UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

COMPUTER STATISTICS, INCORPORATED,
Defendant.

Civil Action No. 307-71

STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR IMPROPER VENUE, OR IN THE ALTERNATIVE FOR CHANGE OF VENUE.

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Plaintiff, Securities and Exchange Commission, has brought this action for injunctive relief to compel defendant Computer Statistics, Inc., timely to file reports with the Commission as required by Sections 13(a) and 15(d) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78m(a) and 78o(d), and to do so in proper form in accordance with the rules and regulations adopted by the Commission under those provisions. The Commission is authorized to obtain such relief pursuant to Sections 21(e) and 21(f) of the Exchange Act, 15 U.S.C. 78u(e) and 78u(f). This Statement of Points and Authorities is filed in opposition to defendant's Motion to Dismiss for Improper Venue, or In the Alternative for Change of Venue.

STATEMENT

A registration statement for shares of Computer Statistics common stock was filed with the Commission on December 29, 1967, and became effective on March 15, 1968, in accordance with the provisions of the Securities Act of 1933 (Securities Act). Consequently, Computer Statistics became subject to the requirements of Section 15(d) of the Exchange Act which provides in pertinent part (emphasis added):

". . . each issuer which shall after . . . [the date of enactment of the Securities Acts Amendments of 1964] file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe . . . such supplementary and periodic information, documents and reports as may be required pursuant to Section 13 of this title in respect of a security registered pursuant to Section 12 of this title. . . .

Under this provision defendant Computer Statistics was required on or before July 29, 1969, to file with the Commission in Washington, D. C. an annual report on Form 10-K for the fiscal year ended March 31, 1969. See Rule 13a-1 under the Exchange Act, 17 CFR 240.l3a-1. Although an extension of time in which to file that report was granted

until September 27, 1969, Computer Statistics did not file that report until October 20, 1969.

Computer Statistics is also the issuer of a class of common stock that has been registered with the Commission under Section 12 of the Exchange Act, 15 U.S.C. 78l, since January 3, 1970. As a result of that registration Computer Statistics is required to file reports with the Commission in Washington, D. C. pursuant to Section 13(a) of the Exchange Act, which provides:

"Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security --

"(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 12 .

"(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe. . . ."

Pursuant to rules adopted under Section 13(a), Computer Statistics was required to file on or before July 29, 1970, an annual report on Form 10-K for the fiscal year ended March 31, 1970. See Rule l3a-1. Although this action was instituted by the Commission on February 3, 1971, it was not until February 17, 1971 -- more than six months after the report was initially due to be filed, and subsequent to the commencement of this action that a 10-K report for the fiscal year ended March 31, 1970, a report purporting to comply with these rules was actually filed. 1/

Pursuant to rules adopted under Section 13(a), Computer Statistics was also required to file a semi-annual report on Form 9-K for the six-month period ended September 30, 1970, on or before November 14, 1970. See Rule 13a-13 as in effect prior to December 31, 1970, 17 CFR 240.13a-13 (1970). That report apparently was not mailed for filing until March 1, 1971 which was after the commencement of this action and after plaintiff's counsel had already been apprised of the filing of the complaint.

The foregoing facts are fully verified by the affidavit of Lloyd M. Dollet which is being filed herewith in opposition to defendant's motion.

ARGUMENT

I. The District of Columbia is a Proper Venue For This Action.

Under Section 27 of the Exchange Act, 15 U.S.C. 78aa, the United States District Court for the District of Columbia, along with the other district courts of the United States, has

"jurisdiction of violations of . . . [that Act] or the rules and regulations thereunder . . . ." With respect to venue, that section provides: "Any suit or action to enforce any liability or duty created by . . . [the Act] or rules and regulations, may be brought," inter alia, in the "district wherein any act or transaction constituting the violation occurred." 2/

