, in *Burger King Corp. v. Rudzewicz*,<sup>128</sup> the Supreme Court held that a Florida federal court could exercise personal jurisdiction over John Rudzewicz, who operated a Burger King franchise in Michigan. Plaintiff Burger King had sued Rudzewicz, alleging that Rudzewicz had breached his franchise agreement with the company. The Michigan franchise operator sold no products in Florida. In fact, Rudzewicz never had visited Florida.<sup>129</sup>

Nonetheless, the *Burger King* decision concluded that the Florida federal court possessed personal jurisdiction. Defendant Rudzewicz had "established a substantial and continuing relationship" with Burger King's headquarters in Miami, Florida, and had received "fair notice from the [Burger King] contract documents and the course of dealing that he might be subject to suit in Florida."<sup>130</sup>

Perhaps decisions like *Burger King* provide helpful guidance to state courts, which must resolve personal jurisdiction issues.<sup>131</sup> Nonetheless, the

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federal courts appear in Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1597 (1992) ("nationwide jurisdiction should be extended to all federal question cases in federal courts"); Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 427-28, 437-38 (1981) (summarizing current approaches to the territorial limits on federal court jurisdiction, and suggesting that a "constitutional requirement of forum-reasonableness" should limit the territorial reach of the federal courts); Pamela J. Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. RICH. L. REV. 697, 718 (1984) (arguing that "fifth amendment constraints on federal personal jurisdiction parallel those of the fourteenth amendment").

127. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) ("The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years."); see also Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 121 (1993) (noting an "easing of the constitutional limitations on personal jurisdiction that began in 1945").

Where the plaintiff's complaint names a defendant located outside of the United States, a court may exercise personal jurisdiction only if the foreign defendant possesses a significant connection with the state where the plaintiff has filed suit. See *supra* note 82 (discussing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-19 (1984)).

128. 471 U.S. 462 (1985).

129. See *id.* at 479.

130. *Id.* at 487.

131. On the other hand, some commentators have argued that the fact-specific *Burger King* analysis will be of little help to state courts that face similar personal jurisdiction questions. See, e.g., Martin B. Louis, *Jurisdiction Over Those Who Breach Their Contracts: The Lessons of Burger King*, 72 N.C. L. REV. 55, 58-59, 89 (1993) (asserting that the *Burger King* decision provides little guidance about when courts possess personal jurisdiction over defendants in breach of contract cases); Mona A. Lee, Comment, *Burger King's Bifurcated Test for Personal Jurisdiction: The Reasonableness Inquiry*

analytic method used in this case seems unlikely to provide clear forum choice rules for the federal courts. According to the *Burger King* majority opinion, courts should determine whether they possess personal jurisdiction based on a case-by-case assessment of a wide range of factors.<sup>132</sup> These factors include the sometimes difficult question of whether the defendant “has ‘purposefully directed’ his activities at residents of the forum,”<sup>133</sup> the inconvenience of the forum for the defendant,<sup>134</sup> the location of the plaintiff,<sup>135</sup> the course of dealings between the parties,<sup>136</sup> the state’s interest in providing its residents with a convenient forum,<sup>137</sup> the applicable law,<sup>138</sup> and perhaps even the sophistication of the defendant.<sup>139</sup> In close cases, some murky combination of these factors will determine whether a court may exercise personal jurisdiction over a defendant.

When combined with the open-ended standard employed in transfer litigation, this sort of fact-specific analysis is certain to encourage litigation about the proper location for a suit. The *Burger King* majority opinion tempts the plaintiff’s attorney to engage in forum shopping. As long as at least some of the *Burger King* factors support personal jurisdiction in a federal district that is perceived to be both sympathetic to the plaintiff and inconvenient for the defendant, a plaintiff’s attorney might file suit in that district.<sup>140</sup> As the *Burger King* majority explicitly noted, the defendant might respond to such a suit with a section 1404(a) transfer motion.<sup>141</sup> In the motion, the defendant could rely on some combination of convenience factors in urging a transfer to a pro-defendant district that is inconvenient for the plaintiff.

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*Impedes Judicial Economy and Threatens a Defendant’s Due Process Rights*, 66 TEMP. L. REV. 945, 965 (1993) (complaining that the *Burger King* approach is difficult for courts to apply, because it requires “balancing numerous factors on multiple levels”).

132. See *Burger King*, 471 U.S. at 485-86 (“[T]he facts of each case must [always] be weighed” in determining whether personal jurisdiction would comport with “fair play and substantial justice.”).

133. *Id.* at 472 (quoting in part *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

134. See *id.* at 484 (“Although the Court has suggested that inconvenience may at some point become so substantial as to achieve constitutional magnitude . . . this is not such a case.”).

135. See *id.* at 473-74, 477.

136. See *id.* at 479.

137. See *id.* at 473.

138. See *id.* at 482 (when the defendant accepted a clause providing that Florida law would govern his contractual relationship with the plaintiff, this decision “reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there”).

139. See *id.* at 484-85 (noting that Defendant John Rudzewicz was an experienced businessman).

140. A district judge might dismiss the case, concluding that the court lacked personal jurisdiction over the defendant. But unless the plaintiff had exceeded the relevant statute of limitations, she could file her suit in a different federal district following such a dismissal.

141. After acknowledging that the court had adopted a broad interpretation of personal jurisdiction, the *Burger King* majority noted that a federal court defendant “claiming substantial inconvenience may seek a change of venue.” *Burger King*, 471 U.S. at 477 (citing 28 U.S.C. § 1404(a) (1994)).

Federal practice should not encourage this sort of procedural gamesmanship. Here a court must intervene to determine the proper forum for the litigation. Regardless of whether the court endorses the plaintiff's choice or the defendant's choice, the ultimate site of this hypothetical case may favor one of the parties. Parties should win or lose cases based on the merits of their substantive claims, and not as a result of procedural maneuvering.

### CONCLUSION

It is so easy to criticize even the best article. I continue to view the recent work by Professor Clermont and Professor Eisenberg as excellent scholarship. The article taught me a good deal about forum selection in the federal courts. In addition, Professor Clermont and Professor Eisenberg present a powerful defense of current transfer law. Nonetheless, as Professor Clermont and Professor Eisenberg observe, I have a very different view of federal transfer practice.<sup>142</sup> In this brief essay, I have attempted to document our differences.

According to Professor Clermont and Professor Eisenberg, federal court plaintiffs manipulate results by forum shopping for locations that are both sympathetic to plaintiffs and inconvenient for defendants.<sup>143</sup> By granting transfer motions, courts relocate cases to more neutral forums that produce more accurate results.

I am not convinced that forum often affects outcome, or that the district receiving a transferred case will produce a more accurate result than the district where the plaintiff originally had filed suit. Even if Professor Clermont and Professor Eisenberg are correct that forum shopping by plaintiffs presents a significant problem, I believe that current transfer practice provides an uneven and inefficient response to this problem. If plaintiffs indeed manipulate results through forum shopping, I would favor clear venue or personal jurisdiction limitations that decreased the locations where a plaintiff could maintain her suit.<sup>144</sup> If such reforms are not prudent or

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142. See Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1510-11 & n.13.

143. See *id.* at 1514-16.

144. Cf. David E. Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH. L. REV. 82, 100 (1968). In 1968, Professor Seidelson suggested that in federal question cases, Congress should abolish the federal venue statute. Under Professor Seidelson's proposal, district judges would rely heavily on the transfer mechanism to relocate federal question cases filed in inconvenient courts. With the liberalization of the federal venue statute, modern practice in both federal question cases and diversity cases is very similar to the regime recommended by Professor Seidelson.

practical,<sup>145</sup> I would at least make transfer practice more efficient, inexpensive, and uniform by focusing on those few facts that are most relevant to determining the most convenient forum.

Professor Clermont and Professor Eisenberg accurately describe my position as a minority view.<sup>146</sup> Transfer practice has continued under section 1404(a) for almost 50 years. I am not aware of any broad movement that seeks transfer reform.<sup>147</sup> Such complacency may suggest that current transfer practice is fair and efficient, and that reform is undesirable.

But I'm not convinced yet.

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145. As discussed above, I am not convinced by the Professor Clermont and Professor Eisenberg argument that forum frequently effects outcome. *See supra* text accompanying notes 7-29. Without more persuasive evidence that any plaintiff forum shopping either manipulates outcomes or results in other pernicious consequences, I would not endorse a narrowing of forum choices through strict venue or personal jurisdiction requirements.

146. *See* Clermont & Eisenberg, *Exorcising the Evil of Forum-Shopping*, *supra* note 2, at 1509-10. Several articles either endorse the current transfer statute or advocate an even broader use of transfers in federal court cases. *See, e.g.*, Korbelt, *supra* note 33, at 616 (proposing a system where the plaintiff "would enjoy an unrestricted initial choice of forum," with courts considering a transfer in every case); Seidelson, *supra* note 144, at 100 (arguing that the federal venue statute should not apply in federal question cases, and that federal courts instead should rely on transfers to prevent inconvenient litigation in such cases); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 626 (1991) (suggesting that American courts should abolish the doctrine of personal jurisdiction, and follow the Australian practice of relying solely on transfers to prevent inconvenient litigation).

147. But as Professor Clermont and Professor Eisenberg acknowledge, a number of authors share my concerns about transfer litigation. *See, e.g.*, Currie, *supra* note 120, at 307 (although in the abstract courts should hear each case in the most convenient forum, "deciding where that forum is costs altogether too much time and money"); Irving R. Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 595, 595 (1951) (expressing concern about the "deluge of transfer applications" facing district judges, but also expressing hope that "the eventual crystallizing of the criteria and boundaries of 1404(a)" would reduce the number of transfer motions); Kitch, *supra* note 92, at 141 (unless section 1404(a) is reserved for "hardship" cases, "most transfers serve no significant purpose and the courts become burdened with consideration of 1404(a) motions"); Stowell R.R. Kelner, Note, *"Adrift on an Uncharted Sea": A Survey of Section 1404(a) Transfers in the Federal System*, 67 N.Y.U. L. REV. 612, 615 (1992) (in section 1404(a) transfer cases, "unchecked district court discretion has resulted in several problems"). *Cf.* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 44, at 286 (5th ed. 1994) ("Section 1404(a) is an interesting experiment in judicial administration . . . . The experiment cannot yet be pronounced a complete success.").

## TABLE I

*Published Default Judgment Opinions: 1992 to 1994*I. Judgments Entered Against Defendants.<sup>1</sup>

## A. Circuit Court Opinions.

1. *Jones v. Phipps*, 39 F.3d 158, 160-66 (7th Cir. 1994) (affirming a default judgment entered against defendants who did not participate in pretrial proceedings).

2. *Yang v. Hardin*, 37 F.3d 282, 284, 286 (7th Cir. 1994) (in a civil rights action, two individual defendants defaulted).

3. *Wella Corp. v. Wella Graphics, Inc.*, 37 F.3d 46, 47 (2d Cir. 1994) (entering a default judgment against a defendant, who did not answer the plaintiff's complaint).

4. *Meyer v. Rigdon*, 36 F.3d 1375, 1377 (7th Cir. 1994) (entering a default judgment against a defendant who failed to answer the plaintiff's complaint).

5. *Grand Lab., Inc. v. Midcon Labs*, 32 F.3d 1277, 1279 (8th Cir. 1994) (entering a default judgment against the defendant in a trade secret case).

6. *Pretzel & Stouffer v. Imperial Adjusters, Inc.*, 28 F.3d 42, 44 (7th Cir. 1994) (affirming a default judgment entered against the defendant, who failed to answer an amended complaint and had not attended a hearing).

7. *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 459-63 (2d Cir. 1994) (affirming a default judgment entered against the defendant, who both failed to answer the plaintiff's complaint and failed to appear at a hearing).

8. *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 240, 244 (2d Cir. 1994) (affirming a default judgment entered against the defendants, who had not filed a timely response to the plaintiff's complaint).

9. *Stookey v. Teller Training Distrib., Inc.*, 9 F.3d 631, 636-37 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 122 (1994) (affirming the entry of a default judgment, where a defendant deliberately had concealed information and had not complied with three court orders).

