IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNICREDITO ITALIANO, et al.,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 02-104 GMS
v.	)	
	)	
JPMORGAN CHASE BANK and	)	
CITIGROUP, INC.	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On February 7, 2002, the plaintiff, Unicredito Italiano ("Unicredito"), filed a complaint against JPMorgan Chase Bank ("JPMorgan") and Citigroup.[1] The complaint was later amended to add Bank Pekao, S.A. ("Pekao") as a plaintiff. The plaintiffs' claims against the defendants arise from loans made by the plaintiffs to the Enron Corporation ("Enron"), which the defendants were hired to facilitate or administrate. The plaintiffs allege that the defendants failed to disclose Enron's precarious financial situation until the loans were completed. As a result, Unicredito and Pekao accuse the defendants of fraud, gross negligence, gross negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing. The defendants claim that the applicable contracts clearly state that they had no duty to investigate Enron's creditworthiness, and that any misrepresentations relied on by the plaintiffs were made by Enron.

Presently before the court are the defendants' motions to dismiss, or in the alternative, to transfer venue to the United States District Court for the Southern District of New York. For the reasons that follow, the court will grant the defendants' motions to transfer venue.

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[1] Some of the actions giving rise to the plaintiffs' claims were taken by Citibank, not Citigroup. For simplicity, the court will refer only to Citigroup.

II. BACKGROUND

Unicredito is an Italian bank that has its American headquarters in New York City. Pekan, a subsidiary of Unicredito, is a Polish bank that also has its American headquarters in New York City. The defendant JPMorgan is a Delaware corporation, as is the defendant Citigroup.[2] Both JPMorgan and Citigroup are headquartered in Manhattan in New York City.

According to the plaintiffs, beginning in 1999, the defendants entered into a partnership with Enron in concealed off-shore partnerships known as "special purpose entities" ("SPEs") The plaintiffs allege that the defendants approved high-risk investments in the Enron SPEs. The plaintiffs further allege that the SPEs were operated through the Wilmington Trust Corporation in Wilmington, Delaware.

The plaintiffs note that by 2001, Enron's financial condition was rapidly deteriorating. Nevertheless, the plaintiffs, along with over fifty other banks, entered into two agreements to loan money to Enron. The agreements permitted the release of funds to Enron once Enron had made a "draw-down request" and provided certain assurances as to its financial condition. Under the agreements, Citigroup was to be the "paying agent" and both Citigroup and JPMorgan would serve as "co-administrative agents." The agreements disclaimed any fiduciary relationship between the paying agents or co-administrative agents and the banks, and specifically absolved the defendants of any duty to disclose Enron's financial status. The contracts were executed in New York and also specified that they were to be governed by New York law.

[2] There is a dispute as to whether JPMorgan is a New York or a Delaware corporation. However, since the state of incorporation matters little to the court's analysis of the transfer issue, the court will accept the plaintiffs' representation as true at this time for the purposes of resolving this motion.

On October 25, 2001, Enron made a request for a loan. The notices of borrowing were sent to the New York offices of each of the parties. A conference call was held later that day, and at 4:06 p.m. on that date, a facsimile was sent from Citigroup's "back office" in New Castle, Delaware to the plaintiffs' New York offices. The plaintiffs contend that the facsimile contained mispresentations by Citigroup. The defendants respond that any misrepresentations were made by Enron, and that their employees merely forwarded the information that Enron had provided.

III. DISCUSSION

The defendants seek to transfer venue pursuant to 28 U.S.C. §1404(a). Section 1404(a) provides that "[f]or the convenience of [the] parties and [the] witnesses, in the interest of justice," the court may transfer an action to "any other district where it might have been brought." 28 U.S.C. § 1404(a). The parties agree that this action could have been filed in the Southern District of New York. The court will, therefore, move on with the inquiry as directed by the Third Circuit. *See Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995).

In *Jumara*, the Court of Appeals provided a list of factors to assist the district courts in determining "whether, on balance, the litigation would more conveniently proceed and the interests of justice be better served by a transfer to a different forum." *Id*. These factors include six private and five public interests which the court should consider. *See id*.

A. The Private Interests

The private interests most relevant to this case include: (1) the convenience of the parties as indicated by their relative physical and financial position; (2) the convenience of the witnesses, but only to the extent that they may be unavailable for trial in one of the fora; and (3) the location of records and other documents, again, only to the extent these files cannot be produced in the alternate forum.[3] *See id*.