The "act or transaction constituting the violation" in this case is the failure of Computer Statistics to comply with provisions of the Exchange Act and rules and regulations thereunder which required it timely to file certain reports in proper form "with the Commission." See Sections 13(a) and 15(d), supra. Under Rule 0-3 of the General Rules and Regulations under the Exchange Act, 17 CFR 240.0-3, "all papers required to be filed with the Commission pursuant to the act or the rules and regulations thereunder shall be filed at its principal office in Washington, D.C." It is well settled that where there is a violation of a statutory duty to perform a required act, the violation will be held to have occurred where the act should have been performed, Johnson v. United States, 351 U.S. 215, 222 (1956), and when a paper must be filed at a designated place, a prosecution for failure to file lies only at the place. Travis v. United States, 364 U.S. 631, 636 (1961). Consequently, the violations of the filing requirements by Computer Statistics occurred in the District of Columbia and, particularly since Section 27 explicitly affords civil venue in the district in which criminal venue may be had, see n. 2, supra, venue is properly laid in these cases in the District of Columbia. 3/

II. No Sufficient Basis Has Been Shown or Exists Upon Which Venue Should Be Changed

Defendants' motion for a change of venue is made pursuant to 28 U.S.C. 1404(a), which provides in pertinent part:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer an civil action to any other district or division where it might have been brought."

The Reviser's Note to Section 1404(a) states:

"Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though venue is proper.

Moore, Federal Practice Sec. 0.145 (1) (2d. ed. 1953). The Supreme Court has accepted the Reviser's statement as "obviously authoritative in perceiving the meaning of the Code". United States v. National City Lines, 337 U.S. 78, 81 (1949). Substantive changes of law were avoided wherever possible in the revision of the Code. Ex Parte Collett, 337 U.S. 55, 62 (1949). Thus, while it may not be necessary under Section 1404(a) for the moving party to make the very extreme showing that was needed to justify outright dismissal of the action under the doctrine of forum non conveniens, see Norwood v. Kirkpatrick, 349 U.S. 29 (1955), the criteria which the court must consider in determining a motion pursuant to Section 1404(a) are derived primarily from forum non conveniens cases. Under that doctrine plaintiff's choice of forum was accorded

substantial weight, and defendants were required to make a strong showing of inconvenience to warrant judicial relief. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

These principles have been recognized by the Court of Appeals for this Circuit in Wiren v. Laws, 194 F. 2d 873, 874-875 (C.A.D.C., 1951), which approvingly quoted the opinion of Judge Frank in Ford Motor Co. v. Ryan, 182 F. 2d 329, 330 (C.A. 2, 1950):

". . . by §1404(a), Congress did not alter the standard theretofore embodied in the doctrine of forum non conveniens, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex parte Collett . . . and United States v. National City Lines . . . . On that basis, these words found in Gulf Oil Corp. v. Gilbert . . . still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties.'"

Accord, Blake v. Capital Greyhound Lines, 222 F. 2d 25 (C.A.D.C., 1955). With respect to companies such as Computer Statistics, the Commission has assigned to the Director of the Division of Corporation Finance responsibility for "all matters . . . arising under the Securities Exchange Act of 1934 in connection with . . . (2) the examination and processing of periodic reports filed pursuant to Sections 13 and 15(d)." See 17 CFR 200.18. Because of its belief "that the Division of Corporation Finance by reason of its familiarity with the facts involved in a particular [report-filing] case is in a position to proceed expeditiously and efficiently for the institution and prosecution of injunctive proceedings," the Commission has now assigned to the Division Director and his staff responsibility to review the facts of particular cases, advise the Commission when enforcement action seems appropriate and, under the general supervision of the Commission's General Counsel, to institute and prosecute actions to compel compliance with the reporting requirements of Sections 13(a) and 15(d) of the Exchange Act. 35 Fed. Reg. 19986 (1970) The offices of the Director of the Division of Corporation Finance and his entire staff, as well as the Office of the General Counsel of the Commission, are all located at the headquarters of the Commission in Washington, D. C. See 17 CFR 200.11. Thus, those of the Commission's officers and agents with knowledge of the facts are located exclusively in the District of Columbia; and the defendant's claim that the Northern District of Texas would be a more convenient forum is nothing more than a request that its convenience be substituted for that of the Commission based upon the location of the defendant's offices and officers. Nor does the fact that the Commission maintains an office in Fort Worth militate in favor of that forum, as defendant urges. Since the defendant has already demonstrated that competent counsel is available to it in the forum chosen by plaintiff Commission, it can hardly be found persuasive that counsel is available to the Commission in the forum preferred by the defendant.

