

IMPACT DIRECT, INC.	§	IN THE COUNTY COURT
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
JP&D DIGITAL SATELLITE	§	
SYSTEMS, INC., DIRECTV, INC.,	§	
WISE OWL COMMUNICATIONS, INC.,	§	AT LAW NO. 3
JERRY WISE, and TAMMY WISE,	§	
	§	
Defendants, and	§	
	§	
THANG TRAN, <i>et al.</i>	§	
	§	
Declaratory Judgment Defendants.	§	DALLAS COUNTY, TEXAS

PLAINTIFF’S RESPONSE IN OPPOSITION TO TAMMY WISE, JERRY WISE, AND WISE OWL COMMUNICATION’S MOTION TO TRANSFER VENUE

Pursuant to the Texas Rules of Civil Procedure, the Texas Civil Practice and Remedies Code, the Texas Business and Commerce Code, and the evidence and authorities cited herein, plaintiff Impact Direct, Inc. files Plaintiff’s Response in Opposition to Tammy Wise, Jerry Wise, and Wise Owl Communication’s Motion to Transfer Venue, as follows:

I.

PRELIMINARY STATEMENT

This case began with systematic thefts, breach, and torts, in Dallas County and, therefore, venue lies in Dallas County. No subsequent shell game among the very same bad actors trying to avoid their liability by swapping hats, name tags, and what’s in their pockets can change that. The motion to transfer venue should be denied.

II.

VENUE BACKGROUND

For convenience, the following abbreviations are used. Plaintiff Impact Direct, Inc. is denoted “Impact Direct”. Defendant JP&D Digital Satellite Services, Inc. is “JP&D”. DirecTV, Inc. is “DirecTV”. Defendants Jerry Wise and Tammy Wise, who are married and act jointly in all pertinent things, are collectively “Jerry and Tammy Wise”. Wise Owl Communications, Inc. is denoted “Wise Owl”.

A. Venue Facts.

1. The Dallas County Defendant Technicians.

The following technicians, who are residents of Dallas County, were joined as defendants to determine by declaratory judgment the amounts they are owed for the services provided to Impact Direct, and for which Impact Direct was not paid. Resolution of those claims will follow mechanically from determining the merits of Impact Direct’s line item claims against Tammy and Jerry Wise, JP&D, and DirecTV, and will, in turn, be paid as Impact Direct recovers what it is owed.¹ Although all of these Dallas County residents were cited and served-out by certified mail, to date only one Dallas County resident filed an answer, Thang Tran. He does not contest venue.

Answer on File:

- (a) Thang Tran, is a resident of Dallas County. Thang Tran has appeared and answered.

¹The technicians in Texas, New Mexico, and Louisiana will be paid as Impact Direct recovers and according to the criteria determined in this action. Only Texas technicians were made parties. All were served via certified mail. Some mail was delivered, some was returned, and a few technicians have answered. One technician, Troy-Ken Luong has settled and a joint order of dismissal is on file for the Court’s approval.

Answers Not on File.

- (b) James Horton, 1043 Twin Brooks Drive, Grand Prairie, Dallas County, Texas 75052;
- (c) Roy Amaducci, 1630 Gentry Place Road, Grand Prairie, Dallas County, Texas 75050;
- (d) Edward Morris, 1043 Twin Brooks, Grand Prairie, Dallas County, Texas 75052.

2. An Hypothetical to Illustrate Impact Direct's Case for Dallas County Venue.

A stylized hypothetical will help to illustrate Impact Direct's venue case, particularly with respect to movants Jerry and Tammy Wise, and their new company Wise Owl.

Suppose Eve owns a courier service, which is located in Dallas County, and which serves Dallas County and its contiguous counties. Adam, who is not in Dallas County, contacts Eve and proposes, "If you will go to an address in Dallas County, and pick up \$100 for me, and deposit it into my bank account at the nearby branch, and then call me to confirm, I will pay you \$20." Eve agrees. From Dallas County, Eve contacts and dispatches a courier, who picks up the \$100 and makes the deposit. Eve then calls Adam to confirm and request her payment.

Instead of paying, however, Adam merely laughs, and refuses to pay.

Further, in avoidance of his debt to Eve, Adam transfers the \$100 in his bank account to his cousin, leaving behind an empty account.

Eve sues Adam for theft of services; and both Adam and his cousin for fraudulent transfer in avoidance of the debt.

