IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
ALBUQUERQUE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 97-0210-M/DJS
	)	
SPARTON TECHNOLOGY, INC.,	)	
	)	
Defendant.	)	

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO STAY, DISMISS OR TRANSFER VENUE

Sparton Technology, Inc. ("Sparton") requests that this case be stayed, dismissed or transferred to the United States District Court for the Northern District of Texas, Dallas Division for the following reasons:

I.
INTRODUCTORY STATEMENT

There has been pending in federal court in Dallas, since August 1996, a lawsuit brought by Sparton that involves the same issue presented by this action -- how should impacts to the environment associated with a Sparton manufacturing plant be addressed? Since October of 1996 there has been an administrative proceeding before the United States Environmental Protection Agency ("EPA," Region VI) in Dallas -- that also seeks to identify how the same impacts to soil and groundwater should be addressed.

In February 1997, the United States initiated a third proceeding, this action, to identify a remedy for addressing these same impacts to soil and groundwater associated with a Sparton manufacturing plant. The United States was required to bring this action as a compulsory counterclaim in the Dallas Litigation. Therefore, this action must be dismissed or stayed.

Even if the claims of the United States in this lawsuit are not compulsory counterclaims in the Dallas Litigation, they could have been brought in Dallas as permissive counterclaims. Doing so would have been more convenient for the parties who are already litigating both judicially and administratively in Dallas. The United States chose instead to expand the proceeding both numerically and geographically by bringing suit in Albuquerque. This case should be heard in Dallas.

II.
FACTUAL BACKGROUND

The facts relevant to this Motion to Stay, Dismiss or Transfer Venue are largely undisputed:[1]

Sparton operated a manufacturing plant at 9621 Coors Road N.W. in Albuquerque, New Mexico from 1961 to 1997. At this plant, Sparton used various solvents in the course of its defense-related manufacturing operation. In the 1980s, Sparton became aware that the method by which it handled and disposed of spent solvents had caused unintended releases to groundwater at the plant. Sparton notified appropriate authorities of this discovery and

[1] The information in this section is taken from the complaint in this lawsuit, the complaint in the Dallas litigation, attached as Exhibit "A," to the affidavit of A. Jan Appel, which is attached as Exhibit "A," to this pleading.

entered into extended discussions with various regulatory agencies. These discussions culminated in an administrative order on consent ("AOC") between Sparton and the EPA office in Dallas. The AOC described how the extent of the soil and groundwater impacts would be determined and specified a process for developing a plan to deal with those impacts. The AOC called the report detailing how the impacts would be addressed the "Corrective Measure Study" ("CMS"). Under the terms of the AOC, if the EPA approved Sparton's CMS, it was required to accept the remedy Sparton recommended in the CMS.

But the EPA did not live up to its promise: In November 1992, Sparton submitted its initial draft CMS. Almost four years later, in March 1996, the EPA submitted final comments in which it requested the draft CMS be revised. Sparton timely submitted a final draft CMS to the EPA in May 1996. In the CMS, Sparton identified a recommended remedy to prevent an increase in the amount of impacted groundwater and to reduce over time the concentration of solvents in the groundwater. In June 1996, the EPA approved the CMS, with concerns, but, in violation of the AOC, refused to accept Sparton's recommended remedy. Instead, the agency made a final decision selecting a remedy other than the one Sparton recommended.

In August 1996, Sparton sued EPA in federal court in Dallas because the agency had violated its obligations under the AOC, in selecting a remedy. EPA made no objection to venue in the Dallas Litigation.

In September of 1996, and apparently in response to the August lawsuit, EPA issued an initial administrative order ("IAO") to Sparton. Under the terms of that order, Sparton was required to implement a remedy other than what it recommended in the CMS. EPA

directed Sparton to proceed with the remedy EPA chose in its "final decision." Sparton objected to the IAO, and the resolution of that objection is the subject of a current administrative proceeding before EPA Region VI in Dallas.

Despite the existence of these two pending actions, the United States, on behalf of EPA, filed this lawsuit on February 19, 1997. That action occurred more than eight years after the AOC was entered and more than 13 years after EPA first had notice of impacts to soil and groundwater. Through this lawsuit, EPA suggests that conditions that have remained relatively unchanged for several years, somehow only now present an "imminent and substantial endangerment" to human health or the environment.

