UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. EOX HOLDINGS LLC and ANDREW GIZIENSKI, Defendants.	Case No.: 18-cv-8890

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER

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Plaintiff Commodity Futures Trading Commission ("CFTC") respectfully submits this memorandum of law in opposition to Defendants' motion to transfer this case to the U.S. District Court for the Southern District of Texas pursuant to 28 U.S.C. § 1404(a).[1]

Introduction

On September 28, 2018, the CFTC filed a four-count complaint against EOX Holdings, LLC ("EOX") and Andrew Gizienski ("Gizienski") (collectively, "Defendants"). Counts I and II are grounded on allegations that Gizienski, a broker for EOX: (1) misappropriated material, nonpublic information in breach of a pre-existing duty owed to EOX customers, who are located throughout the United States and Canada; (2) engaged in acts, practices, or a course of business which operated or would operate as a fraud or deceit upon EOX customers; (3) unlawfully disclosed customer orders held by EOX; and (4) knowingly traded against customers without the customers' prior consent. Counts III and IV stem from allegations that EOX failed to keep required communications and written records, and further failed to adequately supervise Gizienski and other brokers located throughout the United States.

Unhappy with the CFTC's decision to bring suit in this Court, Defendants now ask the Court to transfer this case to the forum they prefer—the Southern District of Texas. But contrary to Defendants' arguments, the operative facts are not limited to Houston, and the Southern District of Texas would be no more convenient for the parties and witnesses, who hail from many places in the United States and Canada. The Southern District of Texas presents no clear advantages with respect to the locus of operative facts and evidence, its familiarity with the

[1] Defendants also seek transfer under 28 U.S.C. §§ 1406(a) and 1631. *See* Defendants' J. Mem. L. (ECF No. 21) at 14-22. Sections 1406(a) and 1631 provide for transfer upon findings of improper venue or lack of jurisdiction. 28 U.S.C. §§ 1406(a), 1631. As noted in the CFTC's response to Defendants' motion to dismiss and for summary judgment, filed concurrently with this memorandum, Andrew Gizienski is subject to this Court's exercise of personal jurisdiction and venue is proper in this district. *See* ECF No. 35 at 16-22. Given the lack of grounds for transfer under sections 1406(a) and 1631, this memorandum focuses on the Court's discretionary power to transfer cases under section 1404(a).

federal laws and regulations governing this action, or judicial economy. As explained below, the CFTC chose this forum for legitimate reasons and its choice is entitled to deference. None of the factors typically analyzed by courts weigh strongly in favor of transfer. Because Defendants have failed to meet their burden by making a strong case for transfer by a clear and convincing showing, the CFTC respectfully requests that the Court deny Defendants' motion and permit the case to move forward in this forum.

Legal Standard

Under section 1404(a), "[f]or 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). In determining whether to exercise this discretion, "courts commonly consider such factors as (1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, (7) the relative means of the parties, (8) the forum's familiarity with the governing law, and (9) trial efficiency and the interests of justice, based on the totality of the circumstances." *Albert Fadem Trust v. Duke Energy Corp.*, 214 F. Supp. 2d 341, 343 (S.D.N.Y. 2002).

As the parties seeking a transfer, Defendants bear the "burden of making out a strong case for transfer," and courts consistently and appropriately apply "the clear and convincing evidence standard in determining whether to exercise discretion to grant a transfer motion." *N.Y. Marine & Gen. Ins. Co. v. LaFarge N. Am., Inc.*, 599 F.3d 102, 114 (2d Cir. 2010) (internal quotations omitted); *see also CFTC v. Wilson*, 27 F. Supp. 3d 517, 537 (S.D.N.Y. 2014)

(denying a motion to transfer and noting that transfers are not favored absent a clear and convincing showing that the balance of convenience strongly favors the alternate forum).

Argument

The CFTC does not dispute that this case could have been brought in the Southern District of Texas, but it disagrees that the case should be transferred there. The CFTC reasonably chose to bring suit in the Southern District of New York, and Defendants have not carried their burden to override that choice.

I. The CFTC's Choice of Forum Is Entitled to Deference and Weighs Against Transfer

A plaintiff's choice of forum must be given due deference and should not be disturbed unless the balance of convenience and justice weighs heavily in favor of a defendant's forum. *See, e.g.*, *Wilson*, 27 F. Supp. 3d at 537; *ESPN, Inc. v. Quiksilver, Inc.*, 581 F. Supp. 2d 542, 547 (S.D.N.Y. 2008) ("plaintiff's choice of forum should be accorded deference in the event that other factors do not weigh strongly in favor of transfer"). In an enforcement action, the CFTC's choice of forum "is a particularly strong factor . . . as the venue provision of the [Commodity Exchange] Act is intended to give the widest possible choice of forum." *SEC v. Thrasher*, No. 92 Civ. 6987 (JFK), 1993 WL 37044, at *3 (S.D.N.Y. 1993); *see also* 7 U.S.C. § 13a-1(e) (venue provision of the Commodity Exchange Act). The Second Circuit has further noted that courts should give "greater deference to a plaintiff's forum choice to the extent that it was motivated by legitimate reasons, including the plaintiff's convenience . . . ." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001).

The CFTC filed this case in the Southern District of New York because (1) Defendants transact business here, (2) non-trivial acts relevant to the alleged violations occurred here, (3) both EOX and the CFTC have offices here; (4) it is centrally located amongst the many districts in which witnesses reside; and (5) the local interest in this matter given that it involves the

brokering and trading of futures contracts listed on a New York-based exchange. The CFTC's forum choice was motivated by valid considerations of convenience and this district's connection to the facts and the issues at stake.

Defendants argue the CFTC's forum choice should receive no weight because it is neither the home forum of the CFTC attorneys responsible for this case nor the locus of operative facts. *See* Defs. J. Mem. L. (ECF No. 21) at 12. Although the undersigned attorneys are employed in the CFTC's Chicago office, the proximity of the CFTC's New York office to the courthouse is of significant convenience. It provides the attorneys with space, resources, and litigation support for court conferences, hearings, and trial. This is a legitimate reason entitled to deference. *See SEC v. KPMG, LLP*, No. 03 Civ. 671 (DLC), 2003 WL 1842871, at *4 (S.D.N.Y. Apr. 9, 2003) ("The plaintiff has shown that its choice of forum was dictated by convenience, principally the presence of an SEC office in New York, and its choice is therefore entitled to substantial deference."). And Defendants are incorrect in their assertion that "none of the operative facts arose in this district." Defs. J. Mem. L. (ECF No. 21) at 10. As explained below in the discussion of the "locus of operative facts" factor, the conduct alleged in the Complaint bears a strong connection to this district. The CFTC's choice of forum is therefore entitled to deference and this factor weighs against transferring the case.

II. The Convenience to the Witnesses Is a Neutral Factor

In determining whether to transfer a case under 28 U.S.C. § 1404(a), the convenience of witnesses is an important consideration, and the convenience of non-party witnesses generally carries more weight than that of party witnesses. *Tarzy v. Dwyer*, No. 18 Civ. 1456 (JFK), 2019 WL 132280, at *3 (S.D.N.Y. Jan. 8, 2019). In their motion, Defendants identify six current and former officers and employees of EOX, excluding Gizienski himself, and three customers, two of

whom are based in Houston, that are likely to be witnesses in this case. *See* Defs. J. Mem. L. (ECF No. 21) at 4-6, 15. The CFTC does not dispute that many of these individuals are likely to be witnesses, but Defendants submit nothing to demonstrate that any of the identified individuals will have difficulty testifying if the case remains here.

Defendants also overlook the fact that numerous witnesses hail from locations far from Houston. As Gizienski notes, the potential witnesses identified as Customers B, E, and F in the Complaint respectively reside in New Jersey, Michigan, and Canada. *See* Gizienski Decl. ¶ 4 (ECF No. 27). The female trader referenced in the Complaint resides in Maryland. *See* Compl. ¶¶ 38-41; Declaration of Heather Dasso filed herewith ("Dasso Decl."), ¶ 11. Each can offer testimony about the trading and communications identified in the Complaint, their relationship with EOX in general and Gizienski in particular, and their expectations regarding the use of their confidential trading information. *Id.* Customer A, a resident of Canada and Arizona, will testify regarding his relationship with Gizienski and the course of conduct set forth in the Complaint. *Id*. Former EOX brokers Tom Brady, Chris Hunter, Chris McQuade, each of whom worked in EOX's New York office and who continue to reside in the New York area, as well as Howard Fishman, a Florida resident, have knowledge regarding the brokerage desk's practices and EOX's recordkeeping practices. *Id*. Communications and information collected during the CFTC's investigation show that Brady, Hunter, McQuade, and Fishman also have knowledge of Gizienski's relationship with Customer A and allegations of unlawful or unethical conduct by Gizienski stemming from that relationship. Dasso Decl. ¶ 11. The CFTC is also likely to call witnesses from ICE Futures, U.S. ("IFUS") in New York or Chicago to testify regarding IFUS' trading rules, block trades submitted by Gizienski and other EOX brokers, Gizienski's trading on IFUS' electronic trading platform, and the exchange's investigation into Defendants' conduct.

