UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	**Criminal No.: 95-236-A**
	)	
v.	)	**Violation: 18 U.S.C. § 1001**
	)	
EXOLON-ESK COMPANY,	)	
WILLIAM H. NEHILL,	)	
	)	
Defendants	)	

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER PURSUANT TO FED. R. CRIM. P. 21(b)

The United States submits this memorandum in opposition to the Motion of Defendants Exolon-ESK ("Exolon") and William H. Nehill ("Nehill") to Transfer Pursuant to Fed. R. Crim. P. 21(b). The Eastern District of Virginia is an appropriate forum in which to try this case because the false statement charged in the Indictment was sent by Exolon and Mr. Nehill to this jurisdiction, relied upon by a government agency in this jurisdiction, and formed the basis of that agency's contract award to Exolon in this jurisdiction. The United States estimates that its case-in-chief will take one to two days, will involve multiple witnesses from the Alexandria, Virginia area, will have little or no impact on the day-to-day operations of Exolon's business, and will disrupt defendant Nehill's personal life little more than would a trial in Buffalo. Defendants have failed to meet their burden under Rule 21(b) of establishing facts which demonstrate substantial inconvenience or undue hardship which are necessary to compel transfer. For these reasons, the United States respectfully requests that defendants' motion to transfer be denied.

I.

STATEMENT OF FACTS

The Grand Jury has charged defendants Exolon and Nehill with making and using false statements in connection with bidding to purchase aluminum oxide fused crude, a material which is used to manufacture abrasive grain and is stockpiled by the Department of Defense, Defense Logistics Agency ("DLA").[1] Defendant Nehill is the former Executive Vice President, Treasurer, and Secretary of Exolon, a large abrasive grains manufacturer headquartered in Tonawanda, New York.

The present case arose out of a complaint received by the Department of Justice from the DLA that Exolon, Nehill, and other Exolon employees had submitted bid packages to the DLA containing false certifications. Based on discussions with John Klein, First Assistant United States Attorney in the Eastern District of Virginia, and Ruth Kowarski, counsel for the DLA, it was jointly decided that the Department of Justice would handle the prosecution of any false statements charged, with the assistance and direction of Mr. Klein's and Ms. Kowarski's offices, due to its familiarity with the industry and the potential defendants. Government Affirmation ("Aff.") at ¶ 2.[2] The Defense Criminal Investigative Service ("DCIS") began an investigation of

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[1]Aluminum oxide is used to manufacture bonded, coated, and refractory abrasive products like grinding wheels, sandpaper, and optical polishing apparatus.

[2]Exolon and Mr. Nehill are under indictment in the Western District of New York with violations of 15 U.S.C. § 1 for fixing the price of abrasive grain, Exolon with a violation of 18 U.S.C. § 401(3) for contempt of a court order, and Mr. Nehill with violations of 18 U.S.C. §1503 and 18 U.S.C. §1621 for his conduct in shredding documents responsive to a grand jury subpoena duces tecum and filing false affidavits of compliance.

Exolon, Mr. Nehill and others on behalf of DLA, in March 1995. The investigation revealed a simple, straightforward course of conduct by defendants to purchase material from the federal government under false pretenses. As the Indictment alleges, defendants made and submitted false certifications regarding debarment, suspension, proposed debarment, and other responsibility matters which were incorporated into, and formed part of, Exolon's bid to the DLA for the purchase of aluminum oxide fused crude. This bid, signed by Mr. Nehill on behalf of Exolon, stated in part that the offerer and/or any of its principals were not presently indicted for certain listed offenses including falsification or destruction of records and making false statements. At the time Nehill signed the bid and Exolon submitted it to the DLA, one of Exolon's principals, Mr. Nehill, was under indictment in the Western District of New York, for obstructing the due administration of justice by destroying company records and for making false declarations under oath.

On May 16, 1995, the Grand Jury empaneled in the Eastern District of Virginia returned a one-count indictment against Exolon and Mr. Nehill for violations of 18 U.S.C. § 1001.

II.

LEGAL ARGUMENT

A. The Eastern District of Virginia Is the Appropriate Venue for This Case.

"'The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. . . .'" Platt v. Minnesota Mining Co., 376 U.S. 240, 245 (1963) (quoting United States v. Cores, 356 U.S. 405, 407 (1958)). Venue for false statements offenses is proper where the statements in question were filed with, or presented to, a federal agency. United States v. Barsanti, 943 F.2d 428, 434-35 (4th Cir. 1991), cert.

denied, 503 U.S. 936 (1992)(venue proper in the Eastern District of Virginia where false statement sent to HUD through Virginia mortgage bank that processed paperwork); United States v. Blecker, 657 F.2d 629, 632 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982)(venue proper in Eastern District of Virginia where last act taken by the defendants was presenting false claims to CSC at Rosslyn, Virginia office). See United States v. Bilzerian, 926 F.2d 1285, 1301 (2d Cir. 1991), cert. denied, 502 U.S. 813 (1991); United States v. Mendel, 746 F.2d 155, 165 (2d Cir. 1984), cert. denied, 469 U.S. 1213 (1985).

In a recent, unpublished decision, a copy of which is attached, the Fourth Circuit held that venue in a false statements case is proper in districts in which an affected federal agency receives and acts upon the statement in question. United States v. Sullivan, 905 F.2d 1532, Nos. 89-5414, 89-5415, 1990 WL 74422 (4th Cir. 1990) (citing United States v. Candella, 487 F.2d 1223 (2d Cir.), cert. denied, 415 U.S. 977 (1974)).[3] The false statement charged in the Indictment was received by the DLA in the Eastern District of Virginia and formed the basis for DLA's decision to award Exolon a purchase contract. Similarly, in Sullivan, where defendants also were charged with violating 18 U.S.C. § 1001 in connection with submitting a false certification in a contract bid to the military, the contract award decision was made in Arlington, Virginia and was based, in part, on the false certifications. The Sullivan Court held that venue was proper in the Eastern District of Virginia because that was the final destination of the contract bid that contained the false statement in question.

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[3]The Government recognizes that the Fourth Circuit does not favor citation of unpublished dispositions, except in limited circumstances. However, the Government's argument is only supplemented by the persuasive reasoning in Sullivan, and its similarities with the instant case argue hard for its consideration in the determination of this motion.

B. Defendants Have Failed to Meet Their Burden of Demonstrating That Transfer Is Warranted in This Case.

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> For the convenience of the parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.

Change of venue under this rule, and Local Rule of Practice 5, is discretionary, and a trial judge's decision on the matter is entitled to deference. United States v. Heaps, 39 F.3d 479, 482 (4th Cir. 1994). The facts must compel and not merely support transfer before an appellate court will find an abuse of discretion. United States v. Morrison, 946 F.2d 484, 489 (7th Cir. 1991), cert. denied, ___ U.S. ___, 113 SCt. 826 (1992).

When deciding Rule 21(b) transfer motions, courts rely on the general rule that criminal prosecutions should be retained in the original district in which the case was filed. See United States v. Bloom, 78 F.R.D. 591, 608 (E.D. Pa. 1977); United States v. Wecker, 620 F. Supp. 1002, 1004 (D. Del 1985). Only "rarely and for good cause should a prosecution be withdrawn by a judicial act from the court in which it was brought." Wecker, 620 F. Supp. at 1004 (quoting United States v. Jones, 43 F.R.D. 511, 514 (D.D.C. 1967)). Because the general rule indicates that criminal prosecutions should stay in their original districts, defendants who request a transfer must show "substantial inconvenience or their motion will be denied." Id.; see also United States v. Green, 373 F. Supp. 149 (E.D. Pa.), aff'd, 505 F.2d 731 (3d Cir. 1974), cert. denied, 420 U.S. 978 (1975). The moving party bears the burden of setting forth facts sufficient to warrant a transfer to a different district. See United States v. Vasta, 649 F. Supp. 974, 979 (S.D.N.Y. 1986); United States v. Persico, 621 F. Supp. 842, 858 (S.D.N.Y. 1985), aff'd, 774 F.2d 30 (2d Cir. 1985).

The courts generally consider ten factors in determining whether a case should be transferred in the "interest of justice" as required by Rule 21(b), including: 1) location of the defendant; 2) location of possible witnesses; 3) location of events likely to be in issue; 4) location of documents and records likely to be involved; 5) disruption of defendant's business; 6) expense to the parties; 7) location of counsel; 8) relative accessibility of place of trial; 9) docket condition of each district or division involved; and 10) any other elements which might affect transfer. Platt v. Minnesota Mining Co., 376 U.S. at 243-44. See Heaps, 39 F.3d at 483 (where Fourth Circuit approved of District Court for Eastern District of Virginia applying the "Platt" factors" to questions of venue, and upheld the District Court's venue determination). A careful review of the Platt factors indicates that defendants have not sustained their burden of demonstrating facts sufficient to compel the transfer of this case.

