

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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JENNY SHIPTOSKI, <i>et al.</i> ,	:	
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Plaintiff,	:	3:16-cv-01216-RDM
v.	:	
	:	
SMG GROUP, LLC,	:	
	:	
Defendant.	:	
	:	

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**PLAINTIFFS’ BRIEF IN OPPOSITION  
TO DEFENDANT’S MOTION TO TRANSFER**

After *over two years* of litigation in this Court, Defendant SMG Group, LLC (“SMG”) has filed a motion seeking to transfer this action to the Eastern District of Pennsylvania (“EDPA”) because, upon transfer, the action might be assigned to EDPA’s Allentown courthouse. See Docs. 85-86. As discussed below, the motion should fail:

**A. SMG carries a heavy burden in seeking transfer to EDPA.**

28 U.S.C. § 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 or to any district or division to which all parties have consented.” Your Honor has observed that:

Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an “individualized, case-by-case consideration of convenience and fairness.” Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988) (quoting Van

Dusen v. Barrack, 376 U.S. 612, 622, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)). Although § 1404(a) allows for flexibility, the burden of establishing the need for transfer still rests with the movant, Jumara [v. State Farm Inc. Co.], 55 F.3d [873, 879 (3d Cir. 1995)], and transfer “is not to be liberally granted.” Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970). “[U]nless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff’s choice of forum should prevail.” Id. (internal quotation marks omitted).

Eastern Roofing Systems, Inc. v. Simon Property Group, Inc., 2015 U.S. Dist. LEXIS 18809, \*4-5 (M.D. Pa. Feb. 17, 2015) (Mariani, J.).

The stringent standard described above recognizes “that a plaintiff’s choice of forum is a paramount consideration in any determination of a transfer request, and that choice . . . should not be lightly disturbed.” Shutte, 431 F.2d at 25 (internal quotations omitted); accord Jumara, 55 F.3d at 879; Eastern Roofing, 2015 U.S. Dist. LEXIS 18809, at \*8-9. “Mere assertions of inconvenience or hardship are insufficient to justify transfer.” Id. at \*8 (quoting Advanced Fluid Systems, Inc. v. Huber, 2014 U.S. Dist. LEXIS 62799, \*19 (M.D. Pa. 2014)); accord Hillard v. Guidant Corp., 76 F. Supp. 2d 566, 571 (M.D. Pa. 1999); Kisko v. Penn Cent Transp. Co., 408 F. Supp. 984, 986 (M.D. Pa. 1976).

Where, as here, the parties do not dispute that jurisdiction and venue could exist in EDPA, the Court’s transfer decision requires consideration of several “public” and “private” factors. See Eastern Roofing, 2015 U.S. Dist. LEXIS 18809, at \*7. The “private” factors include: (1) the plaintiff’s preferred forum; (2)

the defendant's preferred forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) convenience of the witnesses to the limited extent they may actually be unavailable for trial in one of the *fora*; and (6) the location of books and records to the limited extent they cannot be produced in the alternative forum. See id. Meanwhile, the "public" factors include: (1) enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty in the two *fora* resulting from court congestion; (4) the local interest in deciding local controversies at home; (5) the public policies of the *fora*; and (6) the familiarity of the trial judge with the applicable state law in diversity cases.

**B. SMG fails to carry its heavy burden.**

Transfer to EDPA is improper unless the above private and public factors weigh "*strongly in favor* of" MSG." Shutte, 431 F.2d at 25 (emphasis supplied). As discussed below, MSG does not come close to carrying this heavy burden.

***Private Factor 1 – Plaintiff's Preferred Forum:*** As already discussed, this factor is "paramount." Shutte, 431 F.2d at 25. Originating Plaintiff Jenny Shiptoski lives in Old Forge and worked for SMG at convenience stores in Scranton, Dunmore, and White Haven. See Complaint (Doc. 1) at ¶¶ 4, 9. Ms. Shiptoski has every right to pursue her claims in Scranton. SMG asserts that it is

headquartered “less than a mile from” EDPA’s Allentown courthouse. Declaration of Keenan D. Lynch (“Lynch Decl.”) (Doc. 86-1) at ¶ 5. So what? Ms. Shiptoski lives only a few miles away from the Scranton courthouse. Moreover, as indicated below, 20 of the 28 (71.4%) Pennsylvanians who opted-in to this lawsuit reside in MDPA, while only 6 of 28 (21.4%) reside in EDPA:

<u>Last Name</u>	<u>City/Town</u>	<u>County</u>	<u>District</u>
Almquist (Doc. 52)	Tobyhanna	Monroe	MDPA
Berkoski (Doc. 56)	Nicholson	Wyoming	MDPA
Bush, Pamela (Doc. 8)	Scranton	Lackawanna	MDPA
Bush, Paul (Doc. 51)	Scranton	Lackawanna	MDPA
Deiningner (Doc. 46)	Wilkes Barre	Luzerne	MDPA
Denby (Doc. 46)	Scranton	Lackawanna	MDPA
Greenburg (Doc. 47)	Scranton	Lackawanna	MDPA
Harrington (Doc. 47)	Scranton	Lackawanna	MDPA
Harrison (Doc. 47)	Harrisburg	Dauphin	MDPA
Hassan (Doc. 47)	Stroudsburg	Monroe	MDPA
Kielar (Doc. 55)	Jefferson Township	Wayne	MDPA
McCall (Doc. 26)	Old Forge	Lackawanna	MDPA
Nellis (Doc. 48)	New Cumberland	Cumberland	MDPA
Nightingale (Do 6)c.	Jefferson Township	Wayne	MDPA
Noldy (Doc. 53)	Archbald	Lackawanna	MDPA
Parson (Doc. 54)	Pleasant Gap	Centre	MDPA
Pifcho-Roberts (Doc. 59)	Nicholson	Wyoming	MDPA
Rickett (Doc. 50)	Greencastle	Franklin	MDPA
Schwartz (Doc. 17)	Honesdale	Wayne	MDPA
Verrastro (Doc. 46)	Dunmore	Lackawanna	MDPA
Duke (Doc. 47)	Coopersburg	Lehigh	EDPA
Fink (Doc. 46)	Gilbertsville	Montgomery	EDPA
Harmer (Doc. 49)	Philadelphia	Philadelphia	EDPA
Maholland (Doc. 46)	Bethlehem	Northampton	EDPA
Squitieri (Doc. 45)	Whitehall	Lehigh	EDPA
Watters (Doc. 58)	Perkasie	Bucks	EDPA
Kolesar (Doc. 46)	Sugar Run	Bradford	WDPA
Melius (Doc. 46)	Osceola Mills	Clearfield	WDPA

Moreover, almost all of the 94 opt-in plaintiffs previously received Court-authorized notice forms explaining that the lawsuit “is proceeding in the United States District Court in Scranton, PA and is assigned to Judge Robert D. Mariani” and returned consent forms that included the MDPA caption. See Docs. 44, 61 (approving forms). SMG provides no explanation for why the Court should transfer this action after already informing hundreds of workers (per the parties’ agreement) that the litigation is proceeding in Scranton.<sup>1</sup>

***Private Factor 2 – SMG’s Preferred Forum:*** SMG’s preference for EDPA has only become apparent after *over two years* of litigation and after adverse conditional certification rulings by Magistrate Judge Carlson and Your Honor. See Docs. 35, 41. Previously, SMG vigorously litigated conditional certification without ever suggesting that MDPA is inconvenient. See Docs. 23, 36, 38. Then, after conditional certification was granted, SMG *stipulated* to a notice form informing hundreds of workers that the lawsuit will go forward in Scranton. See Docs. 43, 60.

SMG’s belated transfer request seems like forum-shopping. No other justification explains its belated feelings of “inconvenience.” See Eastern Roofing, 2015 U.S. Dist. LEXIS 18809, at \*8-9 (“Mere assertions of inconvenience or

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<sup>1</sup> SMG asserts that a plaintiff’s preferred forum is less significant in a “class action.” See Def. Br. (Doc. 86) at 6. While this might be true in some class actions, it certainly is not true where, as here, over 70% of the Pennsylvania opt-ins reside in MDPA.

hardship are insufficient to justify transfer.”).

***Private Factor 3 – Whether the Claim Arose Elsewhere:*** SMG argues that this lawsuit focuses on “common policies and practices” devised at its Allentown headquarters. See Def. Br. (Doc. 86) at 7-8 That may be true. But SMG fails to explain how litigating this case in nearby Scranton creates a hardship for its policymakers. These individuals will not even be required to travel to Scranton until trial sometime in 2019. Are they really so busy and important that they cannot drive up the Turnpike to testify?

Moreover, the fact that SMG’s policy documents and payroll records are “located” in Allentown is of no consequence. All relevant documents will be produced electronically or, at worst, photocopied and shipped. Indeed, SMG’s hiring of a Philadelphia-area attorney demonstrates that one’s proximity to documents generally unimportant.

Finally, SMG observes that “[m]ore than two-thirds of the approximately 94 opt-in plaintiffs are located outside of Pennsylvania.” Def. Br. (Doc. 86) at 9. But SMG does not – and cannot – explain how this factor favors any particular city within Pennsylvania.