III.
ARGUMENT AND AUTHORITIES

A. The present lawsuit should have been brought as a compulsory counterclaim in the Dallas Litigation.

The claims the EPA asserts against Sparton in the present action should properly be brought as counterclaims in the pending Dallas Litigation. A counterclaim is compulsory "if it arises out of a transaction or occurrence that is the subject matter of the opposing party's claim."[2] Courts have given the terms "transaction" and "occurrence" flexible and realistic constructions in order to promote judicial economy.[3] The controlling test for whether a

---

[2] Fed. R. Civ. P. 13(a).

[3] *Pipeliners Local Union No. 798 v. Ellerd*, 503 F.2d 1193, 1198 (10th Cir. 1974).

claim arises out of the same transaction or occurrence is whether there is any logical relation between the claim and the proposed counterclaim.[4]

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. . . . Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations . . . does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim.[5]

The goal of both the Dallas Litigation and the present lawsuit is to determine the proper remedy for Sparton to undertake at the Coors Road plant. Clearly there is a logical relationship between the Dallas Litigation, in which Sparton challenges the EPA's authority to enforce its IAO and seeks clarification of how a remedy is to be selected, and the present lawsuit, in which the EPA requests this court enter a remedy. Consequently, the present lawsuit should have been filed as a compulsory counterclaim in the Dallas Litigation.

Because the present lawsuit should have been filed as a compulsory counterclaim in the Dallas Litigation, this Court may dismiss, enjoin, or transfer the present lawsuit.[6] Absent special circumstances, the first filed of two competing lawsuits should have priority.[7] Although nothing in Rule 13 prevents the filing of a duplicative action instead of a

---

[4] *Id.*, at 1198-99.

[5] *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610, 46 S. Ct. 367, 371 (1926).

[6] *See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84, 72 S. Ct. 219, 221 (1952) (holding that district court has discretion over whether to stay or dismiss a proceeding); *Texas Eastern Transmission Corp. v. Marine Office - Appleton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978) (holding that district court has discretion to transfer a proceeding).

[7] *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991).

compulsory counterclaim, the filing of the second action contravenes the purpose of Rule 13.[8] "Ideally, once a court becomes aware that an action on its docket involved a claim that should be compulsory counterclaim in another pending federal suit, it will stay its own proceeding."[9] Consequently, when two actions are logically interdependent such that the second filed action could have been brought as a compulsory counterclaim in the first, the second filed action should be enjoined "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters."[10]

In general, when an action before a court involves a claim that should be a compulsory counterclaim in another pending federal suit, the court should stay its own proceedings or dismiss the claim.[11] The general rule exists because the determination of form should be left to the federal court having prior jurisdiction, where questions of venue may be resolved pursuant to a motion to transfer under 28 U.S.C. § 1404(a).[12] Consequently, when it appears that claims in the present suit would be a compulsory counterclaim in the first filed action, the second filed action should be stayed.[13]

---

[8] *Id.* at 93 (citing 6 Charles A. Wright & Arthur R. Miller ("Wright & Miller"), *Federal Practice and Procedure* § 1418, at 142-43 (2nd ed. 1990 & Supp. 1991).

[9] Wright & Miller, at 143.

[10] *See Southern Const. Co. v. Pickard*, 371 U.S. 57, 60, 83 S. Ct. 108, 110 (1962) (stating the purpose of Federal Rule of Civil Procedure 13(a)); *see, e.g., Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, 180 F.2d 97, 98 (10th Cir.) (enjoining second filed action for declaratory judgment where action for alleged patent infringement had already been commenced in federal district court in Oklahoma), *cert. denied*, 340 U.S. 816, 71 S. Ct. 46 (1950).

[11] *Republic Telcom Corp. v. Telemerica Communications, Inc.*, 634 F. Supp. 767, 768 (D. Minn. 1986).

[12] *Id.*

[13] *See, e.g., id.* (enjoining breach of contract action when related breach of contract action was already pending in the Northern District of Texas).

To prevent multiple litigation between the same parties concerning the same issues, this Court may also dismiss the present action.[14] In the alternative, this Court may transfer the present litigation to the Northern District of Texas so that it may be joined with the Dallas Litigation.[15]

B. This court has the authority to transfer venue in the interest of justice.

1. Section 1404 of the Judicial Code allows this Court to transfer the present case to any district where the action might have been brought.