3. Application to Pleaded Facts.

As set out in plaintiff's Second Amended Petition,² Jerry and Tammy Wise, while outside Dallas County, acting personally for their own benefit, and by and through their wholly-owned company JP&D, requested that Impact Direct provide services in Dallas County, and then to report back when the work was complete.³ Impact Direct provided the requested services, in and from Dallas County, and reported back.⁴ This resulted in monies being deposited from DirecTV into JP&D's account, over which Jerry and Tammy Wise exercised complete control.⁵

When Impact Direct sought payment, Jerry and Tammy Wise -- personally for their own benefit, and by and through JP&D -- refused.⁶

Further, in avoidance of their debt to Impact Direct, Jerry and Tammy formed a new company, Wise Owl, in August 2009.⁷ They then conveyed: the liquid wealth of JP&D to themselves personally, the stock of JP&D to DirecTV, and JP&D's goodwill and operations to Wise Owl, leaving behind an empty shell.⁸ Wise Owl now performs the same satellite TV installations

²*See also* Second Venue Affidavit of Tuyen Tran ("Tran Second Aff."), filed with this Venue Response as Exhibit "A", and incorporated herein by reference.

³Second Amended Petition, and Tran Second Aff.

⁴*Id.*

⁵*Id.*

⁶Second Amended Petition.

⁷Second Amended Petition.

⁸*Id.*

for DirecTV as JP&D did before.⁹ To an outside observer, this was merely a name change.¹⁰

III.

SUMMARY OF ARGUMENTS

This case arises from thefts, breach, and torts in Dallas County. After that, the same bad actors sought to avoid Impact Direct's creditor claims by swapping among themselves their hats, name tags, and the contents of their pockets. This was not an arm's length transaction, and a shell game in avoidance of creditor's claims, no matter how sophisticated, does not defeat venue.

IV.

ARGUMENTS AND AUTHORITIES

B. The Standards to Be Applied.

1. The Venue Standards for Theft Liability.

The Texas Theft Liability Act places venue in: (1) the county where the theft occurred; or (2) in the county where the defendant resides.¹¹ Thus, from the statute itself, venue is not limited to defendant's county of residence, but also lies "where the theft[s] occurred".

For venue purposes, a theft can occur in more than one county.¹² The general rule for determining venue based on where a theft occurred is "any county in which the individual thefts or

⁹*Id.*

¹⁰Tran Second Aff., Exhibit 2.

¹¹Tex. Civ. Prac. & Rem. Code §134.004.

¹²*Smallwood v. State*, 464 S.W.2d 846 (Tex. Cr. App. 1971) (Where money and watch were taken from complaining witness in Dallas County, venue in Dallas County was not defeated because complainant's automobile was not finally taken until the parties were in Ellis County.)

any element thereof occurred.”¹³

The elements of theft of services, are: (1) plaintiff provided a service to defendant; (2) defendant knew the service was provided for compensation; (3) defendant intended to avoid payment for the service by ... intentionally or knowingly securing the performance of a service by agreeing to provide compensation and, after the service was rendered, failing to make payment after receiving notice demanding payment; and (4) plaintiff sustained damages as a result of the theft.¹⁴

Impact Direct provided its services in Dallas County.¹⁵ Therefore, venue is proper in Dallas County for its theft claims against Jerry and Tammy Wise, and JP&D.¹⁶

2. Additional Standards on Venue and Joinder.

Pursuant to Tex. R. Civ. P. 87(2)(b), the existence of a cause of action is immune from challenge at a venue hearing.¹⁷ Accordingly, Impact Direct’s claim for fraudulent transfer against Jerry and Tammy Wise, JP&D, DirecTV, and Wise Owl is established by Impact Direct’s second amended petition, as written.

Pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 15.005, in a suit in which plaintiff has

¹³*Gabriel v. State*, 290 S.W.3d 426, 436 (Tex. App. - Houston [14 Dist.], 2009) (citing *State v. Weaver*, 982 S.W.2d 892, 893 (Tex. Crim. App. 1998)).

¹⁴Tex. Civ. Prac. & Rem. Code §134.005(a) (element 4), Tex. Pen. Code §31.04(a) (elements 1-3). *See generally*, O’Connor’s, Texas Causes of Action Ch.27-C (“Theft of Service”), 2007.

¹⁵Tran Second Aff., ¶¶ 3-9, 11-15.

¹⁶Tex. Civ. Prac. & Re. Code §134.004.

