

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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LARRY S. FOX, CYNTHIA ALFORD and  
CARL EDWARDS,

Plaintiffs,

-vs-

**MEMORANDUM  
10-CV-6240**

DAVID A. PATERSON,  
Governor of New York,

Defendant.

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**FACTS**

Plaintiffs have brought an action in Western District of New York seeking to compel the New York State Governor to hold a special election. Plaintiffs allege that "[v]enue is proper in this Court under 28 U.S.C. §1391(b)(2) in that the omission of the defendant in failing to call a special election in the Twenty-Ninth Congressional District, gave rise to the claim and the Twenty-Ninth Congressional District is situated wholly within this federal judicial district." (complaint paragraph 6).

**STANDARD OF REVIEW  
FOR 12(b)(3) MOTION TO DISMISS**

"When venue is challenged in a Rule 12(b)(3) motion to dismiss, the plaintiff bears the burden of proving that venue is proper in the chosen forum. See U.S. Envtl. Prot. Agency ex rel. McKeown v. Port Auth. of N.Y. & N.J., 162 F.Supp.2d 173, 183 (S.D.N.Y.2001). Although a court may consider facts outside the pleadings, it must take all allegations in the complaint as true, unless contradicted by defendants' affidavits, and must draw all reasonable inferences and resolve all factual conflicts in favor of the

plaintiff. See *id.*" Bank of Communications v. Ocean Development America, Inc., 2010 WL 768881, 4 (S.D.N.Y. 2010).

**THE COMPLAINT SHOULD  
BE DISMISSED OR IN THE  
ALTERNATIVE BE TRANSFERRED**

Plaintiffs have commenced a civil action in federal district court based on a federal question and asserts venue pursuant to 28 U.S.C. §1391(b)(2) which provides:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in ... (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred ....

Venue is not proper in Western New York pursuant to 28 U.S.C. §1391(b)(2) and therefore the complaint should be dismissed or in the alternative transferred to the Northern District of New York.

The venue statute should be strictly construed. Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 357 (2d Cir. 2005)("In doing so, however, we caution district courts to take seriously the adjective "substantial." We are required to construe the venue statute strictly. See Olberding v. Illinois Cent. R.R., 346 U.S. 338, 340, 74 S.Ct. 83, 98 L.Ed. 39 (1953).").

Plaintiffs have the burden of establishing venue. Plaintiffs' complaint fails to establish venue. The complaint merely states: "Venue is proper in this Court under 28 U.S.C. §1391(b)(2) in that the omission of the defendant in failing to call a special election in the Twenty-Ninth Congressional District, gave rise to the claim and the Twenty-Ninth Congressional District is situated wholly within this federal judicial district." (complaint paragraph 6). There are no other factual allegations in the complaint to support venue and therefore the complaint should be dismissed. In the alternative, if

the Court does not dismiss the complaint, the Court should send the matter to the Northern District of New York which is the location of the defendant.

The question for the Court is whether impact alone is sufficient to confer venue pursuant to §1391(b)(2). In a recent Western District of New York decision, it was held that "[i]t is clear that in some cases, the fact that the Plaintiff suffers harm in a particular judicial district is sufficient to satisfy §1391(b)(2)." Kirk v. New York State Dept. of Educ., 2008 WL 819632, 4 (W.D.N.Y. 2008). Although there is a line of cases discussing venue in the context of injury in tort cases, see Myers v. Bennett Law Offices, 238 F.3d 1068, 1075 (9th Cir.2001)("The locus of the injury has been deemed to be a substantial part of the events giving rise to the claim in a tort action."), in the dispute before the Court the location of the injury should not be the basis for finding venue.