10. *Florida Physician's Ins. Co. v. Ehlers*, 8 F.3d 780, 782-85 (11th Cir. 1993) (affirming a default judgment entered against a defendant, who had failed to answer the complaint and had not filed a pretrial stipulation).

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1. To assess the empirical argument raised by Professor Clermont and Professor Eisenberg, this table only reviews cases where a plaintiff and a defendant litigate a default judgment. The table excludes default judgments entered on cross-claims, and in third-party actions.

11. *Philips Med. Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 602-05 (7th Cir. 1993) (affirming a default judgment entered against a defendant, who had refused to cooperate in discovery and who had not complied with a court order).

12. *James v. Frame*, 6 F.3d 307, 308-09 (5th Cir. 1993) (affirming a default judgment entered against a defendant, who had engaged in delaying tactics, discovery abuse, and was a “disingenuous, obstreperous, obfuscating pain”).

13. *United States v. High Country Broad. Co.*, 3 F.3d 1244, 1245 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 93 (1994) (affirming a default judgment entered against a corporate defendant, which had refused to retain a licensed attorney).

14. *United States v. Timbers Preserve*, 999 F.2d 452, 455-56 (10th Cir. 1993) (affirming a default judgment entered against a defendant, who had left the United States as a fugitive).

15. *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1396-1405 (7th Cir. 1993) (affirming a default judgment entered against the defendant, who had not filed an answer for 17 months after being served with process).

16. *Comiskey v. JFTJ Corp.*, 989 F.2d 1007, 1008-10 (8th Cir. 1993) (affirming the district court's entry of a default judgment, where the defendant had violated repeated court orders requiring both that the defendant answer the plaintiff's interrogatories, and that the defendant produce a corporate representative for a deposition).

17. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542-45 (11th Cir.), *cert. denied*, 510 U.S. 863 (1993) (affirming a default judgment imposed against the defendants, who willfully had violated three discovery orders).

18. *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc.*, 982 F.2d 686, 692-93 (1st Cir. 1993) (affirming a default judgment entered against a defendant who had failed to appear at trial).

19. *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 917-22 (3d Cir. 1992) (holding that the district court did not abuse its discretion in entering a default judgment against defendants, who had not obtained substitute counsel, had not filed a pretrial memorandum, and had not responded to discovery requests).

20. *Rose v. Franchetti*, 979 F.2d 81, 86 (7th Cir. 1992) (holding that the district court did not abuse its discretion when the judge entered a default judgment against the defendant, who had refused to participate in discovery).

21. *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 63-64 (5th Cir. 1992) (holding that the district court did not err in denying the defendant's motion to set aside a default judgment, where the defendant willfully had failed to answer the plaintiff's complaint).

22. *Pfanenstiel Architects, Inc. v. Chouteau Petroleum Co.*, 978 F.2d 430, 432-33 (8th Cir. 1992) (noting that the district court had entered a default judgment against one defendant).

23. *Waifersong, Ltd. v. Classic Music Vending*, 976 F.2d 290, 291-93 (6th Cir. 1992) (holding that the district court properly had refused to set aside default judgments, where the defendants did not offer an adequate justification for their failure to answer the plaintiffs' complaint).

24. *In re Dierschke*, 975 F.2d 181, 183-85 (5th Cir. 1992) (holding that the district court properly refused to set aside a default judgment, where the defendant willfully had failed to answer the plaintiff's complaint).

25. *FDIC v. Daily*, 973 F.2d 1525, 1529-32 (10th Cir. 1992) (holding that the district court did not abuse its discretion when the judge entered a default judgment, where the defendant had not complied with court orders which required the defendant to produce documents).

26. *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 156-57 (2d Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993) (noting that the district court had entered a default judgment against a defendant, because the defendant had not filed a timely answer in response to the plaintiff's complaint).

27. *Frame v. S-H, Inc.*, 967 F.2d 194, 203-04 (5th Cir. 1992) (holding that the district court properly entered a default judgment against the defendant after the defendant had engaged in repeated discovery violations, and might have destroyed documents willfully).

28. *United States v. One 1988 Dodge Pickup*, 959 F.2d 37, 41-42 (5th Cir. 1992) (holding that the district judge properly denied the defendant's motion to set aside a default judgment, where the defendant had not filed a timely answer and never had asserted a meritorious defense).

29. *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 131-33 (4th Cir.), *cert. denied*, 506 U.S. 821 (1992) (holding that the district judge properly denied the defendants' motion to set aside a default judgment, where the defendants had refused to cooperate in discovery, had refused to attend depositions, and had failed to participate in the defense of the suit).

30. *United States v. McCoy*, 954 F.2d 1000, 1002-04 (5th Cir. 1992) (*per curiam*) (holding that the district court properly entered a default judgment, where a taxpayer had not complied with an Internal Revenue Service summons).

31. *In re Cossio*, 163 B.R. 150, 153-57 (B.A.P. 9th Cir. 1994) (holding that the trial court properly denied a defendant's motion to vacate a default judgment, where the defendant had not filed a timely answer).

## B. District Court Opinions.

1. *Mininberg v. Kresch*, 863 F. Supp. 261, 262-63 (D. Md. 1994) (granting the plaintiffs' motion for a default judgment, where neither of two defendants had filed an answer for more than eight months).

2. *United States v. Robinson*, 860 F. Supp. 565, 566-68 (N.D. Ill. 1994) (denying the defendant's motion to vacate a default judgment, where the defendant had not filed a timely answer).

3. *Cablevision Sys. Corp. v. 45 Midland Enter., Inc.*, 858 F. Supp. 42, 43 (S.D.N.Y. 1994) (entering a default judgment against the defendant).

4. *United States v. Real Property Located at 165 Adelle St.*, 850 F. Supp. 534, 535-38 (S.D. Miss. 1994) (denying a defendant's motion to set aside a default judgment, where the defendant had not responded to a verified forfeiture complaint filed by the United States government).

5. *FDIC v. Moll*, 848 F. Supp. 145, 147-48 (D. Colo. 1993) (entering a default judgment against several defendants, who had not responded to either the plaintiff's complaint or to the plaintiff's motion for a default judgment).

6. *Schueler v. Rayjas Enter., Inc.*, 847 F. Supp. 1147, 1148 (S.D.N.Y. 1994) (entering a default judgment against a defendant, who had failed to answer the plaintiffs' complaint).

7. *Hunt v. Kling Motor Co.*, 841 F. Supp. 1098, 1105-07 (D. Kan. 1993) (denying a motion to set aside a default judgment entered against a defendant, where the defendant had not answered the plaintiff's complaint).

8. *United States v. One Lot or Parcel of Land*, 838 F. Supp. 318, 318-19 (E.D. Tex. 1993) (denying a motion to set aside a default judgment entered against a defendant, where the defendant had not filed a timely answer and could not raise a meritorious defense).

9. *United States v. 42.5 Acres, More or Less, of Land and Personal Property*, 834 F. Supp 912, 918-20 (S.D. Miss. 1992) (entering a default judgment in a forfeiture case, based on the property owner's drug crimes).

10. *Engineers Joint Welfare Fund v. B.B.L. Constructors, Inc.*, 825 F. Supp. 13, 15-16 (N.D.N.Y. 1993) (entering a default judgment against the defendant, where the defendant had failed to file an answer and had not disputed the merits of the plaintiffs' motion for a default judgment).

11. *Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc.*, 822 F. Supp. 137, 139, 141 (S.D.N.Y. 1993) (entering a default judgment against several defendants, who had not filed timely answers).

12. *Schwartz-Liebman Textiles v. Last Exit Corp.*, 815 F. Supp 106, 107-08 (S.D.N.Y. 1992) (adopting a magistrate's report, which recommended that the court award \$20,000 statutory damages to the plaintiff after the trial court had entered a default judgment).



13. *Montcalm Publ. Corp. v. Ryan*, 807 F. Supp 975, 976-77 (S.D.N.Y. 1992) (entering a default judgment against several defendants, where the defendants had failed to answer both the plaintiff's complaint and the plaintiff's motion for a default judgment).

14. *Express Air, Inc. v. General Aviation Serv., Inc.*, 806 F. Supp 619, 620-21 (S.D. Miss. 1992) (denying the defendants' motion to set aside a default judgment, where the defendants had not filed timely answers to the plaintiff's complaint and did not offer adequate excuses for this failure).

15. *Maryland Nat'l Bank v. M/V Tanicorp I*, 796 F. Supp 188, 190-93 (D. Md. 1992) (entering a default judgment where the defendants did not respond to the plaintiff's complaint, with the court rejecting a variety of defense arguments, raised in opposition to the default judgment).

16. *United States v. U.S. Currency in the Amount of \$41,087, More or Less*, 795 F. Supp. 540, 542-44 (E.D.N.Y. 1992) (denying the defendants' motion to vacate a default judgment, where the defendants could not raise a meritorious defense in response to the plaintiff's action).

17. *Northwestern Mutual Life Ins. Co. v. DeMalleray*, 789 F. Supp 651, 654 (S.D.N.Y. 1992) (denying the defendant's motion to vacate a default judgment, where the defendant had failed to appear in response to the plaintiff's complaint, and the defendant lacked a meritorious defense to the plaintiff's action).

18. *Morgan v. Barry*, 785 F. Supp. 187, 197-98 (D.D.C. 1992) (denying a defendant's motion to vacate a default judgment, where the defendant had not filed a timely answer to the plaintiff's complaint, and the defendant had delayed in filing the motion to vacate the default judgment).

19. *Wolstein v. Bernardin*, 159 F.R.D. 546, 552 (W.D. Wash. 1994) (entering a default judgment against two defendants, whose violations of several court discovery orders "was the product of willfulness and bad faith").

20. *Landau v. Cosmetic & Reconstructive Surgery Ctr., Inc.*, 158 F.R.D. 117, 118-19 (N.D. Ill. 1994) (denying a motion to set aside a default judgment, where a defendant had not filed a timely answer and had not established a meritorious defense to the plaintiff's copyright infringement action).

21. *Reich v. ABC/York-Estes Corp.*, 157 F.R.D. 668, 677, 687 (N.D. Ill. 1994), *append dismissed*, 64 F.3d 316 (7th Cir. 1995) (adopting a magistrate's recommendation that the court impose a default judgment against the defendants, who had "repeatedly delayed discovery and denied the existence of relevant documents").

22. *Beck v. Atlantic Contracting Co.*, 157 F.R.D. 61, 62-64 (D. Kan. 1994) (entering a default judgment against the defendant, who had not filed a

timely answer).

23. *Wayne Rosa Constr., Inc. v. Hugo Key & Son, Inc.*, 153 F.R.D. 481, 483 (D. Me. 1994) (denying a defendant's motion to set aside a default judgment, where the defendant "did absolutely nothing" for nearly two months after receiving service of the complaint, and did not move to set aside the default judgment until about three weeks after receiving notice of the judgment).

24. *Hogue v. Fruehauf Corp.*, 151 F.R.D. 635, 639 (C.D. Ill. 1993) (entering a default judgment against the defendant, where the defendant's discovery noncompliance had extended for five years and he defendant's explanation for the failure to meet discovery obligations was "totally preposterous").

25. *Bentley v. Raveh*, 151 F.R.D. 515, 517-19 (D. Conn. 1993) (refusing to set aside a default judgment entered against a defendant, who had failed to attend court hearings and had ignored the litigation).

26. *Standard Chartered Bank v. Red Rock Commodities, Ltd.*, 151 F.R.D. 261, 263 (S.D.N.Y. 1993) (granting the plaintiff's motion for a default judgment where the defendant had not filed an answer, although the court had granted the defendant four extensions of time).

27. *Colonial Penn Life Ins. Co. v. Assured Enters., Ltd.*, 151 F.R.D. 91 (N.D. Ill. 1993) (refusing to vacate a default judgment entered against the defendant, who had failed to answer the plaintiff's complaint and who had not raised a meritorious defense).

28. *Salomon v. 1498 Third Realty Corp.*, 148 F.R.D. 127, 128-31 (S.D.N.Y. 1993) (denying the defendant's motion to vacate a default judgment, where the defendant had not filed a response to the plaintiff's complaint, had failed to respond to three letters which advised the defendant of his default, and had not moved to vacate the default judgment until ten months after it had been entered).