1. Location of Defendants

Criminal defendants have no constitutional right to a trial in their home districts. Platt, 376 U.S. at 245; United States v. Aronoff, 463 F. Supp. 454, 457 (S.D.N.Y. 1978).[4] The home of a defendant has no independent significance in determining whether transfer to that district would be in the interest of justice. Platt at 245-46. See United States v. Espinoza, 641 F.2d 153, 162 (4th Cir. 1981). cert. denied, 454 U.S. 841 (1981)(stating Fourth Circuit's aversion to

[4]Defendants cite Aronoff in support of their contention that "as a matter of policy, a defendant should ordinarily be tried, wherever possible, where he resides." 463 F. Supp. at 457. (Def. Mem. at 12). Aronoff, however, recognizes that this policy was intentionally subordinated by the authors of the Constitution to another policy, contained in Article II, Section 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . ." Aronoff ultimately reaffirms the holding in Platt "that the location of a corporate defendant's home has 'no independent significance in determining whether transfer to that district would be "in the interest of justice."'" 463 F. Supp. at 457.

defense arguments that there is a right to be tried where one resides); United States v. Donato, 866 F. Supp. 288, 293 (W.D. Va. 1994) (defendants' residence has no independent significance apart from other factors militating in favor of transfer).[5] This well-established rule is especially applicable here, where the Government's case-in-chief will take only about one day, and the entire trial will likely last no longer than about two days. Moreover, defendants frequently conduct business in the Eastern District of Virginia and voluntarily have submitted multiple bids to purchase material from the DLA. Defendants' papers neglect to mention that in the past two years, DLA has awarded Exolon contracts to purchase on at least eight occasions. Aff. at ¶ 3. And, Exolon seeks to conduct additional business in this jurisdiction, as it is vigorously lobbying DLA (in-person) to reinstate its suspended purchasing privileges. Id. at ¶ 4. In short, this factor does not compel transfer.

2. Location of Witnesses

Defendants speculate about the number of witnesses they think might be called in this case. However, DCIS interviews of Exolon personnel, including those persons named in Mr. Kearney's affidavit in support of defendants' motion, revealed that only three Exolon employees were involved in DLA bidding other than defendant Nehill. Aff. at ¶ 3. Although the United States has not finalized a witness list, most of the substantive testimony in the Government's affirmative case will come from witnesses employed by the DLA and DNSC in the Eastern

[5]Defendants' reliance on the Supreme Court case Hyde v. Shine, 199 U.S. 62, 78 (1905) for the proposition that a defendant should be tried in his home district is misplaced. That case was decided in 1905, almost sixty years before Platt, in an era before electronic and telephonic communications were commonplace and when cross country travel was likely by steam train, and certainly not by jet airplane.

District of Virginia. Each contracting officer, bid custodian, and other potential trial witnesses from the Government with knowledge of defendants' fraudulent bids, resides in this jurisdiction.

It is when the overwhelming majority of potential witnesses reside closer to the district to which transfer is requested that the convenience of the witnesses may tilt in favor of transfer. See United States v. Hurwitz, 573 F. Supp. 547, 552 (S.D. W.Va. 1983). As the Government's potential witnesses reside in the Eastern District of Virginia, and defendants' potential witnesses allegedly reside in the Western District of New York, the location of witnesses in this case neither militates for nor against transfer. See United States v. Oster, 580 F. Supp. 599, 602 (S.D. W.Va. 1984).

3. Location of Events in Issue

As noted above, the pertinent acts supporting the charges in the Indictment occurred in the Eastern District of Virginia at DLA/DNSC headquarters. Defendants incorrectly represent to the Court that the DLA's receipt of the fraudulent certification "is the only event which has any connection to this indictment and which did not take place in the Western District of New York." Def. Mo. at 5. The false certifications sent by defendants to the DLA not only were received in this jurisdiction, sufficient under the case law to support venue, but also were read, evaluated, discussed, and acted upon by Government personnel in this jurisdiction. See Sullivan, 1990 WL 74422 at *5 (venue proper where affected federal agency acts on statement in question). The DLA's decision to award Exolon the purchase contract was based on defendants' bid including certifications, and was made by the DLA in this jurisdiction. See Candella, 487 F.2d at 1228 (venue proper where affected federal agency decision is reached based on statement in question). Under these circumstances, this factor does not compel transfer. See Aronoff, 463 F. Supp. at

459 (while events occurring within original venue were "less likely to be in issue than the knowledge and intent with which [defendant] acted" outside of venue, the court found this factor to be "relatively unimportant.").

4. Location of Documents and Records

The relevant documents and records, including Exolon's multiple bids signed by Nehill and other Exolon employees, and DLA Solicitations, bid files and contract logs are located in Alexandria and Arlington, Virginia. Moreover, given the modern means of rapid transportation which are available to both the Government and defendants, this factor is of little concern. Oster, 580 F. Supp. at 602; Hurwitz, 573 F. Supp. at 553.

5. Disruption of Defendants' Businesses

A Virginia trial should not unduly disrupt defendant Exolon's business affairs. Exolon is 50% owned by common shareholders in a giant multi-national corporation, Wacker-Chemie ("Wacker"), which is headquartered in Germany. Wacker's representatives on Exolon's Board of Directors, and certainly Exolon-appointed board members, and the approximately 250 other Exolon employees who were not involved in DLA bidding and are not intended as defensive trial witnesses, certainly are capable of operating Exolon during the one to two days Exolon's few witnesses would be in Alexandria for trial. Indeed, the attendance of Shawn Howard and David Grano, two of the four anticipated Exolon witnesses involved in DLA bidding, at one day of grand jury did not, to the Government's knowledge, have a disruptive effect on Exolon's operations.

Although the Affidavit of defendant Nehill's counsel implies that Mr. Nehill is a sole proprietor,[6] Mr. Nehill will have access to telephones, fax machines and work space in Virginia, and can continue to stay in touch with his business during his brief absence, which should be less than the length of a typical weekend. Moreover, even if the trial were held in Buffalo, defendant Nehill and Exolon's employee witnesses would be required to be in court and absent from their offices for most if not all of the normal work day. A Virginia trial simply would not be significantly more disruptive of defendants' business affairs than a Buffalo trial. See Oster, 580 F. Supp. at 602; Hurwitz, 573 F. Supp. at 553-54; United States v. United States Steel Corp., 233 F. Supp. 154, 157 (S.D.N.Y. 1964)("interference with one's routine occupational and personal activities ... do not ipso facto make the necessary showing"). This factor does not compel transfer.

6. Expense to the Parties

Defendants will incur attorney's fees and litigation expenses wherever the trial is held. Any added expense of transporting witnesses who may appear on a defendant's behalf does not justify transfer in the interest of justice. See United States v. Binder, 794 F.2d 1195, 1200 (7th Cir.), cert. denied, 479 U.S. 869 (1986). (There is "no prejudice to [defendant's] rights to due process or a fair trial due to the expense of non-resident witnesses traveling to Illinois to testify. If defendant was actually without funds to bring his witnesses to Illinois, the government would have paid their expenses."). Moreover, as defendants have not addressed this factor in anything

[6]An Exolon representative has informed the DCIS that Exolon continues to pay Mr. Nehill his normal weekly salary.

other than speculative and conclusory terms, (Def. Mem. at 7; Kearney Aff. at ¶ f), this factor does not favor transfer. Oster, 580 F. Supp. at 603; Hurwitz, 573 F. Supp. at 554.

Even assuming defendants will realize some small savings if the case is transferred to Buffalo, such savings are at least balanced, if not outweighed, by the added expense to the Government if the case is moved from Virginia. This case is being prosecuted by the Department of Justice on behalf of the DLA which is headquartered in Alexandria, Virginia and which is taking an active role in preparing this case for trial. The Government and DLA attorneys have relied on and utilized both the DCIS and the United States Attorney's Office in this jurisdiction, from the outset of the investigation. The expenses in arranging for Government counsel, DLA counsel, DNSC counsel, and potentially five DLA/DNSC witnesses to attend trial in Buffalo at the very least equal, and more likely outweigh, any savings for defendants.

7. Location of Counsel

Local counsel for defendant Exolon is David Scott Bracken from an Alexandria law firm, Greenberg, Bracken and Tran. Local counsel for defendant Nehill is Gordon A. Coffee, from Winston and Strawn, a large Washington, D.C. law firm with a multi-state practice. This factor does not compel transfer.

8. Accessibility of Place of Trial

Defendants agree that Alexandria, Virginia is an easily accessible location. Indeed, prospective witnesses for the Government live in Virginia or in areas at least as convenient to Virginia as Buffalo. As for any possible witnesses from Buffalo, the easy availability and flexibility of flights to and from the Washington, D.C. area allows for the possibility of flying in,

testifying, and flying out all on the same day.[7] Courts now evaluate the accessibility of the trial location via modern transportation. See Bloom, 78 F.R.D. at 610; Wecker, 620 F. Supp. at 1005. Accordingly, this factor does not compel transfer. Oster, 580 F. Supp. at 603; Hurwitz, 573 F. Supp. at 554.

9. Docket Condition of Districts

Although the state of the docket in each district generally is not a basis for denying transfer since the passage of the Speedy Trial Act, the courts have recognized that "as a practical matter" courts "cannot ignore the reality that certain districts ... have vast criminal dockets, and that [they] should not contribute to delay by failing to consider this fact when ruling on a motion to transfer." Donato, 866 F. Supp. at 294 n. 3. Defendants sidestep this "reality" in their papers, because they know that if this case is transferred to the Western District of New York, it will not be tried expeditiously -- probably not for at least one year. The Indictment returned against defendants Exolon, Nehill and others in that jurisdiction is dated February 11, 1994, and yet no trial date has been set. No motions date has been set. See Aff. at ¶ 5. According to the Office of Court Administration, the average time from indictment to criminal case disposition in the Western District of New York was 9.3 months in FY 1994 (up from 7.3 months in FY 1993) including cases that pled. Aff. at ¶ 6. And, the Western District of New York is ranked 87th in the country in terms of the time it takes to dispose of cases. Id. at ¶ 6. Assuming defendants want speedy justice, as the Government does, such interests are best served by trying this case in this jurisdiction.

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[7]Currently there are seven flights from Buffalo to Washington National or Dulles Airports and six flights from the Washington, DC area to Buffalo, daily.

10. Other Special Elements

The DLA has suspended Exolon's purchasing privileges partially based on the false statements made in this case. This suspension harms not only Exolon's business in being able to meet the demands of customer orders, but also harms the DLA in that it has lost a potential buyer for its stockpiled materials. The DLA, thus, has an overriding public policy interest in an expeditious resolution of this matter to determine whether or not Exolon's conduct with respect to the bids submitted should serve as a continuing basis for suspension.

C. The Relevant Case Law Supports Trial in This District

The United States is aware of only six decisions from the Fourth Circuit published after Platt which deal with a transfer of venue under Rule 21(b). In each of those six cases the District Court denied the defendant's motion to change venue, and in each of those six cases the Fourth Circuit upheld the decision below. While none of these cases are factually identical to the instant case, taken collectively they delineate the standard for review and determination of Rule 21(b) motions in the Fourth Circuit, a standard the Government respectfully submits Defendants have not met.

In the earliest of these cases, United States v. Snow, 537 F.2d 1166 (4th Cir. 1976), a grand jury in the Eastern District of Virginia had indicted the defendant for distribution of cocaine in violation of 21 U.S.C. §841(a)(1). The defendant subsequently moved prior to trial for a change of venue under Rule 21(b) to the District Court for the District of Columbia. The District Court denied that motion, and on appeal the Fourth Circuit found that the District Court had not abused its discretion in denying the motion. The court held that the defendant had neither an absolute nor a constitutional right to a change of venue, and that venue in the Eastern

District of Virginia was appropriate because the defendant was a Virginia resident, the crime allegedly had occurred in that district, and the defendant had been brought before a magistrate judge in that same district following his arrest. Most significantly for the instant case, the Fourth Circuit ultimately denied the defendant's motion because "there has been no showing that the requested transfer would have substantially served the convenience of the parties or the witnesses." 537 F.2d at 1169.

In United States v. Espinoza, 641 F.2d 153 (4th Cir. 1981), the defendant had been convicted in the Southern District of West Virginia for interstate trafficking in child pornography. On appeal, he argued that the lower court erred by overruling his motion to transfer his trial to the Central District of California. In holding that the lower court had not abused its discretion in denying the motion, the court added that "Espinoza's contention that he had the right to be tried in the Central District of California, the jurisdiction of his residence, under the United States Constitution, Article 3, Section 2, Clause 2, and the First, Fifth and Sixth Amendments thereto, is not well taken." 641 F.2d at 162.