¹⁷*Killeen v. Lighthouse Elec. Contractors, L.P.*, 248 S.W.3d 343, 348-349 (Tex. App. - San Antonio, 2007); *see* Tex.R. Civ. P. 87(2)(b) (“It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action ... shall be taken as established as alleged by the pleadings.”).

established proper venue against some defendants, the Court has venue of all defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences.

Pursuant to Tex. Civ. Prac. & Rem. Code §15.062(a), venue of a “main” action *shall* establish venue of a third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable statute.¹⁸

Pursuant Tex. R. Civ. P. 39(a) (mandatory joinder), a person who is subject to service of process *shall* be joined as a party in the action if in his absence *complete relief* cannot be accorded among those already parties.¹⁹

Pursuant to Tex. R. Civ. P. 40(a) (permissive joinder), all persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.²⁰ Judgment may be granted against one or more defendants according to their respective liabilities.²¹

3. “Complete Relief” under the Texas Uniform Fraudulent Transfer Act.

Pursuant to the Texas Uniform Fraudulent Transfer Act (“UFTA”), Tex. Bus. & Comm. Code §24.008(a), a creditor may, without the necessity of filing a separate action, seek any and/or

¹⁸Emphasis added. Third-party claims pursuant to Tex. Civ. Prac. & Rem. Code §15.062(a) are not, by rule’s own terms, limited to claims asserted by a defendant, as contrasted with third-party claims raised pursuant to Tex. Civ. Prac. & Rem. Code §15.062(b) by an original defendant.

¹⁹Emphasis added. Tex. R. Civ. P. 39(a) (“Joinder of Persons Needed for Just Adjudication”).

²⁰Tex. R. Civ. P. 40(a)(“Permissive Joinder of Parties”).

²¹*Id.*

all the following relief against a transferee:

- (1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
- (2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the applicable Texas Rules of Civil Procedure and the Civil Practice and Remedies Code relating to ancillary proceedings; or
- (3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
 - (A) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
 - (B) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
 - (c) any other relief the circumstances may require.²²

Therefore, based upon DirecTV's acquisition of JP&D, and the cash and other disbursements to Jerry and Tammy Wise, and to Wise Owl, Impact Direct is entitled to seek UFTA relief from all of these defendants.²³

B. Application of the Standards to the Facts.

Venue lies in Dallas County for theft of services against Jerry and Tammy Wise, and JP&D, because Impact Direct provided its stolen services here.²⁴

In turn, by operation of law, venue lies against Jerry and Tammy Wise, JP&D, and DirecTV for Impact Direct's claims in contract, equity, and tort, for recovery of wrongfully unpaid and taken

²²Tex. Bus. & Comm. Code §24.008(a).

²³*Id.*

²⁴Tex. Civ. Prac. & Re. Code §134.004.

monies owed for services, materials, and improperly imposed penalties.²⁵

Impact Direct further asserts that in avoidance of its creditor's claims, JP&D's assets and other property were unlawfully transferred *from and by* Jerry and Tammy Wise, and DirecTV, to Jerry and Tammy Wise, DirecTV, and Wise Owl.²⁶ The existence of this cause of action is immune from challenge, including necessarily the charge that the transfer was done in avoidance of Impact Direct's creditor claims.²⁷

Venue of the "main" action, meaning this Cause, establishes venue of third-party claims, provided that third-parties are: (1) properly joined under the Texas Rules of Civil Procedure or (2) any applicable statute.²⁸ Both sources apply here to make venue proper in Dallas County, including as to Wise Owl, as follows.

First, as a threshold matter, all of Jerry and Tammy Wise, JP&D, DirecTV, and Wise Owl were cited and served, pursuant to the applicable rules and statutes. There are no service of process defects.

Second, the Texas UFTA -- which is an "applicable statute" -- entitles Impact Direct to pursue the assets or other property transferred out of debtor JP&D to any transferee, including Wise

²⁵Tex. Civ. Prac. & Rem. Code Ann. § 15.005 ("In a suit in which the plaintiff has established proper venue against a defendant, the court also has venue of all the defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences.").

²⁶Plaintiff's Second Amended Petition, §V(F) ("DirecTV, JP&D, and Tammy and Jerry Wise's Fraudulent Transfer in Avoidance of Their Debt to Impact Direct"), and §VI, Count Nine ("Fraudulent Transfer").

²⁷Tex. R. Civ. P. 87(2)(b).

²⁸Tex. Civ. Prac. & Rem. Code §15.062(a). This statute is mandatory ("the main action *shall* establish venue") (emphasis added).

Owl, Jerry and Tammy Wise, and DirecTV, by the remedies of avoidance, attachment, receivership, injunctions, and so forth. The statute does not require a separate action but, rather, these remedies can be granted within an existing or “main” action.²⁹ Further, Impact Direct’s UFTA claim against Wise Owl -- which is a transferee and not itself a tortfeasor -- is a third-party claim and, therefore, is subject to mandatory venue under Tex. Civ. Prac. & Rem. Code §15.062(a), which states, “the main action *shall* establish venue ...”.³⁰

Third, the joinder rules *require* a person’s joinder when “in his absence complete relief cannot be accorded among those already parties, ...”³¹. Here, complete UFTA relief (*i.e.*, avoidance, attachment, receivership, inductions, and so forth) can not be accorded Impact Direct without joining Wise Owl as a UFTA transferee defendant. Therefore, Wise Owl *must* be joined. After that, venue is proper in Dallas County as against Wise Owl as a third party to the main action.³²

Fourth, permissive joinder also applies against Wise Owl. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.³³ Here, Impact Direct’s right to UFTA creditor relief begins with theft of its services, breach, and tort; and

²⁹*See, e.g.*, Tex. R. Civ. P. 592 (“Application for Writ of Attachment”) states, “Either at the commencement of a suit or at any time during its progress, plaintiff may file an application for issuance of a writ of attachment. ...”

³⁰Emphasis added.

³¹Tex. R. Civ. P. 39(a).

³²Tex. Civ. Prac. & Rem. Code §15.062(a) “the main action *shall* establish venue ...”.

³³Tex. R. Civ. P. 40(a).

culminates in an avoidance transfer by and among the very same actors who caused Impact Direct's harm, benefitted from it, and then sought to rearrange themselves and their wealth to place it out of Impact Direct's reach.³⁴ This was not at all an arm's length transaction. Before and after, all of the principals, and all of the assets, are exactly the same. Only the hats, name tags, and the contents of each defendant's pants pockets was changed.³⁵

The legally sequential character of these acts -- connected in sequence by the common law "badges of fraud" -- begins with an underlying debt and ends with the transfer itself.³⁶ Legal connectivity and continuity are, indeed, the UFTA statute's *raison d'etre*. Debtors have always endeavored to avoid creditors in this fashion. As it was at common law, the UFTA statute connects the dots of by operation of law.

³⁴Plaintiff's Second Amended Petition, §V(F) ("DirectTV, JP&D, and Tammy and Jerry Wise's Fraudulent Transfer in Avoidance of Their Debt to Impact Direct"), and §VI, Count Nine ("Fraudulent Transfer").

³⁵*Id.*

³⁶*See, e.g., In re Acequia, Inc.*, 34 F.3d 800, 805-806 (9th Cir. 1994, Idaho) ("Therefore, as is the case under the common law of fraudulent conveyance, [bankruptcy courts] frequently infer fraudulent intent from the circumstances surrounding the transfer, taking particular note of certain recognized indicia or badges of fraud."); *City Bank v. Compass Bank*, --- F.Supp.2d ---, 2010 WL 1959808 (W.D.Tex. 2010) (a creditor's state law UFTA claim against a non-bankrupt transferee of a bankrupt debtor based on a pre-petition transfer made outside of any preference period nevertheless is stayed, so that the trustee can unwind the transfer for the benefit of the estate. Were such transfers not legally continuous acts in avoidance of debt, UFTA claims against such a transferee would not belong to the bankruptcy estate); *In re Goldberg*, 277 B.R. 251, 292-293 (Bankr. M.D.La. 2002) ("One example of a 'badge of fraud' is when an insolvent debtor sells property but retains possession of it, without any special reason such as the need to complete unfinished goods; in such a case, common law judges would infer that such a debtor 'was up to no good.'").

VI.

SUMMARY, CONCLUSIONS, AND REQUEST FOR RELIEF

This case began with systematic thefts, breach, and torts, in Dallas County. For these venue lies in Dallas County. No subsequent shell game among the same bad actors to avoid liability changes that. Therefore, defendants Jerry and Tammy Wise, and Wise Owl's motion to transfer venue should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused a true and correct copy of the above and foregoing Plaintiff's Response in Opposition to Tammy Wise, Jerry Wise, and Wise Owl Communication's Motion to Transfer Venue to be served upon the following parties, by and through their respective attorneys in charge, as follows:

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