29. *Broadcast Music, Inc. v. Sports Bar, Inc.*, 145 F.R.D. 349, 349-51 (D. Del. 1992) (denying the defendant's motion to vacate a default judgment, where the defendant did not file a timely answer and could not raise a meritorious defense in response to the plaintiff's complaint).

30. *Sasso v. M. Fine Lumber Co.*, 144 F.R.D. 185, 188-91 (E.D.N.Y. 1992) (denying a defendant's motion to vacate a default judgment, where the defendant had not filed a timely answer, had refused to participate in discovery, and had not filed his motion to vacate the default judgment within a reasonable period of time).

31. *Maizus v. Weldor Trust Reg.*, 144 F.R.D. 34, 37 (S.D.N.Y. 1992) (granting the plaintiff's motion for a default judgment after the defendant would not schedule or attend a deposition).

32. *Corsair Asset Management, Inc. v. Moskowitz*, 142 F.R.D. 347, 348-49 (N.D. Ga. 1992) (denying the defendant's motion for reconsideration of a default judgment where the defendant had failed to attend her deposition, although the plaintiffs had scheduled the deposition on six different occasions).

33. *General Envtl. Science Corp. v. Horsfall*, 141 F.R.D. 443, 450-56 (N.D. Ohio 1992) (entering a default judgment against the defendants, where the defendants had delayed pending court proceedings in order to destroy discoverable documents).

34. *Allemand Boat Co. v. Kirk*, 141 F.R.D. 438, 440-43 (E.D. La. 1992) (denying the defendant's motion for relief from a default judgment, where defense counsel had disregarded court rules and the court held that the defendant was bound by his attorney's misconduct).

35. *O'Brien v. Sage Group, Inc.*, 141 F.R.D. 81, 83-86 (N.D. Ill. 1992) (denying the defendant's motion to vacate a default judgment, where the defendant had not filed a timely response to the plaintiff's complaint and the defendant had waived any objection to personal jurisdiction).

36. *In re Sun Island Realty*, 191 B.R. 246, 248 (S.D. Fla. 1993), *aff'd*, 43 F.3d 678 (11th Cir. 1994) (affirming a default judgment entered by the bankruptcy court, where the defendants "intentionally, repeatedly, and without excuse disobeyed the bankruptcy court's orders regarding production of documents").

37. *In re Raynard*, 171 B.R. 699, 701-03 (Bankr. N.D. Ga. 1994) (denying the defendant's motion to set aside a default judgment, where the defendant had not answered the plaintiff's complaint after the defendant had received advice from an attorney).

38. *In re Food & Fibre Protection, Ltd.*, 168 B.R. 408, 415-16 (Bankr. D. Ariz. 1994) (entering a default judgment with respect to two defendants, but denying a motion for a default judgment with respect to a third defendant).

39. *Citicorp Mortgage, Inc. v. Leonard*, 166 B.R. 645, 647 (N.D. Ill. 1994) (denying the defendants' motion to vacate a default judgment, where the defendants filed the motion to vacate almost six months after the court had entered the default judgment).

40. *Williams v. Texaco, Inc.*, 165 B.R. 662, 675 (D.N.M. 1994) (entering a default judgment against a defendant, which during discovery "engaged in a deliberate campaign of delay and abuse").

41. *In re Hancock*, 160 B.R. 677, 679-82 (Bankr. M.D. Fla. 1993) (denying the defendant's motion to set aside a default judgment, where the defendant's unwillingness to pay for an attorney was not excusable neglect, which would justify an order setting aside the default judgment).

42. *In re Rogers*, 160 B.R. 249, 255 (Bankr. N.D. Ga. 1993) (entering a default judgment where the defendant failed “to present a plausible excuse explaining the reason for the default” and failed “to assert a meritorious defense.”).

43. *United States v. Molitor*, 157 B.R. 427, 428-29 (W.D. Wis. 1992) (enforcing a default judgment previously entered against the defendants, where the defendants had not filed a timely motion to vacate the judgment).

44. *In re Williams*, 149 B.R. 622, 623-25 (Bankr. D. Idaho 1992) (denying the defendant’s motion to set aside a default judgment, where the defendant had not appeared for several court hearings and had not filed her motion to set aside the default judgment within a reasonable time).

45. *In re Folger*, 149 B.R. 183, 185-88 (D. Kan. 1992) (holding that the bankruptcy court did not abuse its discretion in denying a motion to set aside a default judgment entered against the defendants, where the defendants failed to respond to discovery requests, did not respond to the motion for a default, and did not communicate with their attorney for more than one year).

46. *In re Schnell*, 148 B.R. 365, 366-67 (D. Mass. 1992) (affirming a default judgment entered by the United States Bankruptcy Court against a defendant, where the defendant and his attorney failed to attend a pre-trial conference).

47. *FDIC v. Nick Julian Motors*, 148 B.R. 22 (Bankr. N.D. Tex. 1992) (denying the defendant’s motion to set aside a default judgment, where both the defendant and its attorney failed to appear at a hearing and the motion to set aside the default judgment was not timely).

48. *Resolution Trust Corp. v. Rossmiller*, 140 B.R. 1000, 1003-05 (D. Colo. 1992), *aff’d mem.*, 991 F.2d 806 (10th Cir. 1993) (holding that the bankruptcy court did not abuse its discretion by entering a default judgment against the defendant, where the defendant had violated court orders by not answering interrogatories and by not producing requested documents).

## II. Judgments Entered Against Plaintiffs.

### A. Circuit Court Opinions.

1. *Johnson v. Gudmundsson*, 35 F.3d 1104, 1117 (7th Cir. 1994) (affirming a default judgment on the defendant’s counterclaim, where the plaintiff had failed to participate in pre-trial proceedings and had missed deadlines).

2. *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir. 1993) (affirming a district court’s default judgment entered against the plaintiff on a counterclaim, where the plaintiff had demonstrated a “willful failure to

comply with discovery orders” and had engaged in “contumacious conduct”).

B. District Court Opinions.

1. *Long v. Carberry*, 151 F.R.D. 240, 242-45 (S.D.N.Y. 1993) (declining to vacate a default judgment entered against a plaintiff, who had failed to respond to the defendants’ motion to dismiss).

## TABLE II

*Published Transfer Decisions: 1992-1994*

## I. Defendant's Transfer Motion Denied.

## A. Circuit Court Opinions.

1. *Sunbelt Corp. v. Noble, Denton & Assocs., Inc.*, 5 F.3d 28, 30-34 (3d Cir. 1993) (The appellate court issues a writ of mandamus, reversing a district court decision that had transferred the case from the Eastern District of Pennsylvania to the Southern District of Texas. The Southern District of Texas could not exercise personal jurisdiction over one of the defendants, and thus was not a district where the suit "might have been brought.").

2. *Rose v. Franchetti*, 979 F.2d 81, 86 (7th Cir. 1992) (In a brief passage, the appellate court affirms the district court's decision, which had denied the defendant's motion to transfer the case from the Northern District of Illinois to the District of Massachusetts. Both districts would provide convenient sites for this suit. The district judge did not abuse his discretion in denying the transfer motion, because the suit focused on a damaged airplane that the plaintiff had stored in Illinois.).

3. *Scheidt v. Klein*, 956 F.2d 963, 965-66 (10th Cir. 1992) (The appellate court affirms the district court's opinion, which had denied the defendant's motion to transfer the case from the Western District of Oklahoma to a federal court in Florida. The district court did not abuse its discretion in denying a transfer, even though most of the defense witnesses resided in Florida, most of the relevant documents were located in Florida, and Florida law applied to the case.).

## B. District Court Opinions.

1. *E. & J. Gallo Winery v. F. & P. S.p.A.*, 899 F. Supp. 465, 466-67 (E.D. Cal. 1994) (The court denies the defendant's motion to transfer the case from the Eastern District of California to the Central District of California. The plaintiff's headquarters were located in the Eastern District of California, and travel to a trial in the Eastern District of California would not impose an excessive burden on defense witnesses.).

2. *Bacik v. Peek*, 888 F. Supp. 1405, 1413-16 (N.D. Ohio 1993) (The court denies the defendants' motion to transfer the case from the Northern District of Ohio to the District of Colorado. The relevant witnesses and documents were divided equally between Ohio and Colorado.).

3. *Tuff Torq Corp. v. Hydro-Gear Ltd. Partnership*, 882 F. Supp. 359, 361-64 (D. Del. 1994) (The court denies the defendants' motion to transfer two related cases from the District of Delaware to the District of Iowa. In the first case, an Iowa court could not exercise personal jurisdiction over two defendants. In the second case, Delaware would be more convenient for some of the plaintiff's witnesses than Iowa.)

4. *Chemical Waste Management, Inc. v. Sims*, 870 F. Supp. 870, 875-78 (N.D. Ill. 1994) (The court denies the defendants' motion to transfer the case from the Northern District of Illinois to the Middle District of Tennessee. None of the parties made a strong showing that a particular district was convenient, and Delaware law applied to the case.)

5. *Fuller Bros., Inc. v. International Mktg., Inc.*, 870 F. Supp. 299, 304 (D. Or. 1994) (The court denies the defendant's motion to transfer the case from the District of Oregon to the Middle District of Pennsylvania. Although the defendant contends that related litigation is pending in Pennsylvania, the court concludes that many important witnesses are located in Oregon.)

6. *Triangle Fabricators, Inc. v. Forward Indus., Inc.*, 866 F. Supp. 467, 472 (D. Or. 1994) (The court denies the defendants' motion to transfer the case from the District of Oregon to the Southern District of New York. The court concludes that the defendants have not made the "strong showing of inconvenience" necessary to warrant a transfer.)

7. *Medical Assurance Co. v. Jackson*, 864 F. Supp. 576, 580 (S.D. Miss. 1994) (The court denies the defendants' motion to transfer the case from the Southern District of Mississippi to a federal district court in Alabama. A transfer merely would "shift the burden of inconvenience from one party to another.")

8. *Asia North America Eastbound Rate Agreement v. Pacific Champion Serv. Corp.*, 864 F. Supp. 195, 198-99 (D.D.C. 1994) (The court denies the defendant's motion to transfer the case from the District of Columbia federal court to the Central District of California. The defendant had agreed to a forum selection clause, providing that the parties consented to litigation in the District of Columbia. The defendant had not cited any factors that outweighed this forum selection clause.)

9. *Reynolds Metals Co. v. Fmali, Inc.*, 862 F. Supp. 1496, 1501-02 (E.D. Va. 1994) (The court denies the defendant's motion to transfer the case from the Eastern District of Virginia to a California federal court. Many of the plaintiff's witnesses and documents were located in Virginia, and Virginia law probably would apply to the case.)

10. *Modern Computer Corp. v. Ma*, 862 F. Supp. 938, 947-49 (E.D.N.Y. 1994) (The court denies the defendant's motion to transfer the case from the Eastern District of New York to a California federal court. Most of the

plaintiffs' witnesses were located in New York, and New York law applied to some of the plaintiffs' claims. The defendant had not provided "detailed factual statements" showing that litigation would be more convenient in California than in New York.).

11. *Prather v. Marriott Corp.*, 859 F. Supp. 645, 646-47 (E.D.N.Y. 1994) (The court denies the defendant's motion to transfer the case from the Eastern District of New York to the District of New Jersey. Both parties submitted "woefully inadequate papers" which made it "impossible for this Court to make any kind of determination based on this record.").

12. *Bent v. Berman*, 859 F. Supp. 84, 88 (S.D.N.Y. 1994) (The court denies the defendants' motion to transfer the case from the Southern District of New York to the Northern District of New York. The court concludes that prior litigation in the Northern District of New York did not have a sufficiently close relationship with the plaintiffs' action to justify a transfer.).

13. *National Util. Servs., Inc. v. Queens Group, Inc.*, 857 F. Supp. 237, 240-42 (E.D.N.Y. 1994) (The court denies the defendants' motion to transfer the case from the Eastern District of New York to the Southern District of Indiana. The potential witnesses were divided equally between the two districts.).