***Private Factors 4 and 5 – Convenience of the Parties and the Witnesses:*** Here, SMG repeats its arguments that company executives should not be required to travel from Allentown to Scranton for trial and that traveling to EDPA

courthouses is somehow more convenient for out-of-state plaintiffs than traveling to Scranton. See Def. Br. (Doc. 86) at 9-11. As already explained, none of these arguments make sense. It is not burdensome for SMG executives to testify in Scranton, and the notion that out-of-state plaintiffs would prefer one Pennsylvania city over another lacks any factual or logical basis.

Moreover, it is unclear why SMG is so confident that, upon transfer, the EDPA Clerk would assign this case to the Allentown courthouse. The case also could get assigned to Reading or Easton or Philadelphia (where most of the judges sit). Assignment to Philadelphia – which is more difficult to get to from Allentown than Scranton – undermines the whole rationale for SMG’s motion.

***Private Factor 6 – Location of the Books or Records:*** Here, SMG repeats its argument that documents are “located” in Allentown. See Def. Br. (Doc. 86) at 11-12. But, as Your Honor explained in Eastern Roofing, this factor is irrelevant where, as here, the records will not be reviewed on-site. See Eastern Roofing, 2015 U.S. Dist. LEXIS 18809, at \*10 (citing cases).

***Public Factor 1 – Enforceability of the Judgment:*** SMG admits this factor does not favor transfer to EDPA. See Def. Br. (Doc. 86) at 12.

***Public Factor 2 – Practical Considerations that Could Make the Trial Easy, Expeditious, or Inexpensive:*** SMG makes some conclusory assertions about the burdens of trying a case in Scranton rather than Allentown, Reading,

Easton, or Philadelphia. See Def. Br. (Doc. 86) at 12-13. SMG is grasping at straws. Lawyers travel to out-of-town courthouses all the time to try cases, and, in this case, *both* parties' lawyers have successfully resolved complex wage and hour class actions in Scranton. See, e.g., In re Cargill Meat Solutions Wage and Hour Litig., 632 F. Supp. 2d 368 (M.D. Pa. 2008). Moreover, the William J. Nealon Courthouse's facilities are superior to those of any other federal courthouse in Pennsylvania. There simply is no evidentiary rationale for the hardships envisioned by SMG.

Moreover, SMG ignores the fact that Your Honor has presided over numerous wage and hour class/collective actions involving out-of-town parties and/or lawyers. See, e.g., Wojtaszek v. Bald Eagle Fuel & Tire, Inc., 4:17-cv-01888-RDM; Stanek v. Keane Frac NC, LLC, 3:15-cv-01005-RDM; Chung v. Wyndham Vacation Resorts, Inc., 3:14-cv-00490-RDM; Calarco v. Healthcare Services Group, Inc., 3:13-cv-00688-RDM; Sakalas v. Wilkes-Barre Hospital Company, LLC, 3:11-cv-00546-RDM.

***Public Factor 3 – Court Congestion:*** SMG cites statistics demonstrating that EDPA judges have fewer cases than MDPA judges and speculating that transfer to a new judge would somehow speed up this litigation. See Def. Br. (Doc. 86) at 13-14. SMG's arguments lack merit for three reasons: First, a stipulated litigation schedule already is in place, see Doc. 82, and no one suggests

that a new EDPA judge would re-write the existing schedule. Second, there is nothing speedy about transferring an action away from a judge who has presided over the litigation for over two years and requiring a new judge to start from scratch. Third, as already noted, Your Honor has significant experience handling wage and hour class/collective actions.

***Public Factor 4 – Local Interest in Deciding Local Controversies at Home:*** SMG argues that this overtime rights lawsuit is “local” to Allentown. See Def. Br. (Doc. 86) at 14-15. But the controversy can just as easily be defined as “local” to MDPA, since over 70% of the Pennsylvania opt-ins live within the District. Also, as already observed, there is no guarantee that the EDPA Clerk would assign this action to the Allentown courthouse.

***Public Factor 5 – Public Policies of the Fora:*** SMG, which carries the burden of proof, does not address this factor.

***Public Factor 6 – Familiarity of the Trial Judge with the Applicable State Law:*** SMG admits this factor does not favor transfer to EDPA. See Def. Br. (Doc. 86) at 15.

In sum, because none of the private or public factors favor transfer to EDPA, SMG cannot satisfy its heavy burden under § 1404(a).

**WHEREFORE**, Plaintiffs respectfully request that the Court deny SMG's motion to transfer.

Date: August 21, 2018

Respectfully,

A handwritten signature in black ink, appearing to read "Peter Winebrake", written over a horizontal line.

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