In United States v. Bleecker, 657 F.2d 629 (4th Cir. 1981), the defendants were convicted in the Eastern District of Virginia on mail fraud under 18 U.S.C. §§ 287, 1341. Defendants argued on appeal that their conviction was unlawful because the District Court had lacked venue to try those charges, as the claims in question had only "passed through" that district to a private agency, who then forwarded the claims to the General Services Administration in the District of Columbia. The Fourth Circuit began its analysis by stating that "[t]he sixth amendment unequivocally mandates trial in the "State and district wherein the crime shall have been committed. . ." 657 F.2d at 632. As the pertinent statutes did not specifically define venue, the

court looked to "the verbs employed in the statute defining the offense," also minding that, "when the crime is composed of distinct parts or is begun in one district and completed in another, venue may be proper in more than one district." Id. Applying these principles, the court found venue in such cases to lie unquestionably in either the district in which the claims were made or prepared or the district in which they were presented to the government and, following the Second Circuit's lead in United States v. Candella, 487 F.2d 1223, held that venue is also proper in the district in which the intermediary transmits the false claim to the agency.

In United States v. Sullivan, No. 89-5414, 1990 WL 74422 (4th. Cir. May 8, 1990), one of the defendants was convicted in the Eastern District of Virginia under 18 U.S.C. § 1001. That defendant then sought reversal on appeal on the grounds that the Eastern District of Virginia was an improper venue, and was denied. Looking at the nature of the offense and the facts of the case, the Fourth Circuit held that venue in an 18 U.S.C. § 1001 case may lie in the district in which the agency received and acted upon the alleged misrepresentation. 1990 WL 74422 at **4.

In United States v. Barsanti, 943 F.2d 428 (4th Cir. 1991), the defendant was convicted in the Eastern District of Virginia under 18 U.S.C. § 1001. He then argued on appeal that venue in Virginia was improper with respect to certain charges levelled against him. The Fourth Circuit upheld the propriety of the venue, holding that the presentation of the false claims to the agency in the Eastern District of Virginia was sufficient to make proper venue there. In doing so the court looked first to the statutory language, then to the nature of the offense, as it did in Bleecker when evaluating a similar statute.

In United States v. Heaps, 39 F.3d 479 (4th Cir. 1994), the defendant was convicted in the Eastern District of Virginia on several counts of drug trafficking and money laundering. He appealed, inter alia, that the district court should have granted his motion to change venue under Rule 21(b). The Fourth Circuit found venue proper for all counts in dispute, and ruled that the motion was properly denied because the defendant failed to satisfy the standard described in Platt.

These cases describe the standard for pleading and evaluating Rule 21(b) motions in 18 U.S.C. § 1001 cases in the Fourth Circuit. First, venue may lie properly in any district in which the alleged misrepresentations were either prepared by the defendant, received by the agency, or received by some third party instrumental to the ultimate receipt of the misrepresentations by the agency. Second, once the original venue has been found to be proper, the burden is on the defendant to show that the criteria enumerated in Platt demonstrate that transfer of the case to the desired district would be substantially more convenient for the parties and witnesses. We respectfully submit that the defendants have not met their burden under this standard.

III.

CONCLUSION

The Eastern District of Virginia is unquestionably an appropriate venue in which to try this case because the harm caused by defendants' actions occurred here, the DLA's acts in reliance on defendants' false statements occurred here, and the important witnesses in the case reside here. Defendants have failed to meet their burden of establishing facts which compel

transfer to New York. A careful analysis of the Platt factors and case law from the Fourth Circuit and this district support retaining this case in the Eastern District of Virginia.

Dated: May 25, 1995

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I caused copies of the United States' Opposition to Defendants' Motion to Transfer pursuant to Fed. R. Crim. P. 21(b), and Affirmation in Support thereof, to be hand delivered to Gordon A. Coffee, Esq., Winston and Strawn, 14 "L" Street, N.W. Washington, DC, and David Scott Bracken, Esq., Greenberg, Bracken and Tran, 709 Prince Street, Alexandria, Virginia 22314; and to be sent by Federal Express the 25th day of May 1995 to:

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