

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

WILLIAM ATKINS

Plaintiff

v.

NOMINUM, INC.

Defendant.

Civil Action No.: 1:08cv461  
CHM/TRJ

**PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS OR, IN  
THE ALTERNATIVE, TO TRANSFER VENUE**

Plaintiff William Atkins (“Mr. Atkins”), by and through counsel, hereby opposes Defendant Nominum, Inc’s (“Nominum”) Motion to Dismiss or, in the Alternative, to Transfer Venue. Venue is proper in this Court and Nominum has not met its burden to justify dismissal or to transfer the case out of the forum chosen by Mr. Atkins.

**Statement of Facts**

This case is a breach of contract action. Mr. Atkins is seeking payment for unpaid commissions he earned from his employer, Nominum. Mr. Atkins was employed by Nominum from October 16, 2006 to March 6, 2007. Complaint at ¶ 13, 30. Nominum is a federal government contractor. Complaint at ¶ 12. Mr. Atkins conducted his work for Nominum from his home address at 7570 Potomac Falls Road, McLean, VA 22102. Complaint at ¶ 5, Declaration of Willian Atkins (attached as Exhibit 1). Mr. Atkins’ work for Nominum involved procuring contracts for Nominum under a Master Reseller agreement between General Dynamics and the United States Air Force. Complaint at ¶ 23. Mr. Atkins’ work involved contacts with United States government employees and General Dynamics employees located primarily in

Falls Church, Virginia and Arlington, Virginia. See Atkins dec. at ¶ 4-10. Even his contacts with other Nominum employees tended to occur in meetings held in Virginia, Maryland, or Washington, D.C. See Atkins dec. at ¶ 11.

Mr. Atkins' was paid in part by commission under an Employment Agreement and a Sales Compensation Plan. Complaint at ¶ 14, 16. (Copies of these documents were inadvertently not attached to the original complaint and were recently filed with this Court.) By its terms, the Sales Compensation Plan is to be interpreted under California law. See Sales Compensation Plan at 6. Under California law a sales commission is due if the salesperson is the "procuring cause" of the contract. Complaint at ¶ 40-42. See Willson v. Turner, 89 Cal.App.2d 589, 595 (1949)(salesperson entitled to commission instead of co-worker if salesperson was "procuring cause of the sale"); Wise v. Reeve, 183 Cal.App.2d 4, 11 (1960)(salesperson was "procuring cause" of and "materially contributed" to sale, thereby earning commission).

Mr. Atkins filed suit in the Circuit Court for Fairfax County, Virginia. Mr. Atkins' home office was located in Fairfax County at the time of his employment and his government clients and third party customer contacts were located in primarily in Virginia.

### Argument

#### **I. VENUE IS PROPER IN THIS COURT.**

Venue is proper in this Court because Mr. Atkins worked out of his home office in Fairfax County, Virginia and dealt with government agencies and customers located in Fairfax and Arlington Counties, Virginia. See Atkins dec. at 2, 3, 12. Venue is proper in a diversity case (1) in a district where the defendant "resides," (2) where "a substantial part of the events or omissions giving rise to the claim occurred," or (3) where the defendant is subject to jurisdiction, if no other venue is available. 28 U.S.C. §1391(a). For venue purposes, a corporate defendant

“resides” where “it is subject to personal jurisdiction.” 28 U.S.C. §1391(c).

Here, the most of the “events” giving rise to the case occurred in Virginia. The legal issue in this case is whether Mr. Atkins is entitled to commissions. Under California law, which applies to his contract, Mr. Atkins earned his commissions if he was the “procuring cause” of Nominum gaining the government contracts at issue. See Willson and Wise, supra. Mr. Atkins’ actions, which would have been the procuring causes, occurred primarily at his home office in Fairfax. Other actions occurred during meetings or through contacts with people located in Falls Church, Va.; Arlington, Va.; or, in some cases, Massachusetts. See Atkins dec. at ¶ 3-11. Therefore, under subsection (2) venue is proper. In addition, since Nominum was conducting business through Mr. Atkins in Fairfax and Arlington Counties, Virginia courts have jurisdiction over Nominum in this matter, meaning that Nominum “resides” in Virginia for venue purposes under subsection (1). Consequently, venue is proper in this Court.

**II. NOMINUM HAS NOT MET ITS BURDEN TO JUSTIFY DISMISSAL FOR FORUM NON CONVENIENS BECAUSE MOST RELEVANT EVENTS AND WITNESSES ARE IN VIRGINIA.**

Nominum has not met its high burden to justify dismissal on *forum non conveniens* grounds.<sup>1</sup> Given that the primary location of witnesses is in Northern Virginia and the actions at issue in the case occurred in Virginia, this Court is the correct venue for this matter.

First, the courts have noted that “a plaintiff’s choice of forum should rarely be disturbed.” Piper Aircraft Company v. Reyno, 454 U.S. 235, 241, 102 S.Ct. 252, 258, 70 L.Ed.2d 419 (1981), citing Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) and Koster v. Lumbermens Mutual Casualty Company, 330 U.S. 518, 67 S.Ct. 828, 91 L.Ed.

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<sup>1</sup> Although Nominum’s brief does not contain the term “*forum non conveniens*,” it argues for dismissal under the standard articulated in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). See Def. mem. at 5 (citing Piper Aircraft Company v. Reyno, 454 U.S. 235 (1981), which cites Gilbert. Piper is a *forum non conveniens* case.

1067 (1947). The forum should only be changed if it is “oppressive” or “vexatious” to the defendant “out of all proportion to the plaintiff’s convenience, or when it causes “administrative and legal problems” for the court. Id., citing Koster, 330 U.S. at 524. In such cases, the court should apply both “private interest factors” and “public interest factors” in making its decision whether to dismiss. Id., citing Gilbert, 330 U.S. at 508-09.

The “private interest factors” favor trial here in Virginia. The “private interests” to be considered are “relative ease of access to sources of proof, availability of compulsory process for attendance of the unwilling, and the costs of obtaining attendance of the willing witnesses, ..., and all other practical problems that make trial of a case easy, expeditious and inexpensive.” Id., 454 U.S. at 241, n. 6, citing Gilbert, 330 U.S. at 508. This is a case about the failure to pay commissions, and the factual question to be determined is whether Mr. Atkins was the “procuring cause” of the underlying contracts coming to Nominum. Consequently, the primary witnesses are the employees of General Dynamics and the United States Air Force who were involved in the contracting process. See Atkins dec. So, in reviewing the private interest factors, access to proof is easier here than in California because the proof is primarily in Virginia and the D.C. Metropolitan area. Subpoena power for third party witnesses (General Dynamics and Air Force employees) exists here and not in California. Willing witnesses are in Virginia, except for any Nominum employees from California (who would only be relevant to the question of why commissions were not paid, not whether Mr. Atkins was the procuring cause of the contracts). The ease of trial is here where the government offices in question are located, and not in California. Consequently, the private interest factors break three to zero, with perhaps one draw, in favor of maintaining venue here.

The “public interest factors” also favor retaining venue in Virginia. The “public interest

factors” include “the administrative difficulties flowing from court congestion, the ‘local interest in having localized controversies decided at home,’ the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems with conflict of laws ..., and the unfairness of burdening citizens in an unrelated forum with jury duty.” Id. Applying these factors to the instant case, this court is well suited to move this case forward quickly and is undoubtedly faster and less congested than the Northern District of California. The local interest lies in Virginia, not California, because the issue is whether Mr. Atkins was the procuring cause for the contracts at issue going to Nominum, and that work occurred in Virginia. In this diversity case California law applies so that factor favors California. There are no conflict of laws problems. There is no unfair burden on the jury because the actions at issue occurred here, not in California. Consequently, these factors break three to one in favor of maintaining venue in Virginia.

In Piper, the Court upheld dismissal in large part because the trial court would have to apply Scottish law, with which it stated it was unfamiliar and would require reliance on experts. Piper, 454 U.S. at 243, 102 S.Ct. at 259-60. Here, the instant court will have no such trouble applying California law to what is a fairly standard breach of contract matter. The Piper Court further noted “dismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.” Id., 454 U.S. at 249, 102 S.Ct. at 262. Here, the burden on Nominum to try this case in Virginia is not heavy. It contracts with the federal government, and its own employees came to Virginia to meet with Mr. Atkins to work on getting these contracts. See Atkins dec. at ¶ 11. Mr. Atkins has presented very good and specific reasons for bringing these actions here. He is still located in the area (in fact, Mr. Atkins still

owns the Virginia home in which he lived while working for Nominum, see Atkins dec. at ¶ 2) and the principal witnesses from the government and General Dynamics are located here. It will be very difficult for Mr. Atkins to get these third party witnesses to California for trial, while Nominum can get its own employees from California to Virginia for trial. The Supreme Court has stated that “in any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.” Piper, 454 U.S. at 255n.23 (citations omitted). The facts here and any balancing test do not justify disturbing the plaintiff’s choice of forum.

### **III. THE COURT SHOULD NOT TRANSFER VENUE BECAUSE MOST OF THE OPERATIVE EVENTS AND RELEVANT WITNESSES ARE IN VIRGINIA.**

Virginia was the forum legitimately chosen by the plaintiff. Most of the operative events in this case occurred in Virginia, and most of the witnesses are here as well. Consequently, the Court should not transfer venue to California.

“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. §1404(a). The standard for transfer of venue is not the same as the standard for dismissal for reasons of *forum non conveniens*. Piper, 454 U.S. at 253, 102 S.Ct. at 265. Here, the Court needs to apply an “individualized, case-by-case consideration of convenience and fairness.” Stewart Organization, Inc. v. Ricoh Corporation, 487 U.S. 22, 28, 108 S.Ct. 2239, 2243, 101 L.Ed.2d 22 (1988), quoting Van Dusen v. Barrack, 376 U.S. 612, 622, 84 S.Ct. 805, 812, 11 L.Ed.2d 945 (1964).

Cases in this district suggest the Court should weigh four factors in determining whether to transfer venue. They are the plaintiff’s choice of forum, witness convenience and access, party convenience, and the interest of justice. Koh v. Microtek International, Inc., 250 F.Supp.2d

627, 633 (E.D. Va. 2003), citing Corry v. CFM Majestic, Inc., 16 F.Supp.2d 660, 666 (E.D. Va. 1998). Of these, the plaintiff's choice of forum is the most important and it, along with witness convenience and the interests of justice, weigh in favor of retaining venue here. Party convenience is probably a draw, although it may lean in favor of the plaintiff as well. Each of these factors is considered below.

First, the plaintiff's choice of forum is given "substantial weight." Id., citing Acterna, L.L.C. v. Adtech, Inc., 129 F.Supp.2d 936, 938 (E.D. Va. 2001). In fact, to overcome that choice the defendant "bears the burden of demonstrating that the balance of convenience among the parties and witnesses is *strongly* in favor of the forum to which the transfer is sought." Id., quoting Medicenters of America, Inc. v. T & V Realty & Equipment Corp., 371 F.Supp. 1180, 1184 (E.D. Va. 1974). Here, Mr. Atkins chose Virginia. Virginia was Mr. Atkins' home at the time of the operative events in this case, and he still maintains ownership of that residence. See Atkins dec. at 2. Mr. Atkins worked out of his home when working for Nominum and most of the operative events occurred in Virginia. Id. at 3, 12.

Second, witness convenience and access favor retaining venue in Virginia. The issue in this case is whether Mr. Atkins was the procuring cause of certain contracts awarded to Nominum. He performed his work at his home office in McLean, Virginia. The customers he dealt with were primarily in Virginia or the D.C. Metropolitan area. It will be the testimony of the Air Force and General Dynamics employees which determines whether Mr. Atkins was the procuring cause of these contracts, and these witnesses primarily are here in Virginia. These witnesses include a General Dynamics manager and Controller, who work in the Falls Church, Va., office of General Dynamics; the Air Force Controller, who works in the Pentagon; other witnesses located in Ashburn, Va., McLean, Va., Herndon, Va., and Maryland; and two Air

Force officers who were in Massachusetts at the time, but one of which now lives in Fairfax County, Virginia. See Atkins dec. at ¶ 4-10. A Virginia venue favors all of these witnesses.

Nominum attempts to change this analysis by refocusing on the wrong question.

Nominum states that this case is primarily about the actions of the executive management team, since they were responsible for paying Mr. Atkins. See Def. mem. at 5. This simply is not the case. Nominum admits it did not pay Mr. Atkins, so payment is not at issue. What is at issue is whether Mr. Atkins *earned* payment, and that is a question that has nothing to do with Nominum's executive team. It has everything to do with Mr. Atkins and the clients (General Dynamics and the Air Force) with which he dealt. To the extent that Nominum employees are relevant witnesses, it was Nominum's business practice to send those employees to Virginia to meet with Mr. Atkins when he was working for Nominum, Atkins dec. at ¶ 11, so it cannot be unduly burdensome to bring them to Virginia now for trial.

Third, party convenience is probably a draw, although it leans slightly toward Mr. Atkins. Obviously trial in California would be a personal burden on Mr. Atkins. Since Nominum employees came to Virginia to meet with Mr. Atkins when he worked for Nominum, presumably the burden on them to come to Virginia for trial would be less severe than the burden on Mr. Atkins to travel to California.

Fourth, the interests of justice favor Virginia. The operative facts occurred here, so a jury here should determine those facts. While the Court must apply California law to the case, this is a contract case and the law is rather straightforward. Certainly the applicable government documents would be located here in Virginia. The instant court is the most efficient in the country and this case is already on track to be completed shortly. All these factors favor retaining venue in Virginia.

Given the strong presumption in favor of the Plaintiff's choice of venue, Nominum has failed to meet its heavy burden to justify a transfer of venue to California.

WHEREFORE, the plaintiff, William Atkins, requests that the Court deny Defendant Nominum, Inc.'s Motion to Dismiss or, in the Alternative, to Transfer Venue.

Respectfully submitted,

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/s/  
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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing Plaintiff's Opposition to Defendant's Motion To Dismiss or, in the alternative, to Transfer Venue electronically on May 30, 2008 on counsel for defendant addressed as follows:

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
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WILLIAM ATKINS :  
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 Plaintiff :  
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 v. :  
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 NOMINUM, INC. :  
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 Defendant. :  
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Civil Action No.: 1:08cv461  
CHM/TRJ

**Declaration of William Atkins**

I William Atkins state as follows:

1. I am the plaintiff in this action.
2. At the time of my employment with Nominum, I lived in McLean Virginia and used a home office in my McLean, Virginia home as my office. I still own the McLean residence.
3. My work involved procuring contracts for Nominum under a Master Reseller agreement between General Dynamics and the United States Air Force. My job duties were carried out from my physical location in McLean, Va. Much of my time was spent on the telephone or exchanging emails with people in the Air Force or General Dynamics, or NETCENTS system integrators, or drafting documents for submission.
4. Some of the principal professional contacts and witnesses involved in my work were in the Falls Church office of General Dynamics (mistakenly referred to as Arlington in my complaint). The corporate address for General Dynamics is 2941 Fairview Park Drive, Suite 100, Falls Church, Virginia 22042-4513. One of these contacts was Lindy Tagliaferri, who was a manager at General Dynamics who worked with me to build demand for Nominum products



within General Dynamics. Another important witness is L. Hugh Redd, the Controller at General Dynamics, who can verify payments made to Nominum on the contracts I procured.

5. Another important witness in this case will be the Air Force Comptroller, John H. Gibson II, who is located in the Pentagon in Arlington, Va. He can testify as to contracts awarded to General Dynamics and Nominum, and the payments thereunder.

6. Other contacts involved in my work included First Lieutenant Tracy Latch and Jody Yellope, who were with the Air Force and located at Hanscom Air Force Base in Massachusetts. I believe Lt. Latch is a resident of Virginia.

7. Another important contact was James Claar, who was the NETCENTS Procurement Coordinator. NETCENTS was the Air Force contracting vehicle under which I procured sales for Nominum. Mr. Claar worked at a Verizon office in Maryland. He has direct knowledge of my work.

8. Another important witness is Jim Hoke, who was the NETCENTS Procurement Coordinator for Telos. NETCENTS was the Air Force contracting vehicle under which I procured sales for Nominum. Mr. Hoke worked at a Telos office in Ashburn, Virginia. He has direct knowledge of my work.

9. Another important witness is Doug Steele, who was the US Air Force Sales Manager for Red Hat. Red Hat is a partner of Nominum. Mr. Steele worked at a Red Hat office in McLean, Virginia. He has direct knowledge of my work with the US Air Force and NETCENTS.

10. Another contact was Keith Fuller, who now lives in Fairfax County and works for Juniper Networks in Herndon, Va.

11. I had very little contact with Nominum employees in California. Meetings with Nominum to discuss business with the Department of Defense and the Federal Government involved Nominum representatives Tim Dyer, Vice President of Sales, and Paul Mockapetris, the Chairman and Chief Scientist, among others, and were held in my home in McLean, Virginia, or in Alexandria, Virginia; Reston, Virginia; Hendon, Virginia; Fairfax, Virginia; Gaithersburg, MD; or Washington, DC. Further, my home was used at the meeting location for meeting preparations, including meetings with Mr. Mockapetris.

12. I believe most of the people who would testify about the facts that establish I was the procuring cause for the Nominum contracts in question are located here in Northern Virginia or the immediate metropolitan area and the events that led to the contract awards were performed in Virginia.

**Verification**

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATE: 5/30/2008

William Atkins  
William Atkins