14. *Blinzler v. Marriott Int'l, Inc.*, 857 F. Supp. 1, 3-4 (D.R.I. 1994) (The district court approves a magistrate's report, which recommended a denial of the defendant's motion to transfer the case from the District of Rhode Island to the District of New Jersey. The defendant had failed to show that New Jersey would provide a more convenient forum for the litigation than Rhode Island.).

15. *Pillington v. United Airlines, Inc.*, 855 F. Supp. 1248, 1249-51 (M.D. Fla. 1994) (The court denies the defendants' motion to transfer the case from the Middle District of Florida to the Northern District of Illinois. The defendants had not filed a transfer motion for almost two years after the plaintiffs brought suit, and litigation in Florida would not be unreasonably burdensome for the defendants.).

16. *State St. Capital Corp. v. Dente*, 855 F. Supp. 192, 196-99 (S.D. Tex. 1994) (The court denies the defendants' motion to transfer the case from the Southern District of Texas to the Southern District of New Jersey. More potential witnesses and relevant documents were located in Texas than in New Jersey, and Texas law applied to the case.).

17. *LaCroix v. American Horse Show Ass'n*, 853 F. Supp. 992, 1000-01 (N.D. Ohio 1994) (The court adopts a magistrate's report, which recommended denying the defendants' motion to transfer the case from the Northern District of Ohio to the Southern District of New York. The defendants did not specify the number and identity of the witnesses who



would benefit from litigation in New York.)

18. *Dwyer v. General Motors Corp.*, 853 F. Supp. 690, 691-96 (S.D.N.Y. 1994) (The court denies the defendant's motion to transfer the case from the Southern District of New York to the District of Maryland. Although the accident resulting in the litigation occurred in Maryland and the Maryland federal court maintained a less congested docket, the defendant had not demonstrated that a transfer was appropriate.)

19. *United Mortgage Corp. v. Plaza Mortgage Corp.*, 853 F. Supp. 311, 314-15 (D. Minn. 1994) (The court denies the defendant's motion to transfer the case from the District of Minnesota to the Western District of Missouri. A forum selection clause provided that any litigation between the parties should be brought in Minnesota, and the defendant made only "conclusory statements that a transfer to the Western District of Missouri would promote convenience.").

20. *Harley-Davidson, Inc. v. Columbia Tristar Home Video, Inc.*, 851 F. Supp. 1265, 1268-71 (E.D. Wis. 1994) (The court denies the defendants' motion to transfer the case from the Eastern District of Wisconsin to the Southern District of New York. The defendants did not specify the identity of witnesses that would favor litigation in New York, and the plaintiff maintained its principal place of business in Wisconsin.)

21. *Superior Consulting Co. v. Walling*, 851 F. Supp. 839, 845-46 (E.D. Mich. 1994) (The court denies the defendant's motion to transfer the case from the Eastern District of Michigan to the Northern District of Texas. The Michigan and Texas courts were about equally convenient, and the defendant failed to justify a transfer.)

22. *Hupp v. Siroflex of America, Inc.*, 848 F. Supp. 744, 749-51 (S.D. Tex. 1994) (The court denies the defendant's motion to transfer the case from the Southern District of Texas to the Central District of California. The plaintiff allegedly suffered damage in the Southern District of Texas, and the potential witnesses were divided about equally between Texas and California.)

23. *Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett, Ltd.*, 847 F. Supp. 1244, 1246-57 (D.N.J. 1994) (The court denies the defendant's motion to transfer the case from the District of New Jersey to the Eastern District of Pennsylvania. The New Jersey federal court was located within a short drive of the Pennsylvania court, and the New Jersey court could apply the governing Pennsylvania law.)

24. *United States v. \$633,021.67 in United States Currency*, 842 F. Supp. 528, 535-36 (N.D. Ga. 1993) (The court denies the defendant's motion to transfer the case from the Northern District of Georgia to the District of Nebraska. The Nebraska court would not be more convenient for the

witnesses than the Georgia court.).

25. *Tools USA & Equip. Co. v. Champ Frame Straightening Equip., Inc.*, 841 F. Supp. 719, 720-22 (M.D.N.C. 1993) (The court denies the defendant's motion to transfer the suit from the Middle District of North Carolina to the Central District of California. A transfer merely would shift the inconvenience imposed by the litigation from the defendant to the plaintiff, and North Carolina law governed one of the plaintiff's claims.).

26. *Nordica USA, Inc. v. Deloitte & Touche*, 839 F. Supp. 1082, 1086, 1093-94 (D. Vt. 1993) (The court denies the defendant's motion to transfer the case from the District of Vermont to the District of Utah. Although Utah law governed the plaintiffs' claims, Utah and Vermont were about equally convenient for the witnesses.).

27. *Sportsmedia Tech. Corp. v. Upchurch*, 839 F. Supp. 8, 9-11 (D. Del. 1993) (The court denies the defendants' motion to transfer the case from the District of Delaware to the Eastern District of North Carolina. Both districts were about equally convenient, and some defendants previously had signed an agreement stating that they would not object to venue.).

28. *Keller v. Millice*, 838 F. Supp. 1163, 1168-69 (S.D. Tex. 1993) (The court denies the defendant's motion to transfer the case from the Southern District of Texas to the District of Colorado. The defendant failed to identify Colorado witnesses who would face inconvenience if the case remained in Texas.).

29. *Kielczynski v. Consolidated Rail Corp.*, 837 F. Supp. 687, 688-89 (E.D. Pa. 1993) (The court denies the defendant's motion to transfer the case from the Eastern District of Pennsylvania to the Western District of Pennsylvania. The witnesses were about equally divided between the two districts. Also, cases proceeded to trial more quickly in the Eastern District of Pennsylvania than in the Western District of Pennsylvania.).

30. *Reliable Tool & Mach. Co. v. U-Haul, Inc.*, 837 F. Supp. 274, 282-83 (N.D. Ind. 1993) (The court denies the defendant's motion to transfer the case from the Northern District of Indiana to the District of Arizona. The defendant based this motion on pending related litigation in Arizona. However, the Arizona federal court subsequently had transferred the case cited by the defendant to the Northern District of Indiana.).

31. *Alpha Welding & Fabricating, Inc. v. Todd Heller, Inc.*, 837 F. Supp. 172, 175-76 & n.5 (S.D. W. Va. 1993) (The court denies the defendant's motion to transfer the case from the Southern District of West Virginia to the Eastern District of Pennsylvania. Equal numbers of witnesses were located in West Virginia and in Pennsylvania. The court declines to determine the applicable state law at an early stage of the litigation.).

32. *Stanley Works v. Kain*, 833 F. Supp. 134, 136-39 (D. Conn. 1993)

(The court denies the defendants' motion to transfer the case from the District of Connecticut to the Central District of California. The documents and witnesses were divided equally between California and Connecticut. Although California law would apply to the case, "[t]he application of foreign law is an every day occurrence in the federal system and cannot, standing alone, justify a transfer based on 'convenience.'").

33. *Hudson United Bank v. Chase Manhattan Bank*, 832 F. Supp. 881, 887-88 (D.N.J. 1993) (The court denies the defendants' motion to transfer the case from the District of New Jersey to the District of Connecticut. The defendants had not submitted "competent evidence as to which witnesses are in Connecticut, which documents are in Connecticut, or what sort of inconveniences a New Jersey trial might cause.").

34. *K & F Mfg. Co. v. Western Litho Plate & Supply Co.*, 831 F. Supp. 661, 663-64 (N.D. Ind. 1993) (The court denies the defendant's motion to transfer the case from the Northern District of Indiana to the Eastern District of Missouri. Although a related case between the parties was pending in Missouri, no other factor favored litigation in Missouri.).

35. *National Ass'n of Credit Management v. Hubbard Lumber, Inc.*, 831 F. Supp. 588, 592 (W.D. Mich. 1993) (The court denies the defendant's motion to transfer the case from the Western District of Michigan to another venue. A corporate defendant filed the motion pro se. In the Sixth Circuit, a corporation cannot appear in federal court except through an attorney. The defendant also did not file a memorandum of law with its motion, as required under Western District of Michigan local rules.).

36. *United States v. Contents of Account No. 2033301*, 831 F. Supp. 337, 340 (S.D.N.Y. 1993) (The court denies the defendant's motion to transfer the case from the Southern District of New York to the Southern District of Florida. In a very brief discussion, the court concludes that the defendant "has not described any circumstances which would render it inconvenient for him to defend his claim in New York.").

37. *Miot v. Kechijian*, 830 F. Supp. 1460, 1465-66 (S.D. Fla. 1993) (The court denies the defendants' motion to transfer the case from the Southern District of Florida to a North Carolina federal court. The North Carolina court would not provide a proper venue, and probably could not exercise personal jurisdiction over one of the defendants.).

38. *Munoz v. Albuquerque A.R.T. Co.*, 829 F. Supp. 309, 313-14 (D. Alaska 1993) (The court denies the defendants' motion to transfer the case from the District of Alaska to the District of New Mexico. The defendants did not identify potential witnesses located in New Mexico, and the other convenience factors did not favor litigation in New Mexico.).

39. *Editorial Musical Latino Americana, S.A. v. Mar Int'l Records, Inc.*,

829 F. Supp. 62, 66-67 (S.D.N.Y. 1993) (The court denies the defendants' motion to transfer the case from the Southern District of New York to the Central District of California. The defendants failed to identify specific witnesses and documents in California. New York and California probably would provide equally convenient sites for the litigation.).

40. *Rothman v. Emory Univ.*, 828 F. Supp. 537, 543 (N.D. Ill. 1993) (The court denies the defendant's motion to transfer the case from the Northern District of Illinois to the Northern District of Georgia. Most of the defense witnesses resided in Georgia. However, because the plaintiff suffered from epilepsy, he would have difficulty traveling.).

41. *Topro Servs., Inc. v. McCarthy W. Constructors, Inc.*, 827 F. Supp. 666, 668 (D. Colo. 1993) (The court denies the defendants' motion to transfer the case from the District of Colorado to a federal court in Arizona. The witnesses probably were divided equally between Colorado and Arizona, and the more important witnesses resided in Colorado.).

42. *Barr Lab., Inc. v. Quantum Pharmics, Inc.*, 827 F. Supp. 111, 113-14 (E.D.N.Y. 1993) (The court denies the defendants' motion to transfer the case from the Eastern District of New York to the District of Maryland. Although more non-party witnesses resided in Maryland, many of the defendants' witnesses resided in New York.).

43. *M.G.J. Indus., Inc. v. Greyhound Fin. Corp.*, 826 F. Supp. 430, 432-33 (M.D. Fla. 1993) (The court denies the defendant's motion to transfer the case from the Middle District of Florida to the District of Arizona. Although the plaintiffs had accepted a forum selection clause that designated Arizona as a proper forum for litigation, the clause was procured by fraud and was unenforceable. Also, most of the plaintiffs' witnesses resided in Florida.).

44. *Carolina Casualty Ins. Co. v. Mares*, 826 F. Supp. 149, 151-53 (E.D. Va. 1993) (The court denies a motion filed by two defendants to transfer a statutory interpleader action from the Eastern District of Virginia to the District of Utah. Most of the parties did not reside in Utah, and the defendants had not demonstrated that Utah would be more convenient for the witnesses.).

45. *Amp Inc. v. Methode Elecs., Inc.*, 823 F. Supp. 259, 268-59 (M.D. Pa. 1993) (The court denies the defendant's motion to transfer the case from the Middle District of Pennsylvania to the Northern District of Illinois. Relevant witnesses were divided equally between Pennsylvania and Illinois. A transfer only would shift the inconvenience imposed by the litigation from the defendant to the plaintiff.).

46. *Muller v. Walt Disney Prods.*, 822 F. Supp. 1033, 1035-40 (S.D.N.Y. 1993) (The court denies the defendant's motion to transfer the case from the Southern District of New York to the Eastern District of Pennsylvania. The

defendant failed to demonstrate that the suit was related closely to a pending case in Pennsylvania, and no other convenience factors justified a transfer.)

47. *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 821 F. Supp. 962, 964-67 (D. Del. 1993) (The court denies the defendant's motion to transfer the case from the District of Delaware to the District of Utah. The plaintiff's witnesses were located on the east coast. A transfer would "be unduly burdensome" for the plaintiff.)