Under section 1404 of the Judicial Code, this Court may, in the interest of justice, transfer the present lawsuit to any other district or division where the lawsuit might have been brought.[16] The purpose of section 1404 is to prevent waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.[17] The section reflects a desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice.[18] Transfer is appropriate under section 1404 when the moving party

---

[14] *See, e.g., Donaldson, Lufkin & Jenrette v. Los Angeles County*, 542 F. Supp. 1317, 1320-21 (S.D.N.Y. 1982) (applying first filed rule to dismiss second filed lawsuit involving essentially the same parties and the same issues).

[15] *See, e.g., Laughlin v. Edwards Business Machines, Inc.*, 155 F.R.D. 543, 545-46 (W. D. Va. 1994) (holding that transfer and consolidation would serve the interest of justice when claims asserted by plaintiffs in three suits arose out of the same transaction); *Spencer, White & Prentis, Inc. v. Jacor Const. Corp.*, 258 F. Supp. 473, 474 (S.D.N.Y. 1966) (transferring, instead of dismissing, when defendant represented that it would assert compulsory counterclaim in first filed action).

[16] *See* 28 U.S.C.A. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.")

[17] *Van Dusen v. Barrack*, 376 U.S. 612, 616, 84 S. Ct. 805, 809 (1964).

[18] *Id.*

demonstrates that: (1) venue is proper in the transferor district; (2) venue and jurisdiction are proper in the transferee district; and (3) the transfer will serve the convenience of the parties, the convenience of the witnesses, and the interest of justice.[19] In passing on a motion for transfer, the district judge must consider the statutory factors in light of all the circumstances of the case.[20] Because the task of weighing these factors necessarily involves "a large degree of subtlety and latitude," the decision to transfer is committed to the sound discretion of the district judge.[21]

2. The present action "might have been brought" in the Northern District of Texas.

The statutory factors set out in section 1404 are met in the present case. First, venue is proper in this Court. The Resource Conservation and Recovery Act (RCRA) provides that the EPA may institute a judicial proceeding in "the appropriate district court."[22] This Court is an appropriate forum under section 1391(b)(2) of the Judicial Code, which provides that "a civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as 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, or a substantial part of the

---

[19] *Vandeveld v. Christoph*, 877 F. Supp. 1160, 1167 (N.D. Ill. 1995).

[20] *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986).

[21] *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 236, 102 S. Ct. 252, 256 (1981) (explaining that section 1404 gives courts greater discretion than did doctrine of *forum non conveniens*).

[22] 42 U.S.C.A. § 6973.

property that is the subject of the action is situated . . . ."[23] Because the impacted ground water is located within this judicial district, venue is proper in this Court.

But this action "might have been brought" in the Northern District of Texas as well. A federal court's power to transfer an action to another district under section 1404(a) is dependent upon whether the action "might have been brought" by the plaintiff in the transferee district.[24] Whether the action sought to be transferred could have been brought in the transferee district is evaluated as of the time the suit to be transferred was filed.[25] If the action might have been brought as a counterclaim in a pre-existing suit, the plaintiff's ability to raise the action by counterclaim in the transferee district will satisfy the "might have been brought" requirement of section 1404(a).[26] Therefore, in the rare case when both parties are already litigating against one another in the transferee district, the plaintiff's ability to bring its claim as a counterclaim in the transferee district qualifies the transferee district as one where the action "might have been brought."[27]

---

[23] 28 U.S.C.A. § 1391(b)(2).

[24] *Hoffman v. Blaski*, 363 U.S. 335, 343-44, 80 S. Ct. 1084, 1089-90 (1960); *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 691 (10th Cir. 1965).

[25] *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984).

[26] *A.J. Industries, Inc. v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 503 F.2d 384, 387 (9th Cir. 1974); *see also Am. Telephone and Telegraph Co. v. Milgo Electronic Corp.*, 428 F. Supp. 50, 54-55 (S.D.N.Y. 1977) (following *A.J. Industries* in holding that a plaintiff's ability to bring an action as a counterclaim in an action pending in the transferee district qualifies the transferee district as one in which suit "might have been brought"); *Lessona Corp. v. Duplan Corp.*, 317 F. Supp. 290, 293-94 (D.R.I. 1970) (preceding *A.J. Industries* in holding that a plaintiff's ability to bring an action as a counterclaim in an action pending in the transferee district qualifies the transferee district as one in which suit "might have been brought").