Moreover, the Division of Corporation Finance is at present representing the Commission in eleven civil actions filed in the United States District Court for the District of Columbia seeking to compel the filing of delinquent reports required to be filed pursuant to the Exchange Act. Should all or a significant portion of those actions be transferred pursuant to 28 U.S.C. 1404(a) -- as well may be the result if a defendant may prevail on the kind of showing made in the instant case -- it could result in considerable expense to the public and would necessarily have an adverse impact upon the Commission's enforcement efforts. As was observed in United States v. General Motors Corp., 183 F. Supp. 858, 862 (S.D.N.Y., 1960), where a motion for transfer of venue was denied:

"Expense to the Government is a matter for serious consideration. The appropriation available to the Antitrust Division is limited; and this, in turn, limits its enforcement activities. There is an important public interest in conserving the Division's funds."

Particularly in view of these considerations, the superficial presentation made by Computer Statistics in the case at bar is wholly inadequate to meet its burden under the applicable standard. Section 27 of the Exchange Act is a special venue provision which reflects a congressional grant of flexibility necessary to assure that the Commission may effectively carry out its enforcement responsibilities. It would be anomalous -- and would defeat the congressional purpose -- if a change of venue were found appropriate where, as here, the only showing made is of facts which must necessarily exist in every case where the Commission relies on the privilege of suing where a violation has occurred rather than where the defendant is located or does business. Computer Statistics claims that "it would work a substantial hardship on defendant to be required to try this cause in the District of Columbia," but it shows no more than that it is not located in the forum that the Commission has chosen as the most appropriate in the public interest.

Moreover, the factors normally to be considered with respect to a request for a change of venue relate to the burdens that may be imposed upon one of the parties by protracted discovery and a trial. In the case at bar, however, we believe the relevant facts as shown in the affidavit of Lloyd M. Dollett and evidenced by the exhibits annexed thereto will be essentially undisputed; and we anticipate a prompt summary judgment disposition of this case, which, like the other filing cases before this Court, turns essentially upon the question whether required reports have timely been filed with the Commission. The location of the defendant's records and of persons having relevant knowledge is, for that reason, of no significance. Indeed, if Computer Statistics had accompanied its motion with a statement of points and authorities, "including a concise statement of material facts," as required by Rule 9(b) of the General Rules of this Court, the absence of any triable issue would presumably have been manifest from the moving papers alone.

CONCLUSION

For the foregoing reasons Defendant's Motion to Dismisss for Improper Venue, or in the Alternative for a Change of Venue should be denied.

Respectfully submitted,

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1/ That report apparently fails to comply with the Instructions as to Financial Statements for Form 10-K, 17 CFR 249.310, in that the accountant's opinion contained therein seemingly does not comply with Rule 2-02(c) of Regulation S-X, 17 CFR 210.2-02(c), which requires the accountant's certificate to state clearly the opinion of the accountant in respect of the financial statements covered by the certificate.

2/ The section explicitly provides: "Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred;" civil actions are proper in "such district" as well as "in the district wherein the defendant is found or is an inhabitant or transacts business . . ."

3/ Under other federal statutes a different result may obtain where explicit language evidences a congressional intent that the violation be deemed to have occurred other than in the District of Columbia or where the agency permits or requires that documents be filed other than in the District of Columbia. See Wirtz v. Cascade Employer's Association, Inc., 219 F. Supp. 84 (D.D.C., 1963).