48. *Gilbert v. Wilson*, 821 F. Supp. 857, 860-62 (N.D.N.Y. 1993) (The court denies the defendants' motion to transfer the case from the Northern District of New York to the District of Massachusetts. The defendants did not identify relevant witnesses located in Massachusetts, and no other factor required a transfer.)

49. *Van Ommeren Bulk Shipping, B.V. v. Tagship, Inc.*, 821 F. Supp. 848, 850 (D. Conn. 1993) (The court denies the defendant's motion to transfer the case from the District of Connecticut to the Southern District of Florida. The relevant witnesses were located in several different districts, and a change of venue "would merely transfer the inconvenience from the defendant to the plaintiff.")

50. *Thorn EMI North America, Inc. v. Micron Tech., Inc.*, 821 F. Supp. 272, 276 (D. Del. 1993) (The court denies the defendant's motion to transfer the case from the District of Delaware to the District of Idaho. In a brief opinion, the court emphasizes that the plaintiff has brought suit in Delaware, where its principal place of business is located.)

51. *Schwarzkopf Techs. Corp. v. Ingersoll Cutting Tool Co.*, 820 F. Supp. 150, 152-53 (D. Del. 1992) (The court denies the defendant's motion to transfer the case from the District of Delaware to the Northern District of Illinois. About one-half of the relevant witnesses resided in each district.)

52. *Tomar Elecs., Inc. v. Whelen Techs., Inc.*, 819 F. Supp. 871, 877 (D. Ariz. 1992) (The court denies a defendant's motion to transfer the case from the District of Arizona to the District of Connecticut. The District of Connecticut would not possess personal jurisdiction over a co-defendant.)

53. *Provident Mutual Life Ins. Co. v. Bickerstaff*, 818 F. Supp. 116, 118-19 (E.D. Pa. 1993) (The court denies the defendant's motion to transfer the case from the Eastern District of Pennsylvania to the Northern District of California. The defendant had accepted a forum selection clause, mandating that the parties prosecute any litigation in Pennsylvania. When a plaintiff has brought suit in the forum provided by such a clause, a transfer usually will not be appropriate.)

54. *In re ML-Lee Acquisition Fund II, L.P.*, 816 F. Supp. 973, 975-79 (D. Del. 1993) (The court denies the defendants' motion to transfer the class action from the District of Delaware to the District of Massachusetts.)

Delaware law applied to the case. The relevant witnesses were scattered around the east coast.)

55. *Orix Credit Alliance, Inc. v. Mid-South Materials Corp.*, 816 F. Supp. 230, 234-36 (S.D.N.Y. 1993) (The court denies the defendants' motion to transfer the case from the Southern District of New York to the Northern District of Mississippi. A forum selection clause permitted suit in New York. The clause outweighed the defendants' contention that all of their witnesses resided in Mississippi.)

56. *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 815 F. Supp. 1403, 1406-08 (D. Colo. 1992) (The court denies the defendants' motion to transfer the case to the District of Kansas or the Western District of Missouri. Most of the important witnesses resided in Colorado, and a transfer would place an "undue burden" on the plaintiffs.)

57. *Sanders v. State St. Bank & Trust Co.*, 813 F. Supp. 529, 534-37 (S.D. Tex. 1993) (The court denies the defendant's motion to transfer the plaintiffs' suit either to the District of Massachusetts, or to the Northern District of Illinois. Most of the relevant witnesses and documents were located in Massachusetts, and Illinois law applied to the case. However a transfer would impose an "excruciating" burden on the plaintiffs, who allegedly had suffered injuries in Texas.)

58. *Clark v. Milan*, 813 F. Supp. 431, 436 (S.D. W. Va. 1993) (The court denies the defendants' motion to transfer the case from the Southern District of West Virginia to a federal court in Florida. Most of the relevant witnesses and documents were located in West Virginia.)

59. *Resorts Int'l, Inc. v. Liberty Mut. Ins. Co.*, 813 F. Supp. 289, 290-94 (D.N.J. 1992) (The court denies a defendant's motion to transfer the case from the District of New Jersey to the Middle District of Florida. Although Florida would provide a slightly more convenient forum for the witnesses, the defendant had not provided a sufficient justification for a transfer.)

60. *Lewis v. NFL*, 813 F. Supp. 1, 5-9 (D.D.C. 1992) (The court denies the defendants' motion to transfer the case from the District of Columbia federal court to the District of Minnesota. A suit pending in Minnesota was not closely related to the plaintiff's case.)

61. *O'Brien v. Goldstar Tech., Inc.*, 812 F. Supp. 383, 385-87 (W.D.N.Y. 1993) (The court denies the defendant's motion to transfer the case from the Western District of New York to the Northern District of California. The New York and California courts were comparable in terms of witness convenience. The defendant more easily could afford distant litigation than the plaintiff.)

62. *United States ex rel. Grand v. Northrop Corp.*, 811 F. Supp. 330, 332-33 (S.D. Ohio 1992) (The court denies the defendant's motion to transfer the

case from the Southern District of Ohio to the Central District of California. Ohio and California provided equally convenient locations for the suit, and the plaintiff would have difficulty paying the costs of litigation in a state other than Ohio.).

63. *L. Perrigo Co. v. Warner-Lambert Co.*, 810 F. Supp. 897, 900-01 (W.D. Mich. 1992) (The court denies the defendant's motion to transfer the case from the Western District of Michigan to the Northern District of Texas. Most of the relevant witnesses and documents were located in Michigan. A second case pending in Texas was not closely related to the plaintiff's Michigan action.).

64. *Dupre v. Spanier Marine Corp.*, 810 F. Supp. 823, 825-29 (S.D. Tex. 1993) (The court denies the defendants' motion to transfer the case from the Southern District of Texas to the Western District of Louisiana. The suit arose out of events occurring in Texas, the witnesses were scattered across the United States, and the defendants had not established that Louisiana was a more convenient forum than Texas.).

65. *Box v. Ameritrust Texas, N.A.*, 810 F. Supp. 776, 780-83 (E.D. Tex. 1992) (The court denies the defendants' motion to transfer the case from the Eastern District of Texas to the Northern District of Texas. A plaintiff's choice of forum "is the primary factor to be considered in determining motions under section 1404(a)." Although the plaintiffs had agreed to a forum selection clause providing that the Northern District of Texas constituted a proper venue, the plaintiffs alleged that the clause was invalid.).

66. *Sunshine Cellular v. Vanguard Cellular Sys., Inc.*, 810 F. Supp. 486, 500-01 (S.D.N.Y. 1992) (The court denies the defendant's motion to transfer the case to a federal court either in Pennsylvania or in North Carolina. The court acknowledges that more of the witnesses and the documents were located either in Pennsylvania or in North Carolina than in New York. In addition, Pennsylvania state law would govern some of the plaintiff's claims. Nonetheless, the defendant had not established that either Pennsylvania or North Carolina would provide a more convenient forum than New York.).

67. *Cincinnati Bell Tel. Co. v. Allnet Comm. Servs., Inc.*, 810 F. Supp. 217, 219-20 (S.D. Ohio 1992) (The court denies the defendant's motion to transfer the case from the Southern District of Ohio to a District of Columbia federal court. The plaintiff's case arose out of events occurring in Ohio. Many of the relevant witnesses and documents were located in Ohio.).

68. *Harrison v. International Ass'n of Machinists & Aerospace Workers*, 807 F. Supp. 1513, 1516-17 (D. Or. 1992) (The court denies the defendants' motion to transfer the case from the District of Oregon to the District of Maryland. The plaintiff's suit arose out of events occurring in Oregon, and most of the relevant witnesses resided in Oregon.).

69. *General Foam Plastics Corp. v. Kraemer Export Corp.*, 806 F. Supp. 88, 89-90 (E.D. Va. 1992) (The court denies the defendant's motion to transfer the case from the Eastern District of Virginia to the Southern District of New York. The case had a "strong connection" to Virginia, many witnesses resided in Virginia, and Virginia law would apply to the case.).

70. *Continental Airlines, Inc. v. American Airlines, Inc.*, 805 F. Supp. 1392, 1394-1401 (S.D. Tex. 1992) (The court denies the defendants' motion to transfer the case from the Southern District of Texas, Galveston Division to either the Northern District of Texas or the Southern District of Texas, Houston Division. The courts proposed by the defendants were not much closer to the defendants' office and witnesses than the Galveston courthouse.).

71. *Optical Recording Corp. v. Capitol-EMI Music, Inc.*, 803 F. Supp. 971, 974 (D. Del. 1992) (The court denies the defendant's motion to transfer the case from the District of Delaware to the Southern District of New York. Although related litigation was pending in New York, the Delaware court also recently had concluded a related case.).

72. *Telebrands Direct Response Corp. v. Ovation Comms., Inc.*, 802 F. Supp. 1169, 1174-75 (D.N.J. 1992) (The court denies the defendant's motion to transfer the case from the District of New Jersey to the Central District of California. The defendant had filed an appeal with the Third Circuit Court of Appeals, and the pending appeal prevented the district court from entering a transfer order. The New Jersey and California courts were equally convenient for the witnesses. Although related litigation was pending in California, the New Jersey court already had spent substantial time on the case.).

73. *Brandt Consol., Inc. v. Agrimar Corp.*, 801 F. Supp. 164, 168 (C.D. Ill. 1992) (The court denies the defendants' motion to transfer the case from the Central District of Illinois to the Middle District of Florida. The plaintiff had filed its Illinois suit prior to the commencement of an assertedly related case in Florida.).

74. *Hogan v. Malone Lumber, Inc.*, 800 F. Supp. 1441, 1443 (E.D. Tex. 1992) (The court denies the defendant's motion to transfer the case from the Eastern District of Texas to the Western District of Louisiana. Although the litigation arose out of events occurring in Louisiana, the defendant had not established that Louisiana would provide a more convenient forum than Texas.).

75. *Emrick v. Calcasieu Kennel Club, Inc.*, 800 F. Supp. 482, 484 (E.D. Tex. 1992) (The court denies the defendant's motion to transfer the case from the Eastern District of Texas to the Western District of Louisiana. The witnesses were about equally divided between Texas and Louisiana, and Louisiana law applied to the case. Only about 50 miles separated the Texas



and the Louisiana courts.)

76. *Hobson v. Princeton-New York Investors, Inc.*, 799 F. Supp. 802, 805 (S.D. Ohio 1992) (The court denies the defendant's motion to transfer the case from the Southern District of Ohio to the District of New Jersey. The plaintiff had brought suit under the federal Interstate Land Sales Full Disclosure Act, and had invoked a special venue provision in this act. The defendant had not made a sufficiently strong showing of inconvenience to overcome the act's venue provision.)

77. *Combustion Eng'g, Inc. v. NEI Int'l Combustion, Ltd.*, 798 F. Supp. 100, 106-07 (D. Conn. 1992) (The court denies the defendant's motion to transfer the case from the District of Connecticut to the Northern District of Georgia. No single district would be convenient for most potential witnesses, and many relevant documents were located in Connecticut.)

78. *Imagineering, Inc. v. Van Klassens, Inc.*, 797 F. Supp. 329, 333 (S.D.N.Y. 1992) (The court denies the defendants' motion to transfer the case from the Southern District of New York to the Eastern District of Tennessee. The Eastern District of Tennessee would not provide a proper venue, and was not a district where the suit "might have been brought.")

79. *Cottman Transmission Sys., Inc. v. Metro Distrib., Inc.*, 796 F. Supp. 838, 844-45 (E.D. Pa. 1992) (The court denies the defendants' motion to transfer the case from the Eastern District of Pennsylvania to a Michigan federal court. The defendant had consented to jurisdiction in the Eastern District of Pennsylvania through a forum selection clause, and the case appeared to involve few factual issues.)

80. *Doe v. Connors*, 796 F. Supp. 214, 221-22 (W.D. Va. 1992) (The court denies a defendant's motion to transfer the class action from the Western District of Virginia to the District of Columbia federal court. Many plaintiff class members lived in or near the Virginia federal district, and many plaintiffs would face difficulty traveling to the District of Columbia.)

81. *D.P. Riggins & Assocs., Inc. v. American Board Cos.*, 796 F. Supp. 205, 211-14 (W.D.N.C. 1992) (The court denies the defendants' motion to transfer the case from the Western District of North Carolina to the Northern District of New York. New York law applied to the case. Nevertheless, the North Carolina court would have subpoena power over more witnesses than the New York courts, and fewer cases were pending in North Carolina than in New York.)

82. *Resolution Trust Corp. v. Feffer*, 795 F. Supp. 1223, 1224-25 (D.D.C. 1992) (The court denies a motion to transfer an administrative subpoena proceeding from the District of Columbia federal court to the District of Arizona. Most of the relevant witnesses and documents were located in Arizona. Nonetheless, a transfer was not warranted because the case involved

a summary proceeding “with no witnesses or presentation of evidence . . .”).

83. *Schwartz v. Yo-Whip, Inc.*, 795 F. Supp. 869, 871 (N.D. Ill. 1992) (The court denies the defendants’ motion to transfer the case from the Northern District of Illinois to the Central District of California. The case had some connection to Illinois, some of the documents were located in Illinois, and a transfer only would “shift the inconvenience to the plaintiff.”).

84. *Oxford Transp. Servs., Inc. v. MAB Refrigerated Transp., Inc.*, 792 F. Supp. 710, 713-14 (D. Kan. 1992) (The court denies the defendant’s motion to transfer the case from the District of Kansas to a federal district court in Indiana. The defendant made only a “conclusory allegation that more of the witnesses reside in Indiana” which was “patently insufficient to justify a transfer.”).

85. *American Gen. Fire & Cas. v. Wal-Mart Stores, Inc.*, 791 F. Supp. 763, 767-68 (W.D. Ark. 1992) (The court denies the defendants’ motion to transfer the case from the Western District of Arkansas to a federal court in Louisiana. Most of the relevant witnesses resided in Louisiana. But the “key witnesses” would be experts, and the defendants had not demonstrated that most of these experts resided in Louisiana.)

86. *A.I. Credit Corp. v. Liebman*, 791 F. Supp. 427, 430-31 (S.D.N.Y. 1992) (The court denies the defendant’s motion to transfer the case from the Southern District of New York to the District of Connecticut. The potential witnesses were divided equally between New York and Connecticut.)

87. *Schwartz v. R.H. Macy’s, Inc.*, 791 F. Supp. 94, 94-96 (S.D.N.Y. 1992) (The court denies the defendant’s motion to transfer the case from the Southern District of New York to the District of New Jersey. The defendant had not identified particular New Jersey witnesses, and had not explained how New York litigation would inconvenience any such witnesses.)

88. *Johannsen v. Brown*, 788 F. Supp. 465, 469 (D. Or. 1992) (The court denies the defendants’ motion to transfer the case from the District of Oregon to the Eastern District of New York. In a brief passage, the court concludes: “The defendants have not made the ‘strong showing of inconvenience’ necessary to warrant upsetting [Plaintiff] Johannsen’s choice of forum.”).

89. *Utah Pizza Serv., Inc. v. Heigel*, 784 F. Supp. 835, 837-40 (D. Utah 1992) (The court denies a defendant’s motion to transfer the case from the District of Utah to the Eastern District of Michigan. A forum selection clause permitted a Michigan suit, but did not require that the plaintiff file suit in that state. Michigan law would govern the case, and most of the moving defendant’s witnesses were located in Michigan. However, all of the other parties favored litigation in Utah.)

90. *KFC Corp. v. Lilleoren*, 783 F. Supp. 1022, 1023-24 (W.D. Ky. 1992) (The court denies the defendants’ motion to transfer the case from the

Western District of Kentucky to the District of Oregon. The parties had agreed to a forum selection clause, mandating that a party must bring any litigation in Kentucky. Even ignoring this clause, Kentucky and Oregon would provide equally convenient sites for the case.).

91. *Clarkson v. Coughlin*, 783 F. Supp. 789, 799-800 (S.D.N.Y. 1992) (The court denies the defendant's motion to transfer the case from the Southern District of New York to the Northern District of New York. The plaintiffs were incarcerated in the Southern District of New York. Many of the plaintiffs' allegations related to events occurring in the Southern District of New York. Defendants would not find travel to the Southern District of New York to be unduly burdensome.).

92. *Lipton v. The Nature Co.*, 781 F. Supp. 1032, 1036 (S.D.N.Y. 1992) (The court denies the defendant's motion to transfer the case from the Southern District of New York to a federal court in California. The court concludes: "The convenience of the parties appears split between New York and California.").

93. *Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.*, 157 F.R.D. 215, 218-19 (D. Del. 1993) (The court denies the defendant's motion to transfer the case from the District of Delaware to the Northern District of California. Although most of the defendant's witnesses resided in California, the defendant was a "substantial corporation that operates in the national market." The defendant also was incorporated in Delaware, and could anticipate litigation in that state.).

94. *In re New York Trap Rock Corp.*, 158 B.R. 574, 576-77 (S.D.N.Y. 1993) (The court denies the defendant's motion to transfer the action from the Southern District of New York to a federal court in Mississippi. The Mississippi court probably would provide a more convenient forum than the New York court. However, the defendant did not file a transfer motion until a New York judge made some findings adverse to the defendant. This delay suggests inappropriate forum shopping by the defendant.).

95. *Amplifier Research Corp. v. Hart*, 144 B.R. 693, 697 (E.D. Pa. 1992) (The court denies the defendants' motion to transfer the case from the Eastern District of Pennsylvania to the Western District of Texas. The potential witnesses were divided equally between Pennsylvania and Texas.).

96. *Luciano v. Maggio*, 139 B.R. 572, 577 (E.D.N.Y. 1992) (The court denies the defendants' motion to transfer the case from the Eastern District of New York to the District of New Jersey. The plaintiff's action arose out of events occurring in New York, and two of the three defendants resided in New York. In addition, the New York court selected by the plaintiff was only a short drive from the New Jersey court proposed by the defendants.).

## II. Cases Transferred to a District Proposed by the Defendant.

### A. Circuit Court Opinions.

1. *United States v. Copley*, 25 F.3d 660, 662 (8th Cir. 1994) (The court grants the defendant's motion to retransfer the case from the Western District of Missouri to the Eastern District of North Carolina. The North Carolina court previously had transferred the case to the Missouri court. However, the Missouri court lacked personal jurisdiction over the defendant, and was not located in a district where the suit might have been brought.).

2. *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 654-55 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 69 (1994) (The appellate court affirms district court orders, transferring several cases from the Northern District of Georgia and the Southern District of Georgia to the Middle District of Georgia. Most of the relevant documents were located in the Middle District of Georgia, and the district judges reasonably could have assumed that most of the potential witnesses resided in the Middle District of Georgia.).

3. *Everett v. St. Ansgar Hosp.*, 974 F.2d 77, 79 (8th Cir. 1992) (The appellate court affirms a district court order, which granted the defendants' motion to transfer the case from the District of Minnesota to the District of North Dakota. In a brief passage, the appellate court concludes that the district court did not commit an abuse of discretion in granting the transfer motion.).

### B. District Court Opinions.

1. *McEvily v. Sunbeam-Oster Co.*, 878 F. Supp. 337, 343-49 (D.R.I. 1994) (The court approves a magistrate's report, which recommends that the court grant the defendant's motion to transfer the case from the District of Rhode Island to the Southern District of Florida. More of the relevant witnesses and documents were located in Florida than in Rhode Island.).

2. *Dahl v. Hem Pharm. Co.*, 867 F. Supp. 194, 195-99 (S.D.N.Y. 1994) (The court grants the defendant's motion to transfer the case from the Southern District of New York to the District of Nevada. Related litigation was pending in Nevada, and the plaintiff failed to demonstrate any "material connection" between her case and New York.).

3. *Dunn v. Soo Line R.R. Co.*, 864 F. Supp. 64, 65-67 (N.D. Ill. 1994) (The court grants the defendant's motion to transfer the case from the Northern District of Illinois to the Western District of Wisconsin. The case arose out of a fatal accident that had occurred in Wisconsin, more of the witnesses resided in Wisconsin than in Illinois, and Wisconsin law would

apply to the case.).

4. *Dicken v. United States*, 862 F. Supp. 91, 92-95 (D. Md. 1994) (The court grants the motion to transfer the case from the District of Maryland to the District of Kansas. Most of the relevant witnesses were located in Kansas, the case arose out of events occurring in Kansas, and Kansas law would apply.).

5. *Kepler v. ITT Sheraton Corp.*, 860 F. Supp. 393, 398-99 (E.D. Mich. 1994) (The court grants the defendants' motion to transfer the case from the Eastern District of Michigan to the Middle District of Florida. The accident that resulted in the litigation had occurred in Florida, most of the witnesses resided in Florida, and Florida law would govern the suit.).

6. *Weinstein v. Friedman*, 859 F. Supp. 786, 788-91 (E.D. Pa. 1994) (The court grants the defendants' motion to transfer the case from the Eastern District of Pennsylvania to the Southern District of New York. The court doubts whether venue would be proper in Pennsylvania. The defendants' activities and the potential witnesses were concentrated in New York.).

7. *John Hancock Property & Cas. Co. v. Hanover Ins. Co.*, 859 F. Supp. 165, 169-70 (E.D. Pa. 1994) (The court grants a defendant's motion to transfer the case from the Eastern District of Pennsylvania to the District of New Jersey. The plaintiff did not object to a transfer, which would allow for the joinder of an indispensable party.).

8. *Max Planck Gesellschaft Zur Foederung Der Wissenschaften, E.V. v. General Elec. Co.*, 858 F. Supp. 380, 382-84 (S.D.N.Y. 1994) (The court grants the defendant's motion to transfer the case from the Southern District of New York to the Eastern District of Wisconsin. More potential witnesses resided in Wisconsin than in New York. Any patent infringement by the defendant had occurred in Wisconsin. Although the plaintiff argues that it lacks contacts with Wisconsin, the fact is not dispositive. The court stays the transfer order for 20 days, in the hope that the parties will settle the case.).

9. *Azadi v. Berry Network, Inc.*, 858 F. Supp. 83, 84-85 (E.D. Tex. 1994) (The court grants the defendant's motion to transfer the case from the Eastern District of Texas to the Southern District of Ohio. The plaintiff had agreed to a forum selection clause, which provided that a party would file any litigation in the Southern District of Ohio federal court.).

10. *Recovery Processes Int'l, Inc. v. Hoechst Celanese Corp.*, 857 F. Supp. 863, 866 (D. Utah 1994) (The court grants the defendant's motion to transfer the case from the District of Utah to the District of South Carolina. Related litigation was pending in South Carolina, and the plaintiff would not be unduly inconvenienced by a transfer.).

11. *Coulman v. National R.R. Passenger Corp.*, 857 F. Supp. 231, 232-37 (E.D.N.Y. 1994) (The court grants the defendants' motion to transfer the

case from the Eastern District of New York to the Eastern District of Virginia. Related litigation was pending in Virginia, and more potential witnesses resided in Virginia than in New York. Although the court recognizes that the plaintiff's age, poor health, and limited financial resources could make Virginia litigation difficult for the plaintiff, the court nonetheless orders a transfer.).

12. *Glamorgan Coal Corp. v. Ratners Group PLC*, 854 F. Supp. 436, 437-39 (W.D. Va. 1993) (The court grants the defendants' motion to transfer the case from the Western District of Virginia to the Southern District of New York. Although Virginia law would apply to some of the plaintiff's claims, most of the potential witnesses resided in New York, and the plaintiffs' allegations had little connection to Virginia.).

13. *Willoughby v. Potomac Elec. Power Co.*, 853 F. Supp. 174, 175-76 (D. Md. 1994) (The court grants the defendant's motion to transfer the case from the District of Maryland to the District of Columbia federal court. Most of the potential witnesses resided in the District of Columbia, the events resulting in the litigation had occurred in that district, and the district had heard related litigation.).

14. *Pendleton Enters., Inc. v. Iams Co.*, 851 F. Supp. 1503, 1504-06 (D. Utah 1994) (The court grants a defendant's motion to transfer the case from the District of Utah to the Southern District of Ohio. A forum selection clause mandated that the parties commence any legal action in the Southern District of Ohio, and many of the relevant witnesses and documents were located in that district.).