1. The convenience of the parties

New York is clearly the most convenient forum for this action. The plaintiffs note that each of defendants is a Delaware corporation. Nevertheless, to the extent that this fact is relevant to the convenience analysis, it is not dispositive. *See Corixa Corp. v. IDEC Pharms. Corp*., No. CIV.A. 01-615-GMS, 2002 WL 265094, at *4 (D. Del. Feb. 25, 2002) (finding that a party's incorporation in Delaware "alone will not tip the 'balance of convenience' in its favor."). Moreover, each of the plaintiffs and defendants is headquartered in New York. Thus, it would seem reasonable to conclude that this action should proceed in New York.

[3]For the reasons the court discussed in a previous opinion, it will not afford any weight to the first three *Jumara* factors, specifically, the plaintiff's initial choice of forum, the defendant's preferred venue, and whether the claim arose elsewhere. *See Affymetrix, Inc. v. Synteni, Inc.*, 28 F. Supp. 2d 192, 197-201 (D. Del. 1998). In not affording weight to these factors, the court avoids the risk of double-counting these interests and thereby throwing off the transfer analysis. *See id*. Instead, the court will consider whether the Southern District of New York is a more convenient forum for the parties and the witnesses, while also serving the interests of justice. *See* 28 U.S.C. § 1404(a).

The plaintiffs also note that Delaware is a short distance away from New York, and it would therefore not be inconvenient for the litigation to proceed here. Although it is true that the parties would be able to travel to Delaware in a relatively short time, it seems unreasonable to require such travel when the business operations of the parties are headquartered in New York, the majority of the documents and witnesses are in New York, and no party is headquartered in Delaware or conducts business in Delaware that is as significant as the business it conducts in New York. Thus, the convenience factor weighs heavily in favor of transfer to New York.

2. The convenience of the witnesses

The court notes that witnesses that are employees of the parties to the suit are not to be considered in the convenience analysis. *See id.* at *3. However, "Fact witnesses who possess first-hand knowledge of the events giving rise to the lawsuit . . . have traditionally weighed quite heavily in the 'balance of convenience' analysis." *See id* (citations omitted).

As previously noted, although only four banks are present in the case at bar, over fifty banks participated in the Enron loans. The defendants have represented that employees or representatives of these banks may be called as fact witness to testify as to their understanding of the events that occurred on October 25, 2001. Although the court agrees with the plaintiffs' contention that the need for and the number of such witnesses has not yet been clearly established, the plaintiffs do not dispute that the witnesses are located in New York. There is, however, no clear evidence that these parties would be unable to attend trial in Delaware. Since the witnesses could be produced in either forum, this factor must remain neutral.

3. The location of records and documents

This factor is only relevant to the extent that the documents would be unavailable in one forum as opposed to the other. *See id.* at *4. Recent technological innovations have made it possible to move documents from one location to the other quite rapidly. No party has argued that the relevant documents could not be produced just as easily in New York as in Delaware. Therefore, this factor is also neutral.

B. The Public Factors

As other courts have noted, depending on the circumstances of the case, some of the "public interest" factors listed in *Jumara* may play no role in the "balance of convenience." *See id*. at 205. The court thus elects to discuss only the three factors which the parties deem relevant to the pending case.

1. Interests in the Controversy

Initially, the court acknowledges that to the extent the parties are incorporated in Delaware, Delaware has some interest in the resolution of the actions involving its corporate citizens. However, as previously noted, this fact is not dispositive. *See Dippold-Harmon Enterprises, Inc. v. Lowe's Companies*, Inc., No. 01-532-GMS, 2001 WL 1414868, at *7 (D.Del. Nov. 13, 2001) (noting that incorporation alone will not give rise to an interest in the controversy). Other than incorporation, Delaware has little connection to this action. On these facts, New York clearly has a greater interest in the outcome of this action for several reasons.

First, as previously noted, all of the parties are headquartered in New York. Second, the contract specifies that it will be construed in accordance with New York law. Third, the activities that gave rise to this action took place in New York. The contracts that were the impetus for the loans were executed in New York. The plaintiffs argue that the October 25 facsimile transmission was sent from Delaware, thus creating a connection between this case and Delaware. The court is not persuaded. The sending of the facsimile was a purely administrative act. Moreover, the facsimile, while generated in Delaware, was being *sent* to New York where it was apparently received and used. The fact that the transmission was used in New York further leads the court to conclude that the majority of the activity giving rise to this lawsuit occurred in New York. Additionally, to the extent the plaintiffs argue that events occurring at the Wilmington Trust Corporation cause Delaware to have an interest in this action, the court notes that the plaintiffs have failed to allege any wrongdoing on the part of Wilmington Trust which might heighten Delaware's interest in the case. They merely allege that the defendants conducted business through that company. As the court has previously noted, if the plaintiffs wish to produce documents or witnesses from Wilmington Trust that will establish the defendants' knowledge on certain topics, these documents and witnesses can be made available in New York.