[27] *See Phillips Petroleum Co. v. Fed. Energy Admin.*, 435 F. Supp. 1234, 1238 (D. Del. 1977) ("First, *A.J. Industries* involved the unique condition of having both parties already litigating against one another in the transferee district. There only certain claims, and not parties in any real sense, were transferred.").

The ability to raise the subject matter of the transferred suit by counterclaim in a pending action in the transferee district is "significant because it ensures that a plaintiff will not be transferred to a forum where it has not already appeared and is not already engaged in litigation with the defendant."[28] If the plaintiff had brought its claim as a counterclaim in the pending action, the other party could not have objected to the counterclaim on the basis of venue or jurisdiction.[29] Accordingly, when the subject matter of the present suit could have been raised as a counterclaim in a pending suit in the transferee district, both venue and jurisdiction are proper in the transferee district as well.

The EPA could have filed the present action as a counterclaim in the Dallas Litigation. The Dallas Litigation involves Sparton's challenge to the EPA's authority to issue and proceed to enforce the IAO; both because RCRA and the separation of powers doctrine do not permit the EPA to maintain simultaneous administrative and judicial actions, and because the EPA's actions in issuing the IAO conflicts with its obligations under the AOC.

Under Rule 13 of the Federal Rules of Civil Procedure, any claim a defendant has against a plaintiff may be filed in a pending action, whether or not it arises out of the same transaction or occurrence that is the subject matter of the plaintiff's claim. Therefore, there is no question that EPA could have filed this action in Dallas. But, more importantly, the

---

[28] *A.J. Industries*, 503 F.2d at 388.

[29] *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451, 52 S. Ct. 238, 239-40 (1932) (holding that when plaintiff brings suit in federal district court, it submits itself to jurisdiction of the court with respect to all issues embraced in the suit, including those pertaining to defendant's counterclaim); *Mayer v. Devel. Corp. of Am.*, 396 F. Supp. 917, 932-33 (D. Del. 1975) (holding that plaintiffs waived all objections to venue and process as to compulsory counterclaims); *Lemik v. Public Industrials Corp.*, 144 F.2d 968, 977 (2nd Cir. 1944) (holding that plaintiff had waived venue objection to permissive counterclaim), *cited in United States v. Acord*, 209 F.2d 709, 712 (10th Cir.) (holding that no independent jurisdictional basis was necessary for third-party plaintiff's claim), *cert denied*, 347 U.S. 975, 74 S. Ct. 786 (1954).

claims in this lawsuit arise out of the transaction or occurrence that is the subject matter of the Dallas Litigation, namely an appropriate response to environmental impacts associated with the Sparton manufacturing plant. Therefore, EPA was required to file this lawsuit in Dallas.

At the time the EPA filed the present lawsuit, the EPA had the right to file a counterclaim in the Dallas Litigation because it had not yet filed an answer in that case.[30] Because the EPA should have brought the present action as a counterclaim in the Dallas Litigation, the Northern District of Texas is a district where suit might have been brought for purposes of section 1404.

C. The present lawsuit should be transferred to the Northern District of Texas in the interest of justice.

The "interest of justice" is an independent ground for transferring venue.[31] When the interest of justice is paramount, and the comparative convenience of the transferee and transferor forums is not significant, transfer under section 1404 is appropriate.[32] An

---

[30] On the date the EPA filed the present action, February 19, 1997, a motion to dismiss, filed by the EPA based on sovereign immunity, was pending in the Dallas Litigation. Arguably, the EPA would not have waived its sovereign immunity claim by filing a counterclaim in the Dallas Litigation. *See* Fed. R. Civ. P. 13(d); *Citizen Band Potawatomi Indian Tribe v. Tax Comm'n*, 888 F.2d 1303, 1305 (10th Cir. 1989) (holding that Indian Tribe with sovereign immunity coextensive with that of the United States did not waive sovereign immunity as to counterclaim by filing suit as a plaintiff), *aff'd in relevant part*, 498 U.S. 505, 111 S. Ct. 905 (1991). Regardless, however, of whether it would have been strategically advantageous for the EPA to file a counterclaim in the Dallas Litigation, the EPA undisputably had the right to file such a counterclaim. *See* Fed. R. Civ. P. 13(a).