Id. Additional witnesses are likely to be called from the futures commission merchants that held the account Gizienski traded, both of which are headquartered in New York. *Id.*

There is no particular forum that will be convenient for all of the witnesses who are likely to be called in this matter. But this district provides a central location with convenient access for both party and non-party witnesses. Defendants' conclusory allegations of inconvenience to a small number of potential witnesses do not show that the Southern District of Texas is the more appropriate forum. This factor does not weigh in favor of transfer.

III. The Location of Documents Is a Neutral Factor

Defendants claim that access to sources of proof favors transfer because "documents relevant to this case are located or maintained by custodians located in EOX's office in Houston." *See* Defs. J. Mem. L. (ECF No. 21) at 10. Defendants fail to explain why litigating in this district would hinder their access to their own records. In any event, given technological advances facilitating the easy transfer of evidence, as well as the nature of modern discovery, in which virtually all documents are exchanged electronically, courts routinely recognize that document location is, at best, a neutral factor in the transfer analysis. *See ESPN, Inc.*, 581 F. Supp. 2d at 548 ("In an era of electronic documents, easy copying and overnight shipping, this factor assumes much less importance than it did formerly."); *In re Channeladvisor Corp. Sec. Litig.*, No. 15-cv-506 (AJN), 2015 WL 4064625, at *3 (S.D.N.Y. July 2, 2015) (location of documents and access to sources of proof is not particularly significant given the technological age in which we live, where there is widespread use of, among other things, electronic document production") (internal quotations omitted). This factor does not favor transfer.

IV. The Convenience to the Parties Is a Neutral Factor

The "purpose of § 1404(a) is not to shift the convenience from one party to the other." *SEC v. Morton*, No. 10 Civ. 1720 (LAK)(MHD), 2011 WL 1344259, at *14 (S.D.N.Y. Mar. 31, 2011) (citation omitted); *see also Lynch v. Nat'l Prescription Adm'rs*, No. 03 Civ. 1303 (GBD), 2004 WL 385156, at *3 (S.D.N.Y. Mar. 1, 2004) (denying transfer when it would "merely switch the burden of inconvenience from one party to the other") (citation omitted). But this is precisely what Defendants seek to do.

Although Defendants claim that this forum is "highly inconvenient" for them, *see* Defs. J. Mem. L. (ECF No. 21) at 1, they had, and continue to have, a significant presence in this district. EOX maintains a New York office within walking distance of the Southern District of New York courthouse. *See* Dasso Decl. ¶ 5. Defendants transact business in New York, solicit customers based in New York, and the core business of Gizienski's North East Power Desk is the brokering of block trades in futures and options contracts listed on IFUS, an exchange headquartered in New York. *See* Dasso Decl. ¶¶ 5-6, 8. Moreover, EOX serves as the introducing broker for a portfolio of companies owned by OTC Global Holdings LP ("OTC Global"), which holds itself out as "the largest independent institutional broker of commodities, covering physical and financial commodity instruments from offices in Houston, Chicago, New York, New Jersey, Louisville, London, and Geneva."[2] As a wholly-owned subsidiary of OTC Global, EOX is part of a large, international company with extensive resources. The Court should look skeptically on Defendants' inconvenience claim.

The CFTC, in contrast, does not have an office in or anywhere near the Southern District of Texas. As noted above, the proximity of the CFTC's New York office to the Southern District of New York courthouse is of significant convenience for the litigation of this

[2] OTC Global Holdings, http://www.otcgh.com/about-us/ (last visited February 11, 2019).

enforcement action. Defendants cannot, and do not, provide any valid reason why the "inconvenience" of litigating in New York, where they transact business and maintain a physical presence, is any greater than the inconvenience to the CFTC of litigating in Houston. This factor does not favor transfer. *See SEC v. RPM Int'l, Inc.*, 223 F. Supp. 3d 110, 117 (D.D.C. 2016) (transfer not favored where government has office where case was brought, and transfer would merely shift inconvenience); *SEC v. Rose Fund LLC*, No. C 03-04593 (WHA), 2004 WL 2445242, at *2 (N.D. Cal. Jan. 9, 2004) (denying motion to transfer case to S.D. Cal. in part because the government has no regional office in that district).