Finally, the plaintiffs have failed to show that the interests involved are unique to Delaware. *See id*. (noting that where claims at issue are not unique to Delaware, the state's interest is lessened). To the contrary, the primary public interest raised by this case - the ethics of the banking profession - is more appropriately addressed in New York. With deference to Delaware's significant role in the banking industry, New York City remains the financial center of the United States, if not the world. Therefore, the impact of this case might be expected to be felt more acutely in that

jurisdiction.

To that end, the court notes that the defendants moved to dismiss this action by arguing that the provisions of the contract disclaiming any fiduciary duty and other similar clauses insulate them from the plaintiffs' claims. However, the plaintiff has raised at least a question as to whether New York law as interpreted by its state and federal courts will permit the plaintiffs to circumvent those provisions.[4] Certainly, the court would be able to familiarize itself with the relevant New York law. However, the court's diligence and research abilities notwithstanding, the New York courts are simply better equipped to answer a question which arises under and involves New York law.[5] Additionally, due to the number of banks that are located in New York and the number of financial transactions that occur in New York, it is highly probable that the Southern District of New York has previously addressed similar issues. Given the strong connection New York has with the banking industry and the impact that the questions raised by this case will have on that industry, this action should proceed in the Southern District of New York.

2. Practical Considerations Making Trial Easy, Expeditious, or Inexpensive

As previously noted, all of the parties to this action are headquartered in New York and a majority of the potential witnesses are located in New York. Thus, it would be easier to allow the

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[4] *See* D.I. 23 at 15-18. The court notes that the plaintiffs rely heavily, but not solely, upon New York State, Southern District of New York, and Second Circuit cases in support of its contentions.

[5] Without attempting to fully reject the contract's choice of law provisions and without asking the court to engage in a choice of law analysis, the plaintiffs appear to assert that their claims do not necessarily have to be construed under New York law because they extend beyond the contract. This argument is undercut by the plaintiffs very reliance on New York law. Moreover, the plaintiff relies on the contract when it alleges that the clauses do not bar recovery for gross negligence or willful acts. Thus, the court believes that the plaintiffs' "argument" on this point is disingenuous at best.

action to proceed there. The court agrees with the plaintiff that New York City is just a brief and relatively inexpensive train ride away from Wilmington. Nonetheless, this only increases, rather than reduces, the expense associated with this matter. For this reasons and all reasons previously discussed by the court, it would be easier and more efficient for this litigation to take place in the Southern District of New York.

3. Administrative Difficulties

Administrative difficulties also weigh in favor of transfer. The plaintiffs note that they filed this lawsuit in Delaware to obtain a faster resolution of the case. They rely on the fact that the District of Delaware has 10,000 fewer cases than the Southern District of New York. However, as the defendants point out, despite the higher caseload, cases in the Southern District of New York are resolved an average of five months faster than cases filed in the District of Delaware. This fact cuts against the plaintiffs' arguments and in favor of transfer.

Moreover, the plaintiffs fail to realize that this court is currently understaffed. What is normally a four judge court has been temporarily reduced to a three judge court as we await the confirmation of a new judge to replace the Honorable Roderick R. McKelvie. The court will not engage in the folly of attempting to predict when Judge McKelvie's replacement will arrive. Given this unique situation, administrative concerns weigh in favor of transferring this case to the Southern District of New York.

V. CONCLUSION

For all of the foregoing reasons, the court concludes that both private and public interests weigh heavily in favor of transferring this action to the Southern District of New York.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Defendant Citigroup's Motion to Transfer Venue (D.I. 8) is GRANTED.

2. The Defendant J. P. Morgan's Motion to Transfer Venue (D.I. 12) is GRANTED.

3. The above-captioned matter is hereby TRANSFERRED to the United States District Court for the Southern District of New York.

4. The Plaintiffs' Motion for Leave to File a Surreply (D.I. 29) is DISMISSED as MOOT.

Dated: June 26, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE