IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RICHARD P. GIELATA, on behalf of himself and all others similarly situated, *Plaintiff*, v. JAY W. EISENHOFER, and GRANT & EISENHOFER, P.A., a Delaware professional association, *Defendants*.	Civil Action No. 10-648-GMS

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a)

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Plaintiff Richard P. Gielata ("Plaintiff"), by and through undersigned counsel, respectfully submits this answering brief in opposition to the motion and opening brief filed by defendants Grant & Eisenhofer, P.A. and Jay W. Eisenhofer (together, "Defendants") for transfer of this action to the District of Hampshire pursuant to 28 U.S.C. § 1404(a):

NATURE AND STAGE OF THE PROCEEDINGS

On August 3, 2010, Plaintiff commenced this class action. The central claim in the complaint is that Defendants misappropriated approximately $200 million from over 300,000 class members in the Tyco securities litigation (the "Tyco Litigation")[1] by concealing and breaching a fee agreement that would have substantially reduced the $500 million in fees and expense obtained by class counsel in the Tyco Litigation. Defendants do not deny the existence of the fee agreement in their submissions but assert that the release in the Tyco Litigation settlement may shield them from claims arising out of their misconduct. (Defs.' Op. Br. at 6.)

Defendants have neither answered the complaint nor filed a Rule 12 motion. Instead, they have moved to transfer this case from a plainly convenient forum to the District of New Hampshire. Defendants have also sought an indefinite postponement of time to respond to the complaint pending resolution of their motion to transfer.

A related proceeding was recently commenced in Delaware Superior Court. On August 27, 2010, Defendants' professional liability insurance carrier filed a declaratory judgment suit naming the parties to the instant action seeking to disclaim coverage under the Defendants' professional liability insurance policy. *See* Declaration of Joseph Gielata in Support of Plaintiff's Answering Brief ("Decl."), Exh. 1. Defendants' carrier seeks to void coverage in part due to Defendants' misconduct. *See* Decl. Exh. 1 ¶¶ 16, 29.

[1] *In re Tyco Int'l, Ltd. Multidistrict Litig.* (MDL 1335), C.A. No. 02-1335-PB (D.N.H.).

STATEMENT OF FACTS

Defendant Grant & Eisenhofer, P.A. is a Delaware professional association law firm located at 1201 North Market Street in Wilmington, within walking distance of the J. Caleb Boggs Federal Building. Although the law firm also has offices in New York City and Washington, D.C., its website and others indicate that the firm is headquartered in Wilmington. Decl. ¶ 4. Two-thirds of its attorneys are based in Delaware. *Id.* ¶ 5 (not counting "staff attorneys"). In the Tyco Litigation, Defendants listed only their Delaware office in their fee request, among other filings. (*See* Defs.' Op. Br. Ex. F at cover page & 83.) The law firm touts its work in Delaware's Court of Chancery and in the District of Delaware on its website. Decl. ¶ 6. In sum, Defendants unquestionably have extensive connections to Delaware.

This case arises out of a January 8, 2004 fee agreement (the "Fee Agreement")—a document that was never disclosed in the Tyco Litigation. The Fee Agreement appears to have been created in Delaware. The law firm letterhead on which the Fee Agreement is printed lists Defendants' Delaware address and Delaware telephone numbers. Decl. ¶ 6. At the top of the Fee Agreement is a Transmitting Station ID reflecting the date and time of facsimile transmittal, identifying Grant & Eisenhofer, P.A. as the sender, and listing its facsimile number with a Delaware area code. *Id.* There is not a single reference to New Hampshire in the Fee Agreement.

SUMMARY OF ARGUMENT

I. Defendants have failed to argue that this action "might have been brought" in the District of New Hampshire. Given the doubts surrounding this threshold question, Defendants' failure to address this issue justifies denial their motion.

II. Defendants have not met their heavy burden to rebut Plaintiff's rational choice of forum and establish that Delaware is an inconvenient forum. Defendants conduct much of their

business within this District and many of the events described in the complaint took place in Delaware. Several likely witnesses who are subject to compulsory process for trial in this District are outside the subpoena power of the District of New Hampshire. The relevant evidence is located in Delaware, not in New Hampshire. The entity defendant is based and incorporated in Delaware and the individual defendant is licensed to practice law in Delaware. The foregoing considerations informed Plaintiff's rational choice of forum. Accordingly, Defendants' motion fails under the well-established Third Circuit factors for § 1404(a) analysis. Stated simply, transfer would not serve the convenience of the parties and witnesses.

III. Defendants seek to transfer the action to Judge Barbadoro because of his familiarity with the Tyco Litigation. However, the instant action is based on a fee agreement that was never disclosed in the Tyco Litigation. Obviously, Judge Barbadoro cannot be expected to be familiar with information that was concealed from him. Thus, Defendants' hollow assertion of "familiarity" undermines their request for transfer.

