

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PAUL KUCK,)
)
 Plaintiff,)
)
 v.) Civ. No. 04-831-SLR
)
 VERITAS SOFTWARE CORPORATION,)
 EDWIN J. GILLIS and GARY L.)
 BLOOM,)
)
 Defendants.)

MEMORANDUM ORDER

At Wilmington this 14th day of January, 2005, having considered defendants' motion to transfer and the papers submitted in connection therewith;

IT IS ORDERED that said motion to transfer (D.I. 4) is denied, for the reasons that follow:

1. **Introduction.** On July 7, 2004, plaintiff Paul Kuck ("Kuck") filed this complaint against defendants Veritas Software Corporation ("Veritas"), Edwin Gillis ("Gillis") and Gary L. Bloom ("Bloom") alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 28 U.S.C. § 78(j) and § 78(t).¹ (D.I. 1) Plaintiff contends that the individual

¹There are two related cases: Bennet v. Veritas Software Corporation, Civ. No. 04-867-SLR; and Choon v. Veritas Software Corporation, Civ. No. 04-872-SLR. Although formal motions to transfer have not been filed in the related cases, the parties have agreed that the instant motion shall apply to all three cases. (D.I. 13) Additionally, a securities class action was

defendants caused Veritas to issue a materially false and misleading press release regarding expectations on revenue and earnings. (D.I. 1) On July 19, 2004, defendants moved to transfer to the Northern District of California. (D.I. 4, 5) Plaintiff opposes the motion (D.I. 13) and defendants have filed their reply. (D.I. 14)

2. **Background.** Veritas, a Delaware corporation, is a leading provider of software storage products and services. (D.I. 5, 13) Gillis is the Executive Vice President and Chief Financial Officer of Veritas. Bloom is the Chairman of the Board, President and Chief Executive Officer. (D.I. 7)

3. Veritas employs over 6,500 people worldwide, with approximately 3,800 employed in the United States. (Id.) About 1,061 employees work at the corporate headquarters in Mountain View, California. The remaining employees work at 120 offices worldwide, located in 28 states and 36 countries. Veritas does not have any offices, employees or documents in Delaware. Its legal, accounting, finance and marketing departments are located at the Mountain View corporate headquarters. General counsel is also located within the Northern District of California.

Veritas' common stock is traded on the NASDAQ market. (D.I. 13 at 4)

filed on July 29, 2004 in the Northern District of California involving the same claims at bar. Malone v. Veritas Software Corp., 3:04-CV-3088-MJJ (N.D. Cal. 2004).

4. Plaintiff has moved on behalf of himself and of "all other persons similarly situated (the "Class") who purchased or acquired the publicly traded securities of Veritas between April 21, 2004 and July 6, 2004." (D.I. 13 at 4) To that end, motions for consolidation, appointment as lead plaintiff and approval of selection of lead counsel have been filed. (D.I. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26,)

5. **Standard of Review.** Under 28 U.S.C. § 1404(a), a district court may transfer any civil action to any other district where the action might have been brought for the convenience of parties and witnesses and in the interests of justice. Congress intended through § 1404 to place discretion in the district court to adjudicate motions to transfer according to an individualized, case-by-case consideration of convenience and the interests of justice. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988); Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp.2d 192, 208 (D. Del. 1998).

6. The burden of establishing the need to transfer rests with the movant "to establish that the balance of convenience of the parties and witnesses strongly favors the defendants." Bergman v. Brainin, 512 F. Supp. 972, 973 (D. Del. 1981) (citing Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970)). "Unless the balance is strongly in favor of a transfer, the plaintiff's choice of forum should prevail". ADE Corp. v. KLA-

Tencor Corp., 138 F. Supp.2d 565, 567 (D. Del. 2001); Shutte, 431 F.2d at 25.

7. The deference afforded plaintiff's choice of forum will apply as long as a plaintiff has selected the forum for some legitimate reason. C.R. Bard, Inc. v. Guidant Corp., 997 F. Supp. 556, 562 (D. Del 1998); Cypress Semiconductor Corp. v. Integrated Circuit Systems, Inc., 2001 WL 1617186 (D. Del. Nov. 28, 2001); Continental Cas. Co. v. American Home Assurance Co., 61 F. Supp.2d 128, 131 (D. Del. 1999). Although transfer of an action is usually considered as less inconvenient to a plaintiff 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 M.L.-Lee Acquisition Fund II, L.P., 816 F. Supp. 973, 976 (D. Del. 1993).

8. The Third Circuit Court of Appeals has indicated that the analysis for transfer is very broad. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). Although emphasizing that "there is no definitive formula or list of factors to consider," id., the Court has identified potential factors it characterized as either private or public interests. The private interests include: "(1) plaintiff's forum preference as

manifested in the original choice; (2) defendant's preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the convenience of the witnesses but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum)." Id. (citations omitted).

9. The public interests include: "(1) the 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." Id. (citations omitted).

10. **Discussion.** Defendants assert that the convenience of the parties factor is the most compelling reason to transfer. All witnesses, parties, and the legal team are located within the Northern District of California. Moreover, the principal documents regarding internal projections, forecasts and results as well as the SEC filings and press releases related to plaintiff's allegations are located at the Mountain View headquarters. Defendants submit that the expense of travel and

shipping would be greatly reduced by moving the case to California.

11. Plaintiff contends his choice of forum should be afforded deference and that transfer should not be liberally granted. Argos v. Orthotec LLC, 304 F. Supp. 2d 591, 598 (D. Del. 2004). Further, since Veritas is a Delaware corporation enjoying all the benefits and protections of this state's laws, it cannot credibly contend that litigation in the state is inconvenient. (D.I. 13)

12. Weighing the arguments against the Jumara balancing test, the court finds that the asserted advantages of moving the case to the Northern District of California are insufficient to warrant a transfer. Defendants' complaints about litigating here are outweighed by the fact that Veritas has enjoyed the benefits and protections of incorporation in Delaware and that the state has an interest in litigation regarding companies incorporated within its jurisdiction. Moreover, defendants have not provided specific information about problems of certain witnesses being unavailable or unwilling to travel to Delaware for trial. Considering that discovery can be conducted at any location convenient to the parties and their employees, the only event that will take place in Delaware is the trial. The travel expenses and inconveniences incurred for that purpose, by a

Delaware defendant conducting world-wide business, is not overly burdensome.

13. **Conclusion.** For the reasons stated, defendants' motion to transfer (D.I. 4) is denied.

Sue L. Robinson
United States District Judge