V. The Locus of Operative Facts Is a Neutral Factor

Defendants assert that "none of the operative facts arose in this district." Defs. J. Mem. L. (ECF No. 21) at 10. That is an overstatement. Although Gizienski was based in EOX's Houston office, the facts giving rise to the CFTC's claims are not limited to the Southern District of Texas. The Complaint rests, in part, on allegations that Gizienski (1) misappropriated confidential information relating to EOX customers, information he had access to by virtue of his role as a broker on EOX's North East Power Desk, and (2) that he traded while in possession of, and on the basis of, such information. Compl. ¶¶ 2, 29-34. Throughout the relevant period, the North East Power Desk, for which Gizienski served as co-head, operated out of EOX's New York office, as well as Houston. *See* Dasso Decl. ¶ 5. The desk collaboratively brokered block trades for customers located throughout the United States, including New York. *Id.* ¶¶ 6-7. Gizienski regularly communicated with brokers under his supervision in New York, and was privy to the information those brokers received from customers. *Id.* ¶ 7.

Moreover, all of Gizienski's alleged conduct occurred in connection with futures and options contracts listed for trading on IFUS, a New York-based exchange. *See* Dasso Decl. ¶ 8;

Compl. ¶ 14. His discretionary trading authority permitted him to trade on IFUS' electronic trading platform, *see* Compl. ¶ 31, and he executed more than 500 trades directly through the exchange while having access to confidential customer information. Dasso Decl. ¶ 10. The account Gizienski traded was held at futures commission merchants headquartered in New York. *Id.* ¶ 9. The block trades Gizienski brokered or executed in the course of his scheme were governed by IFUS rules, and all block trades were reported electronically to IFUS in accordance with those rules. Compl. ¶¶ 14, 18-19.

Likewise, the CFTC's claims against EOX for failing to comply with recordkeeping obligations and failing to supervise its brokers are not confined to Gizienski's actions in Houston. *See* Compl. ¶¶ 62-74, 93-97. Those claims apply with equal force to EOX's brokerage operations in New York, including the failure of its New York-based brokers to retain all pre-trade communications with customers and to prepare adequate written records of customer orders. *Id.* Because both the Southern District of New York and the Southern District of Texas are loci of operative facts, this factor is neutral and does not favor transfer. *See Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 697 (S.D.N.Y. 2009) ("Because both districts are loci of operative facts, this factor is neutral in the analysis.").

VI. Defendants Fail to Show that the Availability of Process to Compel Witnesses Favors Transfer

Although a court generally cannot compel a non-party witness to travel more than 100 miles to testify, this factor becomes irrelevant in the absence of any indication that non-party witnesses will be unwilling to testify. *City of Pontiac Gen. Employees Ret. Sys. v. Dell, Inc.*, No. 14-CV-3644 (VSB), 2015 WL 12659925, at *6 (S.D.N.Y. Apr. 30, 2015). As the parties seeking transfer, the burden rests on Defendants to make such a showing. *See Thayer/Patricof Educ. Funding, LLC v. Pryor Resources, Inc.*, 196 F. Supp. 2d 21, 33 (D.D.C. 2002) (a defendant

seeking transfer "must demonstrate . . . what a non-resident will testify to, the importance of the testimony to the issues in the case, and whether that witness is willing to travel to a foreign jurisdiction"). Defendants, however, do not identify a single non-party witness whom they would call at trial who would be unwilling to attend a trial in New York or whose testimony could not be presented by deposition testimony, including potential videotaped testimony. *See Kelly v. MD Buyline, Inc.*, 2 F. Supp. 2d 420, 442 (S.D.N.Y. 1998) (denying motion to transfer in party because "defendants make no showing . . . and we have no reason to believe that any significant witnesses would be unavailable for testimony—either live or by deposition—if the case remained here"). This factor does not weigh in favor of transfer.

VII. Defendants Fail to Show That The Relative Means of Parties Favors Transfer

Defendants argue that transfer is warranted simply because they "are a private organization and an individual," whereas the CFTC possesses the resources of a federal agency. *See* Defs. J. Mem. L. (ECF No. 21) at 13. Defendants, however, provide no support for their generalized claim of insufficient means. While a defendant's financial condition is a factor to be considered on a motion to transfer, it is well-recognized that unsubstantiated claims of financial hardship are insufficient. *See Hummingbird USA, Inc. v. Texas Guaranteed Student Loan Corp.*, No. 06 Civ. 7672 (LTS), 2007 WL 163111, at *3 (S.D.N.Y. Jan. 22, 2007) ("any party arguing for a transfer on the basis of the relative means of the parties must offer documentation showing that granting or denying the transfer would be unduly burdensome, which Defendant has failed to do"); *SEC v. Daly*, No. 05 Civ. 55 (CKK), 2006 WL 6190699, at *5 (D.D.C. Feb. 11, 2006) ("Defendant has failed to provide the Court with any specifics or documented proof related to his assertion of financial duress and therefore does not provide the Court with any real basis for disrupting the Plaintiff's choice of forum."). This factor does not weigh in favor of transfer.