IV. Defendants contend that this action is "tightly intertwined" with the Tyco Litigation. Defendants are wrong—this action has nothing to do with what took place at Tyco. It is a case about a Delaware law firm and Delaware lawyer misappropriating massive sums from those whom they were supposed to represent. The Fee Agreement at issue in this case was never disclosed in the Tyco Litigation. It follows that the District of New Hampshire has neither construed nor otherwise reviewed the Fee Agreement. Notwithstanding Defendants' vague speculations, the prosecution and outcome of this case will neither affect the Tyco Litigation settlement nor disturb any rulings in the Tyco Litigation.

ARGUMENT

I. <u>Legal Standard: Plaintiff's Choice of Forum is Entitled to Substantial Deference.</u>

Under 28 U.S.C. § 1404(a), "for the convenience of the 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." The Third Circuit outlined the factors bearing on whether transfer is appropriate in *Jumara v. State Farm Insurance Co.*, 55 F.3d 873 (3d Cir. 1995): (1) the plaintiff's choice of forum; (2) the defendant's preferred forum; (3) where the claim arose; (4) the convenience of the parties; (5) the convenience of the witnesses, but only to the extent that the witnesses may be unavailable for trial in one of the fora; and (6) the location of books and records, again, only to the extent that they may not be available in one of the fora. *Id.* at 879. Courts consider the following public interests: (1) the enforceability of the judgment; (2) practical considerations that could make the trial easier, quicker, or less expensive; (3) court congestion; (4) local interest in the controversy; (5) public policies of the fora; and (6) the trial judge's familiarity with the applicable state law. *Id.* at 879-80.

The burden to establish the need to transfer rests on the moving party, and the "plaintiff's choice of venue [will] not be lightly disturbed." *Truth Hardware Corp. v. Ashland Prods., Inc.*, No. C.A. 02-1541 GMS, 2003 WL 118005, at *1 (D. Del. Jan. 13, 2003) (quoting *Jumara*, 55 F.3d at 879). The movant "'must prove that litigating in Delaware would pose a unique or unusual burden on [its] operations' for the court to transfer venue." *Amgen, Inc. v. Ariad Pharms., Inc.*, 513 F. Supp. 2d 34, 45 (D. Del. 2007) (citation omitted). Ultimately, "unless the balance of convenience strongly favors a transfer in favor of defendant, the plaintiff's choice of forum should prevail." *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970).

II. Defendants Fail to Establish That This Action Might Have Been Brought in New Hampshire.

Section 1404(a) allows "a district court [to] transfer any civil action to any other district or division where it might have been brought." (Emphasis added.) As this Court has observed:

> As a threshold matter, the Court must first ask whether [plaintiff] could have brought these two actions in the [proposed transferee forum]. *See Tuff Torq Corp. v. Hydro-Gear Ltd. Partnership*, 882 F. Supp. 359, 361 (D. Del. 1994). If the Court answers this question in the negative, then its inquiry ends. *See Camasso v. Dorado Beach Hotel Corp.*, 689 F. Supp. 384, 386 (D. Del. 1988) (refusing to transfer the case when the target forum could not exercise personal jurisdiction over one of the defendants); *see also Tuff Torq*, 882 F. Supp. at 361-62 (denying transfer where the target forum could not exercise personal jurisdiction over two of the defendants).

Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp. 2d 192, 196 (D. Del. 1998).

The Supreme Court has held that courts may not transfer venue to a district where an action could not have been brought initially even if defendants waive venue and jurisdiction defenses. *See Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960) ("[T]he power of a District Court under 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff."). Therefore, Defendants' consent to litigate in New Hampshire is irrelevant.

Glaringly absent from Defendants' opening brief is any explanation regarding whether this action "might have been brought" in the District of New Hampshire.[2] In *Shutte*, the Third Circuit issued a writ of mandamus to vacate a transfer order and instructed as follows:

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[2] If Defendants include such an explanation for the first time in their reply, in violation of D. Del. LR 7.1.3(c)(2), it should not be considered. *See Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief . . ."); *Rockwell Tech., LLC v. Spectra-Physics Lasers, Inc.*, 2002 WL 531555 (D. Del. March 26, 2002) (the "tactic of reserving new arguments for its reply brief amounts to impermissible

> Prior to ordering a transfer the district court must make a determination that the suit could have been rightly started in the transferee district. If there is a "real question" whether a plaintiff could have commenced the action originally in the transferee forum, it is evident that he would not have an unqualified right to bring his cause in the transferee forum.