[31] *See Donald v. Seamans*, 427 F. Supp. 32, 33 (E.D. Tenn. 1976); *see also Headrick v. Atchison, T. & S. F. Ry. Co.*, 182 F.2d 305, 310 (10th Cir. 1950) ("Under the provisions of the statute, it is necessary, prior to making a transfer under Section 1404(a), that the court find that such transfer will be not only for the convenience of the parties and their witnesses but further that it is in the interests of justice.").

[32] *Hill's Pet Products v. A.S.U., Inc.*, 808 F. Supp. 774, 777 (D. Kan. 1992) (transferring breach of contract case to federal district court in California where defendant's antitrust and state law claims were pending).

important factor to consider when evaluating the interest of justice is whether related litigation is pending in another forum.[33] "[A]s a general proposition, cases should be transferred to the district where related actions are pending."[34] This general rule exists because, as the Supreme Court has stated, "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent. Moreover, such a situation is conducive to a race of diligence among litigants for a trial in the District Court each prefers."[35]

Consequently, the "first-filed" rule has developed to address situations when parallel litigation is pending in two different district courts. When two courts share concurrent jurisdiction, the first-filed rule gives priority to the court where jurisdiction first attached.[36] The prevailing standard is that, in the absence of compelling circumstances, the first-filed rule should apply.[37]

For example, in *Ervin and Associates, Inc. v. Cisneros*, a nonminority contractor sued the Department of Housing and Urban Development (HUD) in federal court in Colorado to

---

[33] *Id.* (citing 15 Charles A. Wright & Arthur R. Miller ("Wright & Miller"), *Federal Practice & Procedure* § 3854, at 279 (2d ed. 1986)).

[34] *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 743 (N.D. Ill. 1981) (quoting *Sec. and Exch. Comm'n v. First Nat'l Fin. Corp.*, 392 F. Supp. 239, 241 (N.D. Ill. 1975)).

[35] *Continental Grain Co. v. FBL-585*, 364 U.S. 19, 26, 80 S. Ct. 1470, 1474 (1960), *quoted in Cessna Aircraft Co.*, 348 F.2d at 692.

[36] *Harpah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1163 (10th Cir.), *cert. denied*, 456 U.S. 1007, 102 S. Ct. 2299 (1982); *Gen. Comm. of Adjustment GO-386 v. Burlington N. R.R.*, 895 F. Supp. 249, 251 (E.D. Mo. 1995) (citing *Northwest Airlines v. American Airlines*, 989 F.2d 1002, 1004-1006 (8th Cir. 1993).

[37] *Id.* (quoting *Northwest Airlines*, 989 F.2d at 1005).

challenge HUD's decision to award thirty percent of its physical inspection procurement to a single contractor through a Small Business Administration plan to target socially and economically disadvantaged businesses.[38] HUD argued that the contractor's case should be transferred to the District of Columbia, where the contractor had filed a similar lawsuit against the same defendants, asserting the same claims, and seeking the same relief.[39] Recognizing that there were significant similarities between the District of Columbia case and the case at hand, the Colorado court transferred the case to the District of Columbia "for the convenience of the parties and witnesses, in the interest of justice."[40]

Similarly, in *General Committee of Adjustment GO-386 v. Burlington Northern Railroad*, a group of railroad carriers, represented by their collective bargaining agent, filed suit in federal district court in the District of Columbia, seeking a court order requiring two labor organizations to bargain nationally in pending collective bargaining.[41] After several related cases had been filed and transferred to the D.C. district court, one of the two defendant labor organizations in the original District of Columbia lawsuit filed suit in the Eastern District of Missouri to compel four railroad carriers to bargain locally.[42] The railroad carriers invoked the first-filed rule and asked that the case be transferred to the D.C. district court.[43] The Eastern District of Missouri held that all the pending cases presented

---

[38] 939 F. Supp. 793, 794-96 (D. Colo. 1996).

[39] *Id.* at 797-98.

[40] *Id.* at 799.