15. *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 826 (E.D. Tex. 1994) (The court grants the defendants' motion to transfer the case from the Eastern District of Texas to the Western District of Oklahoma. The plaintiffs resided in Oklahoma, and allegedly were injured in Oklahoma.).

16. *In re Eastern District Repetitive Stress Injury Litigation*, 850 F. Supp. 188, 193-96 (E.D.N.Y. 1994) (The court grants the defendants' motion, transferring 75 of 78 personal injury suits from the Eastern District of New York to the various districts where the plaintiffs' claims arose. The transfers would make litigation more convenient for the witnesses, would allow courts to apply the law of the state where the judge was located, and would ease docket congestion in the Eastern District of New York.).

17. *Fontana v. E.A.R.*, 849 F. Supp. 212, 214-15 (S.D.N.Y. 1994) (The court grants the defendant's motion to transfer the case from the Southern District of New York to the District of Wyoming. The plaintiff's alleged personal injuries had occurred in Wyoming, the relevant third-party witnesses resided in Wyoming, and Wyoming law probably would apply to the plaintiff's suit.).

18. *Bell v. KMart Corp.*, 848 F. Supp. 996, 997-1001 (N.D. Ga. 1994) (The court grants the defendant's motion to transfer five cases to federal courts located in the plaintiffs' home states of Florida and North Carolina.).

19. *Davox Corp. v. Digital Sys. Int'l, Inc.*, 846 F. Supp. 144, 149 (D. Mass. 1993) (After dismissing part of the plaintiff's case, the court grants the defendant's motion to transfer the remainder of the case to the Western District of Washington. A closely related suit between the parties already was pending in that district.).

20. *P & J Enters., Inc. v. Best Western Int'l, Inc.*, 845 F. Supp. 84, 87-90 (N.D.N.Y. 1994) (The court grants the defendant's motion to transfer the case from the Northern District of New York to the District of Arizona. The plaintiffs had agreed to a forum selection clause, providing that Arizona courts would have exclusive jurisdiction over all claims. The other relevant factors did not favor New York over Arizona as a site for litigation.).

21. *Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co.*, 844 F. Supp. 1163, 1165-67 (S.D. Tex. 1994) (The court grants the defendant's motion to transfer the case from the Southern District of Texas to the District of New Jersey. The plaintiff's suit arose out of events that had occurred in New Jersey, most of the non-party witnesses resided in New Jersey, New Jersey law applied to the case, and New Jersey judges handled a lighter case load than Texas judges.).

22. *AFA Enters., Inc. v. American States Ins. Co.*, 842 F. Supp. 902, 909 (S.D. W. Va. 1994) (The court grants the defendant's motion to transfer the case from the Southern District of West Virginia to the Western District of Pennsylvania. "[V]irtually all of the witnesses who have any first-hand knowledge concerning the pertinent issues involved" resided in the Western District of Pennsylvania.).

23. *Jewelmasters, Inc. v. May Dep't Stores Co.*, 840 F. Supp. 893, 894-96 (S.D. Fla. 1993) (The court grants the defendant's motion to transfer the case from the Southern District of Florida to the Central District of California. Most of the relevant documents and witnesses were located in California.).

24. *FUL Inc. v. United Sch. Dist. Number 204*, 839 F. Supp. 1307, 1310-14 (N.D. Ill. 1993) (The court grants the defendant's motion to transfer the case from the Northern District of Illinois to the District of Kansas, even though the defendant had agreed to a forum selection clause providing for litigation in Lake County, Illinois. Non-party defense witnesses resided in the District of Kansas, and a related case was pending in that district.).

25. *Karol v. Resolution Trust Corp.*, 839 F. Supp. 14, 16-17 (E.D. Tex. 1993) (The court grants the defendant's motion to transfer the case from the Eastern District of Texas to the Northern District of Texas. A forum selection clause provided that the parties would litigate all disputes in the Northern

District of Texas. Most of the witnesses presumably resided in the Northern District of Texas, the apartment complex that was the subject of the suit was located in that district, and the Eastern District of Texas had virtually no connection with the litigation.).

26. *Falconwood Fin. Corp. v. Griffin*, 838 F. Supp. 836, 839-43 (S.D.N.Y. 1993) (The court grants the defendants' motion to transfer the case from the Southern District of New York to the Western District of Tennessee. The parties had agreed to a forum selection clause, which established that the Southern District of New York would qualify as the exclusive venue for litigation. Nonetheless, the presence of a crucial third-party in Tennessee and the existence of extensive documentary evidence in Tennessee warranted a transfer.).

27. *Tingley Sys., Inc. v. Bay State HMO Management, Inc.*, 833 F. Supp. 882, 885-88 (M.D. Fla. 1993) (The court grants the defendant's motion to transfer the case from the Middle District of Florida to the District of Massachusetts. A related case between the same parties already was pending in Massachusetts.).

28. *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 833 F. Supp. 450, 452-53 (D. Del. 1993) (The court grants the defendant's motion to transfer the case from the District of Delaware to the District of Puerto Rico. Both of the parties maintained their principal place of business in Puerto Rico, most witnesses were located in and around Puerto Rico, and Puerto Rico law would apply to the plaintiff's non-federal claims.).

29. *Burstein v. Applied Extrusion Techs., Inc.*, 829 F. Supp. 106, 109-14 (D. Del. 1992) (The court grants the defendants' motion to transfer the case from the District of Delaware to the District of Massachusetts. Most of the individual defendants resided in Massachusetts, many of the non-party witnesses resided in Massachusetts, and Massachusetts would not be inconvenient for the plaintiff.).

30. *New England Mach., Inc. v. Conagra Pet Prods. Co.*, 827 F. Supp. 732, 734-35 (M.D. Fla. 1993) (The court grants the defendant's motion to transfer the case from the Middle District of Florida to the Eastern District of Virginia. A related case was pending in Virginia, and the case would proceed more quickly in Virginia than in Florida.).

31. *Geris v. Piedmont Fed. Corp.*, 826 F. Supp. 165, 167 (W.D. Va. 1993) (The court grants the defendant's motion to transfer the case from the Western District of Virginia to the Eastern District of Virginia. Most of the potential witnesses resided in or near the Eastern District of Virginia, and the district would be more convenient for an ill plaintiff who had difficulty traveling.).

32. *National Micrographics Sys., Inc. v. Canon U.S.A., Inc.*, 825 F. Supp.



671, 680-82 (D.N.J. 1993) (The court grants the defendant's motion to transfer the case from the District of New Jersey to the Eastern District of New York. The plaintiff had agreed to a forum selection clause, which provided that any litigation must be filed in New York. Also, the case had little connection with New Jersey.).

33. *Cento Group, S.P.A. v. OroAmerica, Inc.*, 822 F. Supp. 1058, 1060-62 (S.D.N.Y. 1993) (The court grants the defendant's motion to transfer the case from the Southern District of New York to the Central District of California. The defense witnesses and most of the relevant documents were located in California, and the case had little connection with New York.).

34. *Miller v. Meadowlands Car Imports, Inc.*, 822 F. Supp. 61, 66 (D. Conn. 1993) (After finding that Connecticut was an improper venue, the district court transferred the case to New Jersey based on 28 U.S.C. § 1404(a). The court should have relied on 28 U.S.C. § 1406.).

35. *Haworth, Inc. v. Herman Miller, Inc.*, 821 F. Supp. 1476, 1479-81 (N.D. Ga. 1992) (The court grants the defendant's motion to transfer the case from the Northern District of Georgia to the Western District of Michigan. Both the plaintiff and the principal defendant maintained their principal place of business in Michigan, and a related case was pending in Michigan.).

36. *DuBois v. Moore*, 821 F. Supp. 792, 793 (D. Mass. 1993) (The court grants the defendants' motion to transfer the case from the District of Massachusetts to the District of New Hampshire. The case arose out of events occurring in New Hampshire, several witnesses resided in New Hampshire, and New Hampshire law would govern the case. Also, the New Hampshire courts could exercise personal jurisdiction over a potential third-party defendant.).

37. *Creditors Collection Bureau, Inc. v. Access Data, Inc.*, 820 F. Supp. 311, 312-13 (W.D. Ky. 1993) (The court grants the defendant's motion to transfer the case from the Western District of Kentucky to the Middle District of Tennessee. The plaintiff had agreed to a forum selection clause, mandating that the parties file any suit in Tennessee. The plaintiff did not demonstrate that litigation in Tennessee would impose unreasonable burdens.).

38. *Ricoh Co. v. Honeywell, Inc.*, 817 F. Supp. 473, 482-88 (D.N.J. 1993) (The court grants the defendants' motion to transfer the case from the District of New Jersey to the District of Minnesota. Most of the relevant witnesses and documents were located in or near Minnesota, and a related suit was pending in Minnesota.).

39. *Cook v. Atchison, Topeka & Santa Fe Railway Co.*, 816 F. Supp. 667, 668-70 (D. Kan. 1993) (The court grants the defendant's motion to transfer the case from the District of Kansas to the Northern District of Oklahoma. The accident that resulted in the suit had occurred in Oklahoma, most of the

witnesses resided in Oklahoma, and Oklahoma law applied to the case.)

40. *Big Baby Co. v. Schechter*, 812 F. Supp. 442, 443-45 (S.D.N.Y. 1993) (The court grants the defendants' motion to transfer the case from the Southern District of New York to the District of Massachusetts. The plaintiffs' suit arose out of events occurring in Massachusetts, and a related case was pending in Massachusetts.)

41. *Tice v. Pro Football, Inc.*, 812 F. Supp. 255, 257-59 (D.D.C. 1993) (The court grants the defendants' motion to transfer the plaintiffs' class action from the District of Columbia federal court to the District of Minnesota. A related case was pending in the District of Minnesota.)

42. *Gordon v. Diagnostek, Inc.*, 812 F. Supp. 57, 62-63 (E.D. Pa. 1993) (The court grants the defendants' unopposed motion to transfer the case from the Eastern District of Pennsylvania to the District of New Mexico. The court does not explain its transfer decision.)

43. *Martin v. South Carolina Bank*, 811 F. Supp. 679, 685-87 (M.D. Ga. 1992) (The court grants the defendant's motion to transfer the case from the Middle District of Georgia to the Northern District of Alabama. A related case was pending in Alabama, and the Alabama court would not be inconvenient for the plaintiff.)

44. *Fairchild Semiconductor Corp. v. Nintendo Co.*, 810 F. Supp. 173, 174-76 (D.S.C. 1992) (The court grants the defendants' motion to transfer the case from the District of South Carolina to the Western District of Washington. The parties had little connection with South Carolina, and some of the documents and witnesses were located in Washington.)

45. *Berry v. New York State Dep't of Correctional Servs.*, 808 F. Supp. 1106, 1110 (S.D.N.Y. 1992) (Pursuant to section 1404(a), the court transfers the case from the Southern District of New York to the Western District of New York. Most witnesses were located in the Western District of New York. After concluding that the Southern District of New York was not a proper venue for the suit, the court should have transferred the case pursuant to 28 U.S.C. § 1406.)

46. *Hill's Pet Prods. v. A.S.U., Inc.*, 808 F. Supp. 774, 776-79 (D. Kan. 1992) (The court grants the defendant's motion to transfer the case from the District of Kansas to the Central District of California. Related litigation was pending in California.)

47. *Habitat Wallpaper & Blinds, Inc. v. K.T. Scott Ltd. Partnership*, 807 F. Supp. 470, 474-75 (N.D. Ill. 1992) (The court grants the defendants' motion to transfer the plaintiff's suit to the District of Massachusetts. More of the potential defense witnesses resided in Massachusetts than in Illinois, and the plaintiff's allegations of trademark infringement arose out of activities in Massachusetts.)

48. *International Show Car Ass'n v. ASCAP*, 806 F. Supp. 1308, 1310-15 (E.D. Mich. 1992) (The court grants the defendants' motion to transfer the case from the Eastern District of Michigan to the Southern District of New York. More witnesses resided in the New York area than in Michigan, the Southern District of New York court had heard related cases, and courts in the New York district had lighter dockets than courts in the Michigan district.).

49. *Pierce v. Coughlin*, 806 F. Supp. 426, 428-29 (S.D.N.Y. 1992) (The court grants the defendants' motion to transfer the case from the Southern District of New York to the Northern District of New York. The plaintiff's suit arose out of events occurring in the Northern District of New York, and the relevant documents were located in that district. In addition, the plaintiff admitted in an affidavit that he had decided to file suit in the Southern District of New York primarily as a result of forum shopping.).

50. *Brown Sch., Inc. v. Florida Power Corp.*, 806 F. Supp. 146, 151-52 (W.D. Tex. 1992) (The court grants the defendants' motion to transfer the case from the Western District of Texas to the Middle District of Florida. Most of the potential witnesses were located in Florida.).

51. *Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276, 1277-82 (S.D.N.Y. 1992) (The court grants the defendants' motion to transfer the case from the Southern District of New York to the Central District of California. Although the plaintiff had little connection with California, he had signed a forum selection clause providing that a party could bring any litigation in California. Also, many relevant documents were located in California.).

52. *United States Fidelity & Guaranty Co. v. Republic Drug Co.*, 800 F. Supp. 1076, 1080-83 (E.D.N.Y. 1992) (The court grants the defendant's motion to transfer the plaintiff's case from the Eastern District of New York to the Western District of New York. More potential witnesses resided in the Western District of New York than in the Eastern District of New York.).

53. *Manufacturers Hanover Trust Co. v. Palmer Corp.*, 798 F. Supp. 161, 163-68 (S.D.N.Y. 1992) (The court grants the defendant's motion to transfer the case from the Southern District of New York to the District of New Jersey. The parties and the witnesses would not find the New Jersey court more convenient than the New York court. However, the presence of related litigation in New Jersey justified a transfer.).

54. *Detroit Coke Corp. v. NKK Chem. USA, Inc.*, 794 F. Supp. 214, 219-21 (E.D. Mich. 1992) (The court grants the defendants' motion to transfer the case from the Eastern District of Michigan to the Western District of Pennsylvania. The plaintiff had agreed to a forum selection clause, which mandated that a party must bring any suit in Pennsylvania. Also,

Pennsylvania law applied to the case, and a related case was pending in a Pennsylvania state court.)

55. *Studdard v. Connaught Lab., Inc.*, 793 F. Supp. 291, 292-93 (D. Kan. 1992) (The court grants the defendants' motion to transfer the case from the District of Kansas to the Eastern District of Missouri. Both parties and all of the witnesses resided in Missouri.)

56. *Clisham Management, Inc. v. American Steel Bldg. Co.*, 792 F. Supp. 150, 157-60 (D. Conn. 1992) (After initially denying the defendants' motion to transfer the case from the District of Connecticut to the Southern District of Texas, the court orders a transfer *sua sponte* just prior to trial. A complicated body of Texas law governed the case, and a forum selection clause provided that litigation should be brought in Texas.)

57. *Medi USA, L.P. v. Jobst Inst., Inc.*, 791 F. Supp. 208, 210-12 (N.D. Ill. 1992) (The court grants the defendant's motion to transfer the case from the Northern District of Illinois to the Northern District of Ohio. Although most convenience factors were weighted equally between Illinois and Ohio, related litigation was pending in the Ohio court.)

58. *Water Energizers Ltd. v. Water Energizers, Inc.*, 788 F. Supp. 208, 212-14 (S.D.N.Y. 1992) (The court grants the defendants' motion to transfer the case from the Southern District of New York to the Southern District of Indiana. The parties had agreed to a forum selection clause, which provided that any litigation should occur in Indiana. The witnesses would not find litigation in New York to be more convenient than litigation in Indiana.)

59. *Frasca v. Yaw*, 787 F. Supp. 327, 330-33 (E.D.N.Y. 1992) (The court grants the defendants' motion to transfer the case from the Eastern District of New York to the Northern District of New York. The plaintiffs' case arose out of events occurring in the Northern District of New York, and that district would be convenient for the witnesses.)

60. *Bennett v. Bally Mfg. Corp.*, 785 F. Supp. 559, 562-63 (D.S.C. 1992) (The court grants the defendants' motion to transfer the case from the District of South Carolina to the Northern District of Illinois. Most of the witnesses and documents were located in Illinois, and the Illinois court had heard related litigation.)

61. *Bicicletas Windsor, S.A. v. Bicycle Corp. of America*, 783 F. Supp. 781, 789 (S.D.N.Y. 1992) (The court grants the defendant's motion to transfer the case from the Southern District of New York to the Eastern District of Pennsylvania. The case arose out of events occurring in Pennsylvania, and many important witnesses were located in Pennsylvania.)

62. *Johnston v. Foster-Wheeler Contractors, Inc.*, 158 F.R.D. 496, 504-05 (M.D. Ala. 1994) (The court grants the defendant's motion to transfer the case from the Middle District of Alabama to the Southern District of Florida.

The plaintiff's suit arose out of events occurring in Florida, most witnesses were located in Florida, and Florida law applied to the suit.)

63. *Murray v. Sevier*, 156 F.R.D. 235, 256-57 (D. Kan. 1994) (The court grants the defendants' motion to transfer a class action from the District of Kansas to the Middle District of Alabama. The relevant events had occurred in Alabama, most of the potential witnesses resided in Alabama, and Alabama law probably would govern the case.)

64. *Laughlin v. Edwards Bus. Machs., Inc.*, 155 F.R.D. 543, 545-46 (W.D. Va. 1994) (The court grants the defendant's motion to transfer three suits from the Western District of Virginia to the Eastern District of Pennsylvania. Closely related suits involving the same parties were pending in Pennsylvania.)

65. *Apache Prods. Co. v. Employers Ins. of Wausau*, 154 F.R.D. 650, 655-61 (S.D. Miss. 1994) (The court grants the defendant's motion to transfer the case from the Southern District of Mississippi to the Northern District of Illinois, although a transfer would not occur until after the parties had completed discovery. The defendant could compel more of its potential witnesses to testify in Illinois than in Mississippi, and Illinois law would govern at least two of the plaintiff's claims.)

66. *Sage Prods., Inc. v. Devon Indus., Inc.*, 148 F.R.D. 213, 215-17 (N.D. Ill. 1993) (The court grants the defendants' motion to transfer a consolidated case from the Northern District of Illinois to the Central District of California. Most defense witnesses resided in California.)

67. *Hampton Int'l Communications, Inc. v. Johnson & Hardin Co.*, 143 F.R.D. 59, 60-61 (S.D.N.Y. 1992) (The court grants the defendant's motion to transfer the case from the Southern District of New York to the Southern District of Ohio. An Ohio court could compel more witnesses to testify than a New York court, and related litigation in Ohio was likely to occur.)

68. *C.I.S. of Pine Bluff, Inc. v. Alltel Cellular Assocs.*, 175 B.R. 834, 837-39 (S.D.N.Y. 1994) (The court grants the defendants' motion to transfer the case from the Southern District of New York to the Eastern District of Arkansas. The plaintiff's suit arose out of activities occurring in Arkansas, and almost all of the potential witnesses resided in Arkansas.)

69. *In re McCrory Corp.*, 160 B.R. 502, 507-08 (S.D.N.Y. 1993) (The court grants the defendant's motion to transfer the case from the Southern District of New York to the Central District of California. The plaintiff's claims arose out of events occurring in California, and most of the relevant witnesses and documents were located in California.)

### III. Cases Transferred on the Court's Own Motion.

#### A. Circuit Court Opinions.

1. *Lloyd v. Federal Deposit Ins. Corp.*, 22 F.3d 335, 336-38 (1st Cir. 1994) (The court retransfers the case from the District of Rhode Island to the District of Columbia federal court. The District of Columbia court previously had granted the defendant's motion to transfer the case to Rhode Island. However, the Rhode Island court lacked subject matter jurisdiction over the case, and was not a district where the suit might have been brought.)

#### B. District Court Opinions.

1. *Haskel v. FPR Registry, Inc.*, 862 F. Supp. 909, 912-917 (E.D.N.Y. 1994) (The court transfers the case from the Eastern District of New York to the District of Maryland. A forum selection clause mandated that the parties must bring any suit in a Maryland court.)

2. *Seagrave v. Delta Airlines, Inc.*, 848 F. Supp. 82, 85-86 (E.D. La. 1994) (The court transfers the case from the Eastern District of Louisiana to the Eastern District of Virginia. Although the applicable Louisiana statute of limitations barred the plaintiff's suit, he could maintain this action under Virginia law.)

3. *Capitol Records, Inc. v. Optical Recording Corp.*, 810 F. Supp. 1350, 1354-56 (S.D.N.Y. 1992) (The court transfers the case from the Southern District of New York to the District of Delaware. Closely related litigation between the same two parties was pending in Delaware.)

4. *Plywood Panels, Inc. v. M/V Thalia*, 141 F.R.D. 689, 690-92 (E.D. La. 1992) (The court retransfers the case from the Eastern District of Louisiana to the Central District of California. The California court previously had transferred the case to Louisiana. However, many of the witnesses and relevant documents were located in California. Also, a California court would be more likely to possess personal jurisdiction over third-party defendants recently named by the defendant.)

### IV. Plaintiffs' Transfer Motions.

#### A. Circuit Court Opinions.

1. *Phelps v. McClellan*, 30 F.3d 658, 663-64 (6th Cir. 1994) (The district court properly denied a plaintiff's transfer motion, because the applicable statute of limitations barred the plaintiff's suit.)

2. *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 329 (6th Cir. 1993) (The district court properly denied a plaintiff's transfer motion, where the district court lacked personal jurisdiction over the defendants.).

#### B. District Court Opinions.

1. *Stokes v. Southeast Hotel Properties, Ltd.*, 877 F. Supp. 986, 1000-01 (W.D.N.C. 1994) (The court grants the plaintiffs' motion to transfer the case from the Western District of North Carolina to the Northern District of Florida. The plaintiffs' suit arose out of events occurring in Florida, more witnesses were located in Florida than in North Carolina, and Florida law would apply to the suit.).

2. *Dombrowski v. Swiftships, Inc.*, 864 F. Supp. 1242, 1244 (S.D. Fla. 1994) (The court grants the plaintiff's motion to transfer the case from the Southern District of Florida to the Eastern District of Louisiana. Related litigation was pending in the Eastern District of Louisiana, and the defendant's principal place of business was located in Louisiana.).

3. *Long v. Quality Computers & Applications, Inc.*, 860 F. Supp. 191, 193-94 (M.D. Pa. 1994) (The court denies the plaintiff's motion to transfer a related case from the Eastern District of Michigan to the Middle District of Pennsylvania. Most of the relevant witnesses and documents were located in Michigan, and Michigan law applied to the case.).

4. *Lappe v. American Honda Motor Co.*, 857 F. Supp. 222, 229-31 (N.D.N.Y. 1994), *aff'd*, 101 F.3d 682 (2d Cir. 1996) (The court denies the plaintiff's motion to return the case from the Northern District of New York to the District of New Jersey. The case already had been transferred once. The plaintiff's action arose out of a New York accident, and most of the potential witnesses resided in New York.).

5. *Hutson v. A.H. Robins Co.*, 846 F. Supp. 14, 15-17 (S.D.N.Y. 1994) (The court denies the plaintiff's motion to transfer her suit from the Southern District of New York to the Central District of California. The plaintiff originally had filed her case in New York, most of the relevant events occurred in New York, the majority of the potential witnesses resided in New York, and New York law governed the plaintiff's action.).

6. *Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp.*, 820 F. Supp. 503, 506-08 (C.D. Cal. 1992) (The court denies the plaintiff's motion to transfer the case from the Central District of California to the Northern District of Texas. The case already had been transferred on the defendant's motion from New York to California. The plaintiff did not seek a transfer to Texas until one year after the case was filed, and a belated transfer would delay the case. The case had little connection with Texas, and the plaintiff's

efforts to litigate in New York or Texas indicated forum shopping by the plaintiff.).

7. *American Home Assurance Co. v. Glovegold, Ltd.*, 153 F.R.D. 695, 697-700 (M.D. Fla. 1994) (The court denies the plaintiff's motion to transfer the case from the Middle District of Florida to the Southern District of Florida. The plaintiff filed the motion to transfer as the case was nearing a trial. The transfer motion was not timely.).