Many courts have held that venue under §1391(b)(2) or the parallel language of §1391(a)(2) should not be based solely on the location of the impact, effect or injury. See Duarte v. California Hotel & Casino, 2009 WL 4668739, 4 (D.Hawaii 2009)(Venue denied; "[p]laintiffs also argue that their ongoing harm constitutes a substantial event in Hawaii. The court rejects this argument-allegations regarding where Plaintiffs felt their injuries are irrelevant to the venue determination, which focuses on a defendant's actions."); Sonic Supply, LLC v. Universal White Cement Co., Inc., 2008 WL 2938051, 4 (D.N.J. 2008)(Venue not proper in state where effects of the events were felt but rather in state where all business decisions were made); Turpin v. Cal-Ark Trucking, Inc., 2007 WL 3306072, 6 (W.D.Ky. 2007)(Venue is not proper in this Court because all events and decisions giving rise to any discrimination or retaliation occurred in Arkansas and

the location where the injury occurred is not sufficient to confer venue); Gaston v. Gottesman, 2007 WL 1114014, 1 (N.D.Cal. 2007)(§1391 does not provide that venue is proper in any district where “injury and damage” occurs, but rather, e.g., where “a *substantial part* of the events or omissions giving rise to the claim occurred”); Prime Leasing, Inc. v. CMC Lease, Inc., (1999 WL 965688 N.D.Ill. 1999)(Pursuant to §1391(b)(2) venue was not proper because ([a]lthough plaintiff may have felt the effects of defendants' actions in Illinois, the Supreme Court has held that is by itself insufficient to confer venue; Leroy v. Great Western United Corp., 443 U.S. 173, 186-87 (1979)); Gaskin v. Pennsylvania, 1995 WL 154801 (E.D.Pa 1995)(“In making this determination, the Court must focus on the location where the state action that is being challenged was taken, not the location where the impact of the action was felt.”). It is respectfully submitted that the impact, without more is not sufficient to confer venue in the Western District of New York.

The Court in Kirk relied, in part, on Daniel v. American Bd. Of Emergency Medicine, 988 F.Supp. 127, 274 (W.D.N.Y.1997). It is important to note that the district court's decision on venue in Daniel was reversed. Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 433 (2d Cir. 2005). The Second Circuit held “[a]pplying these principles to this case, we conclude that §1391(b)(2) does not support venue in the Western District of New York.” In Daniel, the Second Circuit reversed the district court's granting of venue concluding: “Applying these principles to this case, we conclude that §1391(b)(2) does not support venue in the Western District of New York.” The District Court's holding in Kirk that “ABEM's denial of the applications and appeals of Dr. Daniel and five other individual Plaintiffs and the official communication of this action to

Plaintiffs in New York is sufficient to constitute a substantial part of the events giving rise to Plaintiff's claims" was wrong.

Daniel addressed how to apply §1391(b)(2):

Although our court has had few occasions to interpret §1391(b)(2) since that statute was amended in 1990, certain principles are clear. Section 1391(b)(2) does not restrict venue to the district in which the "most substantial" events or omissions giving rise to a claim occurred. See Bates v. C & S Adjusters, Inc., 980 F.2d 865, 868 (2d Cir.1992); David D. Siegel, "Commentary on the 1988 and 1990 Revisions of Section 1391, Subdivision (a), Clause (2)," printed in 28 U.S.C.A. §1391 at 9-10 (West 1993); see also First of Mich. Corp. v. Bramlet, 141 F.3d 260, 264 (6th Cir.1998)(interpreting analogous "substantial part of the events or omission" language in 28 U.S.C. § 1391(a)(2)(relating to jurisdiction founded only on diversity)); Setco Enters. Corp. v. Robbins, 19 F.3d 1278, 1281 (8th Cir.1994)(same). Rather, as we recently explained, §1391(b)(2) "contemplates that venue can be appropriate in more than one district" and "permits venue in multiple judicial districts as long as a 'substantial part' of the underlying events took place in those districts." Gulf Ins. Co. v. Glasbrenner, 417 F.3d at 356. Nevertheless, the "substantial events or omissions" requirement does limit the forums available to plaintiffs. See *id.* at 357 (cautioning district courts to "take seriously the adjective 'substantial' " in discharging duty to "construe the venue statute strictly"). This is so because, as the Supreme Court explained before the amendment of section 1391, "[i]n most instances, the purpose of statutorily defined venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." Leroy v. Great W. United Corp., 443 U.S. 173, 183-84, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979)(emphasis in original); see also Bates v. C & S Adjusters, Inc., 980 F.2d at 867 (noting that Leroy and other pre-amendment precedents "remain important sources of guidance" in construing the venue statute and recognizing 1990 amendments to §1391 as "at most a marginal expansion of the [general] venue provision" aimed at reducing litigation about "where the claim arose" under the former venue provision); Cottman Transmission Sys. v. Martino, 36 F.3d 291, 294 (3d Cir.1994)(explaining that "the current statutory language still favors the defendant in a venue dispute by requiring that the events or omissions supporting a claim be 'substantial' " and "is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute"); Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir.1995)(explaining that "by referring to 'events and omissions giving rise to the claim,' Congress meant to require courts to focus on relevant activities of the defendant, not of the plaintiff").

Thus, when a plaintiff relies on §1391(b)(2) to defeat a venue challenge, a two-part inquiry is appropriate. First, a court should identify the nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims. See

Gulf Ins. Co. v. Glasbrenner, 417 F.3d at 357. Second, the court should determine whether a substantial part of those acts or omissions occurred in the district where suit was filed, that is, whether “significant events or omissions material to [those] claim[s] ... have occurred in the district in question.” See *id.* (emphasis removed); see also Jenkins Brick Co. v. Bremer, 321 F.3d 1366, 1372 (11th Cir.2003)(asking (1) “What acts or omissions by [defendant] gave rise to [plaintiff’s] claim?” and (2) “Of those acts, did a ‘substantial part’ of them take place in [the chosen venue]?”); cf. Cottman Transmission Sys. v. Martino, 36 F.3d at 295-96 (identifying alleged acts or omissions and then asking whether they are substantial).

“Substantiality” for venue purposes is more a qualitative than a quantitative inquiry, determined by assessing the overall nature of the plaintiff’s claims and the nature of the specific events or omissions in the forum, and not by simply adding up the number of contacts. See Gulf Ins. Co. v. Glasbrenner, 417 F.3d at 357; Cottman Transmission Sys. v. Martino, 36 F.3d at 295-96 (“In assessing whether events or omissions giving rise to the claims are substantial, it is necessary to look at the nature of the dispute.”). When material acts or omissions within the forum bear a close nexus to the claims, they are properly deemed “significant” and, thus, substantial, but when a close nexus is lacking, so too is the substantiality necessary to support venue. See Jenkins Brick Co. v. Bremer, 321 F.3d at 1372 (explaining that substantiality requirement of §1391(b)(2) requires consideration only of acts or omissions that “have a close nexus to the wrong”).

This principle has informed our venue analysis in other cases, even if we have not articulated the substantiality requirement specifically in terms of the nexus between the acts or omissions in the chosen forum and the nature of plaintiffs’ claims. Most recently, we concluded that judgment holders’ request and receipt of an order lifting an automatic bankruptcy stay in the district, which permitted the judgment holders to obtain their judgment, together with the submission, approval, or issuance in the district of the insurance policy under which the judgment allegedly must be paid, could constitute a substantial part of the events giving rise to a claim sounding in contract. See Gulf Ins. Co. v. Glasbrenner, 417 F.3d at 357-58 (vacating and remanding for venue determination). Similarly, in Bates v. C & S Adjusters, Inc., 980 F.2d at 868, we concluded that plaintiff’s receipt of a collection notice in the district was a substantial part of the events giving rise to a claim under the Fair Debt Collection Practices Act because the statute seeks to curb the effect on consumers of abusive debt practices like the collection notices sent to the plaintiff. Also, where two agreements giving rise to a defense were negotiated through a series of communications directed to one party in the Southern District of New York, we concluded that a substantial part of the plaintiff’s claim to a right to arbitration under those agreements occurred in that district and supported venue there. See U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d at 153. But when all events supporting a claim for dissolution of a defendant company (including commingling of funds, improper

transactions, and failure to maintain corporate records) occurred in Illinois, we concluded that the fact of defendant's incorporation in New York, its servicing of New York hospitals, its collection of money from New York debtors, and its employment of a New York law firm did not support venue in the Southern District of New York because the New York actions did not constitute a substantial part (or, indeed, any part) of the events or omissions giving rise to plaintiff's claims. See Friedman v. Revenue Mgmt. of N.Y., Inc., 38 F.3d 668, 672 (2d Cir.1994).

The Daniel court did not state harm or effect alone was sufficient to confer venue nor was it mentioned as a factor to consider.

Kirk discussed New York Mercantile Exchange v. Central Tours Intern., Inc., 1997 WL 370600, 4 (S.D.N.Y. 1997). Although the Court in New York Mercantile Exchange held that harm may be considered, the district court found many other substantial events occurred in the district: "[a]pplying that standard, many of the fraudulent acts alleged either occurred in or have a substantial relationship to this venue. Defendants' fraudulent charges involved air travel to, from, or through New York, as well as food and lodging in New York. Gilson visited NYMEX corporate headquarters in New York in an attempt to justify those charges. Plaintiff also alleges that it suffered financial loss in New York as a result of defendants' acts. The place where the harm occurred is also relevant for venue purposes." It is clear from a reading of New York Mercantile Exchange there were many other substantial events in addition to harm that supported the conclusion that there was venue.

Kirk also cited Astor Holdings, Inc. v. Roski, 2002 WL 72936, 8 (S.D.N.Y. 2002). Astor specifically rejected the position that impact alone is sufficient to support venue. "Plaintiffs contend that the Court can find venue solely because 'plaintiffs were injured in New York.' (Pl's. Br. at 5.). While it is true that the place where harm of a tort occurs is 'relevant for venue purposes,' New York Mercantile Exch. v. Central Tours, Inc., 1997

U.S. Dist. LEXIS 9242, at \*13 (S.D.N.Y. June 30, 1997), Plaintiffs' contention overstates the breadth of the law of venue." The Court also stated "[t]he only case cited that directly supports Plaintiffs' argument that a court may find venue proper under 28 U.S.C. §1391(a)(2) based solely on the situs of the economic harm is Reynolds Corp. v. National Operator Services, Inc., 73 F.Supp.2d 299 (W.D.N.Y.1999)." The Astor Court wrote in a footnote that " The Reynolds court cited to Rothstein v. Carriere, 41 F.Supp.2d 381, 387 (E.D.N.Y.1999), to support this effects-only test for venue. However, in Rothstein, Judge Gershon noted that "*the place where the harm occurred ... [is] ... relevant for venue inquiry,*" but not determinative and, further, that "all of the events regarding plaintiff" transpired in the forum district. *Id.*" (emphasis applied). Astor appears to hold that injury alone is not sufficient to confer venue.

The defendant contends that under a 28 U.S.C. §1391(b)(2) venue analysis the only consideration to consider would be the location where the state action that is being challenged took place, that is, where the decision not to hold a special election took place. The defendant does not agree that venue could be conferred in the Western District simply because this is the district where the results of the decision is felt. Although some courts consider impact as a factor, it is submitted that impact on its own is not sufficient to confer venue.

In the matter before the Court, there is nothing in the complaint that supports plaintiffs' venue burden, therefore the Court should dismiss the complaint or in the alternative, transfer this lawsuit to the Northern District of New York.

## CONCLUSION

The claims against the defendant should be dismissed or in the alternative the matter should be transferred to the Northern District of New York. In the event the Court denies the application for a dismissal, the defendant requests thirty (30) days to file an answer.

Dated: May 11, 2010

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### CERTIFICATE OF SERVICE

I certify that on May 11, 2010, I electronically filed the foregoing Memorandum of Law with the Clerk of the District Court using CM/ECF system, which sent notification of such filing to the following:

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And, I hereby certify that I have mailed, by the United States Postal Service, the document to the following non-CM/ECF participant(s):

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