431 F.2d at 24 (citations omitted).

First, it is doubtful that the District of New Hampshire could even exercise personal jurisdiction over Defendants. Defendants neither reside nor maintain an office in New Hampshire, and Plaintiff is unaware of facts supporting Defendants' minimum contacts with New Hampshire other than their role as counsel admitted *pro hac vice* in the Tyco Litigation.[3]

Second, Defendants cannot demonstrate proper venue because, among other things: the Defendants do not reside in New Hampshire; the law firm defendant does not maintain an office in New Hampshire; the firm is not incorporated in New Hampshire; and "a *substantial* part of the events or omissions giving rise to the claim" may not even have occurred in New Hampshire. 28 U.S.C. § 1391 (emphasis added). In determining whether New Hampshire is a district in which a substantial part of the events occurred, the First Circuit looks "not to a single 'triggering event' prompting the action, but to the entire sequence of events underlying the claim." *Uffner v. La*

'sandbagging.'") (quoting *Jordan v. Bellinger*, 2000 U.S. Dist. LEXIS 19233, *18 (D. Del. April 28, 2000)).

[3] *Cf. Irwin v. Mahnke*, 2006 WL 691993, at *3 n.3 (D. Conn. Mar. 16, 2006) (citing "numerous cases that have held that pro hac vice admission alone is not sufficient to confer personal jurisdiction over non-resident attorneys who are not otherwise subject to personal jurisdiction."); *Kronzer v. Burnick*, 2004 WL 1753409, at *3 (N.D. Cal. Aug. 5, 2004) (holding that pro hac vice admission does not subject counsel to the jurisdiction of courts in the admitting state for all purposes); *Cerberus Partners, L.P. v. Gadsby & Hannah, LLP*, 836 A.2d 1113, 1121 (R.I. 2003) (holding that the law firm's pro hac vice admissions in six cases unrelated to representation of a Rhode Island client were insufficient to constitute "continuous and systematic" activity for personal jurisdiction purposes); *Ex parte Dill, Dill, Carr, Stonbraker & Hutchings, P.C.*, 866 So.2d 519, 529 (Ala. 2003) ("Case law overflows on the point that providing out-of-state legal representation is not enough to subject an out-of-state lawyer or law firm to the personal jurisdiction of the state in which a client resides.") (quoting *Cape v. von Maur*, 932 F. Supp. 124, 128 (D. Md. 1996)).

Reunion Francaise, S.A., 244 F.3d 38, 42 (1st Cir. 2001) (quoting *Mich. Corp. v. Bramlet*, 141 F.3d 260, 263-264 (6th Cir. 1998)). In this case, a substantial part of the sequence of events giving rise to the claims undoubtedly occurred in Delaware (where the Fee Agreement originated, the bulk of Defendants' work on the Tyco Litigation was performed, and where the fee request was prepared). There is a real question as to whether the same can be said of New Hamphire.

In sum, Defendants have not satisfactorily answered even the threshold question of whether this action "might have been brought" in New Hampshire. The burden rests on Defendants, who have utterly failed to address this threshold issue (and who should not be permitted to do so for the first time in their reply brief). Accordingly, the motion should be denied. *See Butz v. Schleig*, 2010 WL 1409654, at *4 (M.D. Pa. Apr. 2, 2010) ("As we conclude that the present action could not have been brought in the [transferee forum], which is a threshold question, the analysis of the § 1404 factors becomes irrelevant.").

III. Defendants Have Not Met Their Heavy Burden To Tip the Balance in Favor of Transfer.

Given that Defendants' principal place of business is within walking distance of the District of Delaware's courthouse, Defendants cannot seriously argue that Delaware is an inconvenient forum for the parties. The applicable *Jumara* factors are addressed below.[4]

A. Private Interest Factor #1: Plaintiff's Choice of Forum

Plaintiff, a resident of Pennsylvania, brought this action in the neighboring District of Delaware, where Defendants are based, where a substantial part of the events giving rise to the

[4] As this Court explained in *Affymetrix*, the first three private interest factors collapse into other portions of the *Jumara* analysis. *See* 28 F. Supp. 2d at 197-202. The first three factors are addressed for the sake of completeness in order to permit the Court to consider relevant facts in the context of the entire inquiry.

claims occurred, where nearly all potential non-party witnesses may be compelled to appear for trial (*see* Part III.E *infra*), and where the Defendants are undoubtedly subject to personal jurisdiction.[5] Plaintiff's choice of forum is entitled to "paramount consideration," and "should not be lightly disturbed." *Shutte*, 431 F.2d 22, 25 (3d Cir. 1970)). Even if "the plaintiff has not chosen its home turf or a forum where the alleged wrongful activity occurred, the plaintiff's choice of forum is still of paramount consideration, and the burden remains at all times on the defendants to show that the balance of convenience and the interests of justice weigh strongly in favor of transfer." *In re ML-Lee Acquisition Fund II, L.P.*, 816 F. Supp. 973, 976 (D. Del. 1993). Indeed, "[t]he deference afforded plaintiff's choice of forum will apply as long as a plaintiff has selected the forum for some legitimate reason." *Kuck v. Veritas Software Corp.*, 2005 WL 123744, at *2 (D. Del. Jan. 14, 2005).[6]

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[5] By contrast, as noted in Part II, *supra*, there exists doubts as to whether the District of New Hampshire could exercise personal jurisdiction over Defendants and whether New Hampshire could be a proper venue.

[6] Defendants contend that Plaintiff's choice of forum should be given less weight because this is a class action. (Defs.' Op. Br. at 13-14.) However, in this case the Plaintiff has chosen a forum that is strongly connected to the facts of the case and indisputably convenient to Defendants. By contrast, in each of the cases cited by Defendants, the representative plaintiff had filed suit in a forum that had little or no connection to the defendants or to the facts giving rise to the claims. *See Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 526 (1947) ("[T]he plaintiff shows not a single fact provable by record or witness within the district or state where he has brought suit. It is undenied that every source of evidence to prove plaintiff's own case, as well as for defendant to disprove it, is in Illinois."); *Smith v. HireRight Solutions, Inc.*, 2010 WL 2270541, at *10 (E.D. Pa. June 7, 2010) ("The matter is a nationwide class action focusing almost entirely on the actions of the Defendant corporation in Tulsa, Oklahoma. All witnesses crucial to the elements of the class claims and all sources of documentary proof can be found in Oklahoma. Finally, travel considerations and issues of court congestion all point to Oklahoma as the most convenient situs for further litigation of this matter."); *Burstein v. Applied Extrusion Techs., Inc.*, 829 F. Supp. 106, 111-12 (D. Del. 1992) (finding defendants met burden for transfer to Massachusetts where, *inter alia*, Delaware's connection to acts giving rise to lawsuit was insubstantial, 9 of 12 individual defendants resided in Massachusetts and 9 of 18 potential non-party witnesses worked and/or resided in Massachusetts); *Howell v. Shaw Indus.*, 1993 WL 387901, at *3 (E.D. Pa. Oct.

B. Private Interest Factor #2: Defendant's Preferred Forum

While this factor ordinarily weighs in favor of transfer, here it does not because Defendants are seeking to transfer venue from a convenient forum to an inconvenient forum.

C. Private Interest Factor #3: Where The Claims Arose

The Fee Agreement at issue in this case appears to have been created in Delaware, executed by Defendants in Delaware, faxed by Defendants from Delaware, faxed back to Delaware once countersigned, and largely performed in Delaware (to the extent it was not breached). The original agreement signed by Defendants (assuming it has not been destroyed) likely remains in Delaware, and the computers and other machines on which the Fee Agreement was created and transmitted are likely in Delaware. In sum, this litigation arises out of events that took place in Delaware and involves Delaware defendants.

Defendants' fee request in the Tyco Litigation was presumably filed in New Hampshire by local counsel, not by Defendants (who are not licensed to practice in New Hampshire). Given that Defendants do not maintain an office in New Hampshire, and that they listed only their Delaware address in their Tyco Litigation filings (*see, e.g.,* Defs.' Op. Br. Ex. F at cover page & 83), the Court may infer that Defendants prepared the fee request in Delaware.

Defendants' fee request states that Defendants spent 141,862.5 hours on the Tyco Litigation. (Defs.' Op. Br. Ex. F at 39-40.) Given that discovery involved over 83 million pages of documents (*see id.* at 3), it is reasonable to infer that the vast majority of time devoted by Defendants to the Tyco Litigation was document review conducted in Delaware. The Fee Agreement covered the engagement of Defendants for the purpose of the Tyco Litigation, and

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1, 1993) (granting transfer to Georgia "where[, *inter alia*,] the majority of the evidence and witnesses are conveniently located.").

therefore the work to be performed under the Fee Agreement was primarily in Delaware. While the fee request was submitted in New Hampshire, it was likely prepared by Defendants in Delaware (*i.e.*, the portions of the fee request for which Defendants were responsible).

Based on the foregoing facts, it is respectfully submitted that these claims arose in Delaware. Thus, this factor does not weigh in favor of transfer.

D. Private Interest Factor #4: Convenience Of The Parties

As noted above, Defendants maintain their principal place of business in Delaware, within walking distance of the federal courthouse in Wilmington. They do not appear to have any presence in New Hampshire. Therefore, it is certainly more convenient for Defendants to litigate this case in Delaware than in New Hampshire.

Plaintiff resides near Pittsburgh, Pennsylvania, less than six hours driving distance from Wilmington. The flight from Pittsburgh to Philadelphia takes approximately one hour. By contrast, driving from Pittsburgh to Concord, New Hampshire would take approximately twelve hours. A flight from Pittsburgh to New Hampshire would take over four hours.[7] Therefore, New Hampshire is significantly less convenient for Plaintiff than Delaware.

In sum, this factor does not weigh in favor of transfer because Delaware is more convenient than New Hampshire for all parties.

E. Private Interest Factor #5: Convenience Of The Witnesses

Most anticipated witnesses (including former employees of Defendants) are located within the subpoena power of the District of Delaware. By contrast, Plaintiff is unaware of any anticipated witnesses within the District of New Hampshire. This Court observed:

[7] Both the driving distances from the Philadelphia airport to Wilmington and from the Manchester airport to Concord are approximately the same.