[41] *Id.* at 251.

[42] *Id.*

[43] *Id.*

the same question: whether the railroad carriers could be compelled to bargain locally instead of nationally.[44] Because the cases all involved the same issue, the court applied the first-filed rule and transferred the Missouri case to the D.C. district court, stating, "Furthermore, it is clear to this court that for the convenience of the parties and probable witnesses, and in the interest of judicial efficiency and swift resolution of this matter, this case should be tried in Washington, D.C."[45]

Likewise, the present lawsuit should be transferred to the Northern District of Texas to promote judicial efficiency and facilitate the swift resolution of this dispute. The present lawsuit and the action pending in the Northern District of Texas are duplicative in that both involve the issue of what remedy Sparton must undertake to correct the unintended environmental impacts of its manufacturing processes and how that decision should be made. In addition, however, the Dallas Litigation will answer the threshold question of whether the EPA violated the AOC when it issued the IAO it seeks to impose on Sparton in the present litigation. Consequently, the outcome of the Dallas Litigation could render this proceeding

---

[44] *Id.* at 252.

[45] *Id.* at 253-54; *see also Tingley Sys. v. Bay State HMO Management*, 833 F. Supp. 882 (N.D. Fla. 1993) (applying first-filed rule to transfer breach of contract suit to district where related declaratory judgment action was already pending); *Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523 (5th Cir. 1988) (upholding district court's *sua sponte* transfer of oil field operator's action from the Southern District of Texas to the Eastern District of Texas in part because pending cases in the transferee district involved identical or substantially related issues); *Mfrs. Hanover Trust v. Palmer Corp.*, 798 F. Supp. 161 (S.D.N.Y. 1992) (applying first-filed rule to transfer lender's collection action to District of New Jersey where borrower had previously commenced lender liability action); *Gen. Tire & Rubber Co. v. Watkins*, 373 F.2d 361 (4th Cir.) (ordering district court to transfer case involving patent validity and infringement to Northern District of Ohio where case could be consolidated with pending case involving same parties and issues to prevent wasteful and useless duplication of time and effort by federal courts), *cert. denied*, 386 U.S. 960, 87 S. Ct. 1031 (1967).

moot.[46] Under these circumstances, one "cannot conceive of an arrangement more expensive, time consuming, and inconvenient to the parties, plaintiff as well as defendant, or more exhaustive of judicial resources," than to proceed with both the present action and the Dallas Litigation simultaneously.[47]

To avoid wasting the courts' and the parties' resources by permitting these duplicative actions to proceed simultaneously, the first-filed rule should be applied, and this lawsuit should be transferred to the Northern District of Texas. Absent compelling circumstances, the first-filed rule should be applied whenever multiple actions involving the same parties and the same issues are pending at the same time. Consequently, the burden now shifts to the EPA to demonstrate compelling circumstances for maintaining the present action in this Court.[48]

C. In the present case, convenience considerations do not preclude application of the first-filed rule.

The first-filed rule does not apply when its application is precluded by overwhelming considerations of convenience; in the present case, however, no such overwhelming considerations exist. First, no weight should be given to the EPA's choice of venue in this case. The EPA's choice, as a government agency, is afforded no more weight than the

---

[46] These same considerations will likely allow the present litigation to be consolidated with the Dallas Litigation, if this case is transferred to the Northern District of Texas. When separate actions are pending between the same district court or two different courts within the same judicial district, the actions may be consolidated when they involve common questions of law and fact. *See* Fed. R. Civ. P. 42(a); *Enter. Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994).

[47] *Air Express Int'l Corp. v. Consol. Freightways Inc.*, 586 F. Supp. 889, 892 (D. Conn. 1984) (granting defendants' motion to transfer venue when defendants in federal court action were plaintiffs in related state court action in California).