Moreover, EOX is a registered introducing broker that maintains an office and transacts business in New York. It is a wholly-owned subsidiary of OTC Global, the largest independent interdealer broker of commodities in North America and Europe, and EOX executes block futures and options trades on behalf of numerous affiliate companies within OTC Global's portfolio of companies.[3] Compl. ¶ 12. Likewise, as an Associated Person of EOX, Gizienski transacts business in this district and supervises brokers located in this district. Any contention by Defendants that it is unreasonable or inconvenient for them to litigate in this forum, or that they lack the financial resources to do so, is baseless given that they continue to avail themselves of the benefits of doing business here.

VIII. The Court's Familiarity with the Substantive Law Is a Neutral Factor

Defendants contend that transfer is appropriate because federal courts in Texas are more familiar with the "state fiduciary and agency law" that bears on the CFTC's allegations that Gizienski misappropriated material, nonpublic information in breach of a pre-existing duty owed to EOX customers. *See* Defs. J. Mem. L. (ECF No. 21) at 12-13. But it is federal common law, not state law that defines the scope of one's duty to maintain the confidentiality of material, nonpublic information. *See Steginsky v. Xcelera, Inc.*, 741 F.3d 365 (2d Cir. 2014) ("the fiduciary-like duty against insider trading . . . is imposed and defined by federal common law"); *United States v. Whitman*, 904 F. Supp. 2d 363, 369 (S.D.N.Y. 2012), *aff'd* 555 Fed App'x 98 (2d Cir. 2014) ("*Dirks*, and indeed all the Supreme Court cases dealing with insider trading, have implicitly assumed that the relevant fiduciary duty is a matter of federal common law, for they have described it and defined it without ever referencing state law."). This forum is fully capable

[3] EOX Holdings, http://www.otcgh.com/eox-holdings/ (last visited February 11, 2019); OTC Global Holdings, http://www.otcgh.com (last visited February 11, 2019).

of applying the federal statutes and regulations upon which the CFTC based its claims. This factor does not favor transfer.

Moreover, even assuming, counterfactually, that Texas law applied, this factor would be of little weight. "In federal court, familiarity with the governing law is generally given little weight when considering transfer of venue." *Royal & Sun Alliance Ins., PLC v. Nippon Express USA, Inc.*, 202 F. Supp. 3d 399, 410 (S.D.N.Y. 2018). Federal courts commonly apply state substantive law, which may not be the law of the state in which the court sits. *Id.* (quoting *Kwik Goal, Ltd. v. Youth Sports Publ'g, Inc.*, No. 06 Civ. 395 (HB), 2006 WL 1517598, at *4 (S.D.N.Y. May 31, 2006)).

IX. Neither Trial Efficiency Nor the Interest of Justice Favors Transfer

Defendants claim that docket congestion weighs in favor of transfer, *see* Defs. J. Mem. L. (ECF No. 21) at 20, because the median time from filing to trial in the Southern District of Texas is 18.9 months compared to 29.4 months in this district. But the statistics cited by Defendants also show that this district has a slightly shorter median time to disposition in civil cases than the Southern District of Texas (6.1 months versus 7.6 months), and slightly less pending cases per judgeship than the Southern District of Texas (659 compared to 688).[4] The docket statistics, in short, are neutral at best and do not weigh in favor of transfer. Moreover, transferring the case at this stage would likely delay, not expedite its resolution. An initial pretrial conference is scheduled for March 16, 2014, prior to which the parties are expected to jointly submit a case scheduling order. The interest of justice is better served by permitting discovery to proceed in a timely manner before this Court.

[4] *See* Adm. Office of the U.S. Courts, *Federal Court Management Statistics* (reporting period of September 30, 2018), *available at* http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-september-2018 (last visited February 8, 2019).

Conclusion

The law imposes a heavy burden on those seeking to transfer a civil action under 28 U.S.C. § 1404. Defendants have failed to satisfy that burden. The CFTC respectfully submits that Defendants' motion to transfer this case to the U.S. District Court for the Southern District of Texas must be denied.

Date: February 13, 2019

Respectfully submitted,

s/ Daniel R. Burstein

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CERTIFICATE OF SERVICE

I certify that on February 13, 2019, I served the foregoing Memorandum of Law in Opposition to Defendants' Motion to Transfer on counsel of record via the Court's ECF system.

s/ Daniel R. Burstein