> Traditionally, the location of potential witnesses and, thus, their ability to be subject to compulsory process has weighed heavily in the "balance of convenience" analysis. *Cf.* 15 Wright, Miller & Cooper § 3581, at 415 (identifying this consideration as "[p]robably the most important factor, and the factor most frequently mentioned in passing on a motion to transfer").

Affymetrix, 28 F. Supp. 2d at 203.

As a preliminary matter, Defendants failed to provide any evidence (*e.g.*, affidavits) showing that any particular fact witness would be unwilling or unable to testify at trial.[8]

Defendants point to the following potential witnesses: "the lead plaintiff that allegedly executed the fee agreement with Defendants, the other two class counsel firms, and [*sic*] the retired judges that mediated the settlement and the retired judges that reviewed class counsel's fee application and made a recommendation to the New Hampshire court…." (Defs.' Op. Br. at 14.) Defendants state that these potential witnesses do not reside within Delaware (*ibid*), yet neglect that this Court has the power to compel witnesses outside this District to appear for trial so long as they are within a 100-mile radius of the courthouse under Fed. R. Civ. P. 45(b)(2)(B). Of these potential witnesses, most appear to be within the subpoena power of the District of Delaware. Decl. ¶ 8. In addition, Plaintiff submits that over a dozen other potential non-party

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[8] *Acuity Brands, Inc. v. Cooper Indus., Inc.*, 2008 WL 2977464, at *2 (D. Del. July 2, 2008) ("As for the convenience to the witnesses, it is only relevant to the extent that they would be unavailable for trial in the forum....[W]hile it is true that none of the potential third-party witnesses identified by Cooper appear to reside in Delaware, Cooper fails to demonstrate that these witnesses will be either unable or unwilling to travel to Delaware."); *Mallinckrodt, Inc. v. E-Z-Em Inc.*, 670 F. Supp. 2d 349, 357 (D. Del. 2009) ("With regard to the convenience of the witnesses, Defendants have failed to identify any potential witnesses who would be unable to testify in this District."); *Matsushita Battery Indus. Co., Ltd. v. Energy Conversion Devices, Inc.*, 1996 WL 328594, at *3 (D. Del. April 23, 1996) ("Defendants have not specifically identified any witnesses who have refused to testify; despite [counsel's] opinion, the court does not find defendants' showing of the necessity of compulsory process sufficient to warrant transfer."); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756-57 & n.2 (3d Cir. 1973) ("Defendants, having the burden of proof, did not support their motion to transfer with any affidavits, depositions, stipulations, or other documents containing facts that would tend to establish the necessary elements for a transfer under 28 U.S.C. § 1404(a).").

fact witnesses are likely within the subpoena power of the District of Delaware.[9] By contrast, it does not appear that a single potential witness resides within the subpoena power of the District of New Hampshire (assuming Judge Barbadoro is not considered a potential witness).

Accordingly, the convenience of the witnesses heavily weighs against transfer.

F. Private Interest Factor #6: Location Of Books And Records

Technology such as email and photocopying has ordinarily reduced the relative importance of this factor. However, in this case, the location of proof warrants special attention. In the event that Defendants challenge the authenticity of the critical Fee Agreement, then it may be necessary to subpoena a number of witnesses in or near Delaware to verify the evidentiary trail of the Fee Agreement as it was drafted, executed and transmitted. These third parties include third-party service providers in Delaware with technical knowledge of Defendants' computer systems, fax machines, and document management software, as well as former personnel (*e.g.*, secretaries, copy room personnel, information technology specialists, all in or near Delaware) with first-hand knowledge relating to the relevant document(s). Thus, this factor weighs against transfer.

[9] For example, the following is a non-exhaustive list of attorneys who formerly worked for Defendants on the Tyco Litigation, the vast majority of whom likely continue to reside in Delaware, eastern Pennsylvania, southern New Jersey or Washington, D.C. and thus within 100 miles of this District's courthouse: Abbott Leban, Esq., Adrienne Crenshaw, Esq., Benjamin Hinerfeld, Esq., Brian Rostocki, Esq., Dmitry Pilipis, Esq., Domenico Minerva, Esq., Gregg Levin, Esq., James P. McEvilly, Esq., James R. Banko, Esq., Lauren E. Wagner, Esq., Marlon Q. Paz, Esq., Michelle Wirtner, Esq., P. Bradford deLeeuw, Esq., R. Michael Lindsey, Esq., Richard M. Donaldson, Esq., Ricki Goodstein, Esq., Russell Paul, Esq. and Sidney S. Liebesman, Esq. Decl. ¶ 10. The foregoing list could be expanded to include approximately 40 "staff attorneys" who formerly worked for Defendants on the Tyco Litigation. *Ibid.* There are also non-attorney personnel who no longer work for Defendants but who may have first-hand knowledge of relevant facts, such as the secretary whose initials appear on the fee agreement, Bernadette R. Difrancesco, who likely continues to reside in Delaware.

G. Public Interest Factor #1: The Enforceability Of The Judgment

Plaintiff agrees that this factor is neutral and thus does not weigh in favor of transfer.

H. Public Interest Factor #2: Practical Considerations That Could Make The Trial Easier, Quicker, Or Less Expensive

Plaintiff's choice of the District of Delaware was based in part upon practical considerations. The fact that the District of Delaware's courthouse is more convenient for all parties than New Hampshire should make the trial easier, quicker and less expensive.

A less obvious issue merits attention. Section 1404(a) does not provide for transfer to a particular judge. Nevertheless, what Defendants actually seek in their motion is a transfer to Judge Barbadoro in the District of New Hampshire. The premise of Judge Barbadoro's superior familiarity with the Tyco Litigation pervades Defendants' opening brief (although Defendants do not contend that Judge Barbadoro is familiar with the Fee Agreement, since it was not disclosed). The practical problem with Judge Barbadoro is *precisely* his familiarity with the Tyco Litigation. After all, a judge must disqualify himself in "any case in which he ... is or has been a material witness…." 28 U.S.C. § 455. Defendants contend that "the New Hampshire court is ideally situated to decide…whether a different fee award would have been made had the alleged fee agreement been disclosed." (Defs.' Op. Br. at 3.) What they really mean to argue is that Judge Barbadoro is the person in the best position to *testify* as to whether a different fee award would have been made had the Fee Agreement been disclosed.[10] Of course, "[t]he judge presiding at

[10] Such testimony might be irrelevant. To be clear, Plaintiff's essential claim is not simply that Defendants should have disclosed the Fee Agreement. The essential claim is that Defendants should have disclosed *and adhered to* the Fee Agreement. Thus, the issue of damages does not turn on whether a different fee award would have been granted if the Fee Agreement had been disclosed. Rather, damages flowed from the fact that Defendants breached the Fee Agreement and sought a higher fee than they were entitled to request. Judge Barbadoro would not have awarded $500 million in fees and expenses if a substantially lower award had been requested.

the trial may not testify in that trial as a witness." F.R.E. 605. In view of § 455 and F.R.E. 605, it is clear that transferring this action to Judge Barbadoro could create dilemmas that are not a concern here in the District of Delaware.

Accordingly, practical trial considerations weigh strongly against transfer.

I. Public Interest Factor #3: Court Congestion

Defendants contend that median time from filing to disposition is 0.5 months less in the District of New Hampshire than in the District of Delaware. (Defs.' Op. Br. at 12.) This difference of less than one month is insignificant and does not support transfer.

J. Public Interest Factor #4: Local Interest In The Controversy

Defendants are a prominent Delaware law firm and a Delaware-licensed lawyer. Defendants are active in Delaware. Thus, local interests weigh against transfer.

K. Public Interest Factor #5: Public Policies Of The Fora

This Court has an interest in adjudicating cases in which Delaware law controls. *See ML-Lee Acquisition Fund.*, 816 F. Supp. at 979 (citing *Sports Eye, Inc. v. Daily Racing Form, Inc.*, 565 F. Supp. 634, 639 (D. Del. 1983)) ("The courts in this district have stated that it is preferable for the court of the state whose substantive law controls to hear the case"). *See also* Part III.C *supra*. Thus, this factor weighs against transfer.

L. Public Interest Factor #6: The Trial Judge's Familiarity With Applicable State Law

One of the most pronounced fallacies in Defendants' opening brief is that transfer is warranted because the Tyco Litigation settlement agreement is governed by New Hamsphire law. However, this action does not concern the settlement agreement. Rather, this action arises out of the Fee Agreement. If the Fee Agreement is governed by Delaware law (*see* Part III.C

supra), then this Court should be presumed to be more familiar with applicable state law. Furthermore, Defendants do not contend that the breach of fiduciary duty claims are governed by New Hampshire law. Accordingly, this factor does not weigh in favor of transfer.

M. Taken As A Whole, The *Jumara* Factors Weigh Heavily Against Transfer

As explained above, not a single *Jumara* factor weighs in favor of transfer. Given Defendants' heavy burden to rebut Plaintiff's choice of forum, there is no basis under the jurisprudence of this Circuit and this District to find that transfer to the District of New Hampshire would serve the convenience of the parties and witnesses.

Accordingly, Defendants' motion should be denied.

IV. The Claims in This Case Are Independent of the Tyco Litigation.

Defendants' motion carefully sidesteps well-established § 1404 analysis under *Jumara* and instead points to a red herring, namely, the settlement agreement in the Tyco Litigation. However, the complaint in this case does not question the adequacy of the settlement or the decisions of the District of New Hampshire in connection with the Tyco Litigation. There is nothing in the complaint that would call into question the Tyco Litigation settlement agreement. The claims in this case do not invoke or rely upon the settlement agreement. Indeed, while the damages sustained by the class here resulted from the 14.5% fee request sought by Defendants, the settlement agreement is silent with respect to the fee request percentage or magnitude that Defendants intended to seek. (*See, e.g.,* Defs. Op. Br. Ex. C at 44 (settlement agreement provisions relating to attorneys' fees).)

The claims in this case are based on a *different* agreement, the two-page Fee Agreement that was never disclosed in the Tyco Litigation. The Fee Agreement is connected to Delaware in multiple ways, both Defendants have strong links to Delaware, many of the events giving rise to

this action took place in Delaware, and thus Delaware is the most suitable and practical forum for this matter. As shown below, Defendants' argument that this action is "tightly intertwined" with the Tyco Litigation is without merit. (Defs.' Op. Br. at 9.)

A. The District of New Hampshire Did Not Reserve Exclusive Jurisdiction Over Plaintiff's Claims

Defendants contend that "[t]he New Hampshire court retained 'continuing and exclusive jurisdiction' over any disputes about attorneys' fees…." (Defs.' Op. Br. at 2.) The record belies this assertion. The District of New Hampshire's July 22, 2010 order clarified the purpose and scope of its retention of jurisdiction over the Tyco Litigation:

> [T]his Court has retained jurisdiction of this Action for the purpose of considering any further application or matter which may arise in connection with the **administration and execution of the Settlement** and the **processing of Proofs of Claim** and the **distribution of the Net Settlement Fund** to the Authorized Claimants;….

(Defs.' Op. Br. Ex. H at 3-4 (emphasis added).) Plaintiff's claims relate neither to "the administration and execution of the Settlement [nor] the processing of Proofs of Claim [nor] the distribution of the Net Settlement Fund" and thus do not fall within the limited jurisdiction retained by the District of New Hampshire. The settlement in the Tyco Litigation has been finalized and distributed. There is no consent decree to supervise or enforce. If Plaintiff prevails in the instant action, the completed settlement in the Tyco Litigation will not be affected at all, notwithstanding Defendants' vague speculations. As noted above, the settlement agreement in the Tyco Litigation says absolutely nothing about the percentage of the settlement fund that Defendants would request.

Stated simply, this case is not really about the Tyco Litigation settlement. Instead, it concerns the conduct of Delaware attorneys who have misappropriated client funds. The District

of New Hampshire did not reserve exclusive jurisdiction over such claims, which are wholly independent of the Tyco Litigation settlement agreement.

B. The Release in the Settlement Agreement Excludes Plaintiff's Claims

The plain language of the release does not cover claims relating to fees paid to Defendants. The release provision cited by Defendants begins with boilerplate catch-all language but then refers specifically to claims relating to "attorneys' fees…**incurred by** Co-Lead Counsel[.]" (Defs.' Op. Br. at 6 (emphasis added).) The provision does not refer to fees paid **to** Co-Lead Counsel.[11] Under the contract interpretation maxim of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the release provision was not intended to cover any claims relating to fees paid to Defendants.[12] Moreover, given that Defendants drafted the release language, any ambiguity should be construed against them.

As Defendants have yet to file an answer to the complaint, they have not expressly asserted the defense of release. Even if they do, the release in the Tyco Litigation does not cover Plaintiff's claims, and therefore it cannot serve as a logical basis to transfer this action to the District of New Hampshire.

C. Defendants Rely on Inapposite and Non-Binding Decisions

Defendants cite seven inapposite and non-binding decisions for the proposition that, regardless of Third Circuit authority and regardless of the convenience of parties and witnesses,

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[11] Defendants' fee request offers a specific example of fees they paid to attorneys: "Co-Lead Counsel also employed full-time counsel whose primary responsibility was to find and review key documents and to assist Gryphon with the investigation." (Defs.' Op. Br. Ex. F at 21.)

[12] *Corbin on Contracts* lists *expressio unius est exclusio alterius* as an "additional maxim of interpretation," noting: "If the parties in their contract have specifically named one item or if they have specifically enumerated several items of a larger class, a reasonable inference is that they did not intend to include other, similar items not listed." 5 *Corbin on Contracts* § 24.28 (5th ed.).

transfer under § 1404 is appropriate where a case is "tightly intertwined" with a prior litigation in another forum. (Defs.' Op. Br. at 9-11.) Each case is distinguished below.

Koehler v. Green, 358 F. Supp. 2d 346 (S.D.N.Y. 2005) is inapposite because the plaintiff's claims in that case directly attacked the adequacy and allocation of the class action settlement in a prior litigation, an issue which had been actually litigated in and squarely adjudicated by the transferee forum. *See, e.g., In re BankAmerica Corp. Sec. Litig.*, 228 F. Supp. 2d 1061, 1067-68 (E.D. Mo. 2002) (noting Mr. Koehler's objections to the settlement). The problem of relitigation was especially plain because the plaintiff had previously articulated many of the same objections in the transferee forum before the settlement was approved. *See Koehler v. Brody*, 483 F. 3d 590, 593-94 (8th Cir. 2007) (summarizing the history of Mr. Koehler's repeated attacks on the settlement). In this case, Defendants do not contend that any claim arising out of the Fee Agreement was actually litigated in the District of New Hampshire—after all, the Fee Agreement was never disclosed in the Tyco Litigation. Furthermore, Plaintiff's claims do not question the adequacy of the Tyco Litigation settlement. Thus, *Koehler* is not on point. Moreover, *Koehler* is devoid of any discussion of the factors required in any § 1404 analysis in the Third Circuit.

Birks v. Park, 2008 WL 3905902 (S.D. W. Va. Aug. 19, 2008) is inapposite because the court found (in accepting the magistrate judge's recommendations) that venue was improper and that it lacked personal jurisdiction over one of the defendants. Transfer cured the venue defect. By contrast, in this case venue is clearly proper in Delaware, but it may not be in New Hampshire. *See* Part II *supra*. Also, as in *Koehler*, the plaintiff in *Birks* specifically challenged the amount and distribution of the settlement fund, which is not the case here. *See id.* at *6. As

noted by Defendants, the *Birks* decision contains "no further analysis of § 1404(a) factors." (Defs.' Op. Br. at 9.)

In *Willoughby v. Potomac Electric Power Co.*, 853 F. Supp. 174 (D. Md. 1994), transfer from Maryland to the District of Columbia was granted because the plaintiff was specifically challenging and invoking rights under a class action consent decree entered and enforced in the District of Columbia. The plaintiff claimed "that he was an intended beneficiary of certain clauses of the District of Columbia settlement agreement (Counts I and II) and that certain representations made to him in connection with the settlement were either fraudulent (Count III and Count V) or negligent (Count IV)." *Id.* at 175. In addition, the defendant resided in the transferee forum, the claims arose in the transferee forum and most of the witnesses resided or worked in the transferee forum. *Ibid*. Unlike *Willoughby*, in this case: (1) Plaintiff's claims neither invoke the settlement agreement nor challenge the adequacy of the settlement; (2) Defendants and most witnesses reside or work in this District or within 100 miles of Delaware's federal courthouse; and (3) there is no ongoing consent decree to enforce or supervise (indeed, the settlement in the Tyco Litigation has been consummated and distributed).

In *Stephen L. LaFrance Pharmacy, Inc. v. Unimed Pharmaceuticals, Inc.*, 2009 WL 3230206 (D.N.J. Sept. 30, 2009), the court affirmed a magistrate judge ruling granting transfer to a forum which was: "(1) the setting of the events giving rise to the instant actions; (2) the home of some defendants; (3) the location of a multitude of documents and witnesses; and (4) the transferee court for [parallel] cases [filed in another district], which, like the instant cases, have allegations of antitrust violations based on the same alleged conduct." *Id.* at *5. The ruling comprehensively analyzed the relevant *Jumara* factors, which favored transfer (unlike here). *Id.* at *4-*5. Also, defendants had entered into a settlement and permanent injunction in the

transferee forum, and the plaintiffs were directly attacking the settlement as violating antitrust laws. *Id.* at *2-*3. Here there is no injunction to supervise or enforce, and Plaintiff is not attacking the settlement in the Tyco Litigation.[13]

CONCLUSION

For the above reasons, Defendants' motion to transfer venue should be denied.

Respectfully submitted,

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[13] Two cases cited by Defendants do not involve § 1404(a). The first, *United States v. American Society of Composers, Authors and Publishers*, 832 F. Supp. 82 (S.D.N.Y. 1993) ("*ASCAP*"), like *Willoughby* and *Unimed*, involves a consent decree and does not mention § 1404 at all. *See id.* at 84 ("The sole issue presented by this motion to reconsider is whether this Court lacked subject matter jurisdiction to entertain petitioner's application to vacate the arbitration panel's award."). The petitioner in *ASCAP* sought relief necessitating an interpretation of a consent decree that would contradict the interpretation of the court overseeing the consent decree. *See* 832 F. Supp. at 87. No such relief is sought in this action. Here there is no risk that a decision in this litigation "would tend to interfere with or frustrate" the District of New Hampshire's oversight of the Tyco Litigation settlement, particularly now that the settlement has been consummated and distributed. (Defs.' Op. Br. at 10 (quoting *ASCAP*)). The District of New Hampshire did not interpret or review the Fee Agreement since it was never disclosed in the Tyco Litigation, and the settlement agreement did not govern the maximum fee that Defendants were entitled to request. The second case, *In re McMahon Books, Inc.*, 173 B.R. 868 (Bankr. D. Del. 1994), does not involve a motion to transfer venue. In dismissing a debtor's complaint on grounds of abstention, the bankruptcy court found that the debtor was seeking relief calling for "'effectuation and administration' of the Settlement Agreement" in a different court. *Id.* at 876. Again, Plaintiff's claims are not premised on the Tyco Litigation settlement agreement.