

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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ENTERED <u>6/24/08</u>
FILED
<b>JUN 24 2008</b>
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA
BY <u>104</u> DEPUTY

8 UNITED STATES BANKRUPTCY COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re ) Case No. 05-05926-PBINV  
12 FRANCIS J. LOPEZ, )  
13 Debtor. ) ORDER ON MOTION FOR  
14 ) TRANSFER OF VENUE

15 On September 30, 2005, Alan Stanly commenced this case  
16 by filing an involuntary petition against alleged debtor,  
17 Francis J. Lopez. On July 20, 2005, Lopez moved to transfer  
18 venue to the Northern District of Florida. The Court denied the  
19 motion without prejudice. Since then Lopez has challenged the  
20 involuntary petition both on the ground that there were not  
21 enough petitioning creditors (§ 303(b)(1)) and that he was  
22 generally paying his debts as they came due (§ 303(h)(1)). The  
23 Court granted Lopez's motion to bifurcate the issues, addressing  
24 the number of petitioning creditors first. On September 26,  
25 2006, after much argument and briefing, the Court entered an

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1 order granting summary judgment in favor of Stanly determining  
2 that the petition was properly filed under § 303(b)(1).

3 Discovery issues have continued to plague this case, and the  
4 Court has been compelled to impose sanctions against Lopez, both  
5 monetary and terminating. On January 28, 2008, the Court entered  
6 an order for relief on the involuntary petition as a sanction for  
7 Lopez's continued failure to comply with discovery requests and  
8 this Court's orders. Lopez's appeal of the order is pending.

9 On March 3, 2008, Lopez renewed his motion seeking to  
10 transfer venue of this case to the Northern District of Florida,  
11 where he resides. On April 7, 2008, the Court held a hearing on  
12 the Lopez's motion to transfer venue and took the matter under  
13 submission.

14 This Court has subject matter jurisdiction over the  
15 proceeding pursuant to 28 U.S.C. § 1334 and General Order  
16 No. 312-D of the United States District Court for the Southern  
17 District of California. This is a core proceeding under  
18 28 U.S.C. § 157(b)(2)(A).

#### 19 DISCUSSION

20 Venue for a bankruptcy case is proper in the district court  
21 for the district-

22 (1) in which the domicile, residence, principal place  
23 of business in the United States, or principal assets  
24 in the United States, of the person or entity that is  
25 the subject of such case have been located for the one  
26 hundred and eighty days immediately preceding such  
commencement ....

26 28 U.S.C. § 1408(1). The parties agree that this Court is a

1 proper venue based upon the related bankruptcy case of Prism  
2 Advanced Technologies, Inc., (Case No. 03-07777-JM7), which is  
3 pending in this district.

4         Nevertheless, 28 U.S.C. § 1412 allows the transfer of a case  
5 properly filed in one district to another district. Rule  
6 1014(a)(1) of the Federal Rules of Bankruptcy Procedure sets out  
7 the procedure for a motion to transfer venue - if, upon a "timely  
8 motion" and after notice and a hearing, the Court determines that  
9 the transfer "is in the interest of justice or for the  
10 convenience of the parties," the case may be transferred to  
11 another district. 28 U.S.C. § 1412; Fed. R. Bankr.P. 1014(a)(1);  
12 In re Custom Builders of Steamboat, Inc., 349 B.R. 39, 42  
13 (Bankr.D.Idaho 2005). The analysis of the combination of  
14 "interest of justice" and "convenience of parties" under § 1412  
15 and Rule 1014 is fact specific to each case and necessarily  
16 requires the exercise of discretion based on the totality of the  
17 circumstances, which may include considerations regarding  
18 witnesses and the presentation of evidence. In re Donald, 328  
19 B.R. 192, 204 (9<sup>th</sup> Cir.BAP 2005). The party urging a change of  
20 venue has the burden of showing, by a preponderance of the  
21 evidence, that the transfer is warranted. In re Kona Joint  
22 Venture I, Ltd., 62 B.R. 169, 172 (Bankr.D.Haw.1986). The  
23 resolution of an issue of venue is left to the sound discretion

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1 of the trial court, but the power of the court to transfer venue  
2 should be exercised cautiously. Id. (Citations omitted).<sup>1</sup>

3 Several non-exclusive factors, which generally amounts to a  
4 totality-of-circumstances analysis, are to be considered: (1)  
5 proximity of creditors to Court; (2) proximity of debtor to  
6 Court; (3) proximity of witnesses necessary to administration of  
7 the estate; (4) location of assets; (5) economic and efficient  
8 administration of the case; (6) need for further administration  
9 if liquidation ensues. In re Donald, 328 B.R. at 204. See also  
10 Custom Builders of Steamboat, Inc., 349 B.R. at 42; In re Kona  
11 Joint Venture I, Ltd., 62 B.R. at 172.

12  
13 **(1) proximity of creditors to Court.**

14 Lopez's schedules list several creditors with addresses  
15 throughout the nation. However, the most active creditor to date  
16 and likely for the remainder of this case is Stanly, who resides  
17 in this district.

18 Gregory Akers, the trustee in the Prism bankruptcy case,  
19 suggests that he has "substantial avoidance claims against  
20 Mr. Lopez" and that moving the case to Florida would increase his  
21 costs of pursuing such claims. To date though, no such actions  
22 have been commenced.

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24 <sup>1</sup> Counsel for Stanly suggests that, in an involuntary case  
25 such as this, deference should be paid to the will of the  
26 petitioning creditors. The Court finds that any such deference  
is unnecessary in light of the burden of persuasion placed upon  
the party seeking transfer - the party, presumably, which did not  
choose the original venue.

1        This factor weighs in favor of venue remaining in this  
2 Court.

3        **(2) proximity of debtor to Court.**

4        This factor is perhaps the simplest of all. Lopez  
5 undeniably lives in Florida, approximately 2,050 miles from this  
6 courthouse. This factor weighs in favor transferring venue to  
7 Florida. However, contrary to the suggestion by Lopez, this  
8 factor carries no more weight than the others - this case was  
9 properly commenced as an involuntary under § 303. Thus, reason  
10 dictates that the petitioning creditor(s) selects among the  
11 available venues. The involuntary debtor, as movant, bears the  
12 burden to show that the case should be moved.

13        **(3) proximity of witnesses necessary to administration of estate.**

14        Neither party has identified any witnesses who will be  
15 necessary for the administration of this estate other than  
16 themselves. Counsel for Stanly suggested at the hearing that if  
17 a § 523 or § 727 action were filed in this case, there might be  
18 witnesses who were "not in the Northern District of Florida."  
19 However, no such action is presently pending, and no such  
20 witnesses have been identified. Thus, the only two witnesses of  
21 which the Court is aware are Stanly and Lopez. Since one is here  
22 and one in Florida, this factor is a wash.

23        **(4) location of assets.**

24        Lopez's assets consist primarily of the residence in Florida  
25 which he owns with his wife, and personal property located in  
26 Florida. This factor weighs in favor of a transfer of venue.

1 (5) economic and efficient administration of case.

2 As Stanly suggests, this Court has spent a good deal of time  
3 with this case and with the parties. The Court has heard the  
4 discovery squabblings of the parties, and has been compelled to  
5 impose sanctions. Were the case to be transferred, the new court  
6 would have to spend some time and energy bring itself up to date.  
7 However, the Court notes that in connection with the present  
8 motion, counsel for both parties have ably set forth a complete  
9 history of the proceedings to date. The Court has no doubt that,  
10 with the assistance of counsel, a new court in Florida could get  
11 up to speed with little difficulty. This Court has, as Stanly  
12 points out, imposed monetary and non-monetary sanctions against  
13 Lopez. However, they are simple orders which can be as easily  
14 enforced in a Florida Bankruptcy Court as anywhere else.

15 Similarly, the Court is not concerned with the fact that  
16 Florida law may need to be applied with respect to Lopez's  
17 residence. Over the years this Court has been called upon to  
18 apply the laws of other states. The Court is certain that, with  
19 the guidance of counsel, it can navigate the Florida law if  
20 necessary. In fact, counsel for Stanly gave a seemingly sound  
21 summary of Florida exemption law at the hearing on this matter.

22 Stanly complains that Lopez has failed to provide authority  
23 for the proposition that an underlying case may be transferred  
24 when an order from the original court is pending. However, the  
25 Court notes that Stanly has provided no authority for the  
26 proposition that it cannot. The Court does not consider this to

1 be a matter worth weighing - both this Court and any court of the  
2 Northern District of Florida would be competent to follow any  
3 instructions which might come from the appellate court.

4 Stanly also suggests that the case should remain in this  
5 district, because the Prism case, the affiliation to which was  
6 the basis of initial venue, is here. That factor was considered  
7 in the Kona Joint Venture case, where four related proceedings  
8 were pending in the district from which venue was sought to be  
9 moved. However, in our situation the Prism case has been dormant  
10 for some time. The case remains open only at the request of  
11 Stanly. Stanly and those supporting his opposition suggest that  
12 there may be avoidance actions brought in the case. However, as  
13 of the time this Court is asked to rule on this motion, no such  
14 actions have begun.

15 Thus, on the one hand this Court would have to spend a  
16 little time familiarizing itself with Florida law. On the other,  
17 a Florida court would need some little time to learn the facts of  
18 this case. Either Court could presumably follow any instruction  
19 the appellate court sees fit to give regarding the pending  
20 appeal. In summary, this factor is a wash.

21 **(6) need for further administration if liquidation ensues.**

22 This factor came into play in Kona Joint Venture, a case in  
23 which the debtor, along with its affiliates, looked to  
24 reorganize. As this is a chapter 7 case, this factor would not  
25 seem to apply.

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1 **Summary of factors.**

2 Clearly, ours is not a case such as In re Donald where the  
3 factors were overwhelmingly in favor of transferring venue.  
4 Rather, the various factors seem to balance each other out.  
5 Given that the burden is on Lopez to demonstrate that venue ought  
6 to be transferred, this Court concludes that he has failed to  
7 meet his burden. This case will stay where it is.

8 In light of this ruling, the Court need not rule on Stanly's  
9 argument that the motion is not timely, as required under Rule  
10 1014. However, the Court notes that since the denial of the  
11 previous motion to transfer, without prejudice, the parties have  
12 been actively addressing the first portion of the bifurcated  
13 § 303 issue as well as the related discovery disputes. The Court  
14 finds that Lopez's renewal of the motion is timely.

15  
16 **CONCLUSION**

17 For the reasons set forth above, the Court denies Lopez's  
18 motion to transfer venue.

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20 IT IS SO ORDERED.

21 DATED: JUN 24 2008

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25 PETER W. BOWIE, Chief Judge  
26 United States Bankruptcy Court