[48] *See Gen. Comm.*, 895 F. Supp. at 251-252 (holding that plaintiff labor organization had failed to establish compelling circumstances to thwart application of the first-filed rule).

choice of any other plaintiff.[49] In this case, the EPA's choice of venue should receive no weight, since honoring the EPA's choice of venue as plaintiff in this second-filed litigation would in essence deprive Sparton of its choice of venue as plaintiff in the first-filed Dallas Litigation.[50]

Secondly, Sparton, as the party moving for a transfer of venue, is able to meet its burden of showing that the original forum is inconvenient and that the plaintiff would not be substantially inconvenienced by a transfer.[51] As stated, it would be inconvenient and wasteful to litigate the same issues in both Albuquerque and Dallas. Furthermore, it is no more inconvenient for the EPA to litigate in Dallas as opposed to Albuquerque. The most important convenience consideration is the availability and convenience of witnesses.[52] In considering the availability and convenience of witnesses, the trial court must concentrate primarily on key witnesses.[53] In the present case, as set forth in the attached affidavit of R. Jan Appel, Secretary of Sparton Technology, Inc., the location of key witnesses identified Dallas as the most convenient location for litigation.

In addition, neither party's counsel practices in New Mexico. Instead, Sparton's attorneys are located in Dallas, and the EPA's attorneys are located in the District of

---

[49] *Sec. and Exch. Comm'n v. First Nat'l Fin. Corp.*, 392 F. Supp. at 242 (transferring venue of SEC action against corporate and individual defendants to transferee district where corporate defendants were involved in bankruptcy proceeding).

[50] *See Merle Norman Cosmetics v. Martin*, 705 F. Supp. 296, 298 (E.D. La. 1988) (relating first-filed rule to rule that plaintiff's choice of forum is given considerable weight).

[51] *Standard Office Sys. v. Ricoh Corp.*, 742 F. Supp. 534, 539 (W.D. Ark. 1990) (quoting 15 Wright & Miller, *Federal Practice & Procedure* § 3849, at 259 (2d ed. 1986)).

[52] *Dupre v. Spanier Marine Corp.*, 810 F. Supp. 823, 825 (S.D. Tex. 1993).

[53] *Id.*

Columbia. The location of counsel becomes a significant factor when, as here, the primary counsel for neither party involved in parallel litigation practices in the transferor district, particularly if other factors also point to a transfer.[54]

In this case, therefore, considerations of convenience do not mandate that this action continue in New Mexico. On the contrary, it would undoubtedly be more convenient for both parties to try the case only once in Dallas than to attempt to maintain parallel litigation.[55] The public interest favors speedy and less-expensive dispute resolution. Consequently, it favors the resolution of all issues arising out of one episode in one forum.[56] In the present case, considerations of judicial efficiency far outweigh any other possible convenience consideration. Because the Dallas Litigation and the present lawsuit involve identical parties and issues, and because resolution of the Dallas Litigation may render this proceeding moot, Sparton requests, in the interest of justice, that this lawsuit be transferred to the Northern District of Texas, so that it may be consolidated with the Dallas Litigation.

IV.
CONCLUSION

Sparton has demonstrated that the most appropriate forum for this action is Dallas. The Court should stay, dismiss or transfer this action.

---

[54] *Dupre*, 810 F. Supp. at 826.

[55] *See, e.g. Tingley*, 833 F. Supp. at 887 (observing that financial hardship of litigating in distant forum would be less than hardship of maintaining parallel litigation in both fora).

[56] *Liaw Su Teng*, 743 F.2d at 1149.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By _____
James P. Fitzgerald
Attorneys for Defendant
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900
Fax: (505) 768-7395

THOMPSON & KNIGHT
A Professional Corporation
James B. Harris
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201
Telephone: (214) 969-1102
Fax: (214) 969-1751

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

On the 31st day March, 1997, a true and correct copy of the foregoing document was served upon all counsel of record by hand-delivery and overnight package express.

_____
James P. Fitzgerald

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
ENVIRONMENTAL ENFORCEMENT SECTION
P.O. BOX 7611
WASHINGTON, D.C. 20044-7611
FAX (202) 514-8395

FACSIMILE COVER SHEET

****

TO: Gary O'Dea (505) 768-4525
Ana Marie Ortiz (505) 827-1628
Patrick Trujillo (505) 768-4245
Charles de Saillan (505) 827-4440

****

FROM: Michael T. Donnellan (202) 514-4226

DATE: April 4, 1997

NUMBER OF PAGES (including cover sheet): 23

DESTINATION FAX No.:

DESTINATION VOICE COORD:

SUBJECT: U.S. v. Sparton Technology, Inc., No CIV 97 0210M (D.N.M)

MESSAGE: