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

NAVAJO HEALTH FOUNDATION - SAGE MEMORIAL HOSPITAL, INC.	)	
PLAINTIFF,	)	
v.	)	
SYLVIA MATHEWS BURWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; YVETTE ROUBIDEAUX, ACTING DIRECTOR OF INDIAN HEALTH SERVICE; JOHN HUBBARD, JR., AREA DIRECTOR, NAVAJO AREA INDIAN HEALTH SERVICE; and FRANK DAYISH, CONTRACTING OFFICER, NAVAJO AREA INDIAN HEALTH SERVICE,	)	**NO. 1:14-cv-958-JB-GBW**
DEFENDANTS.	)	

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS OR TRANSFER

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Plaintiff Navajo Health Foundation - Sage Memorial Hospital, Inc. ("Sage") opposes "Defendants' Motion to Dismiss under *Fed. R. Civ. P.* 12(B)(3) or Motion to Transfer under 28 U.S.C. § 1401(A) [*sic*]"[1] (the "Motion"). Venue is proper in this Court, and Defendants' request to transfer this case to the Arizona federal District Court should be denied.

I. STATEMENT OF RELEVANT FACTS

The undisputed facts show that venue is proper in this Court and that the case should not be transferred. Defendants Hubbard and Dayish reside in this District. Defendant Dayish's "personal residence is in Gallup, New Mexico." Motion Ex. 4 ¶ 3. *See* 28 U.S.C. § 1391(c)(1) ("[f]or *all* venue purposes – a natural person . . . shall be deemed to reside in the judicial district in which that person is domiciled") (emphasis added).[2] By his own admission, Defendant Hubbard, the Navajo Area Director for the Indian Health Service ("IHS"), performs a significant amount of his official duties in New Mexico. Motion, Ex. 5 ¶¶ 1 ("The Navajo Area IHS's area of responsibility for health care services corresponds with the boundaries of the Navajo Nation."), 4 ("Forty percent (40%) of our user population resides in New Mexico . . ."). Five of the twelve Navajo Area IHS hospitals and clinics are in the New Mexico part of Hubbard's service area. Ex. A.

A substantial part of the events giving rise to Sage's claim occurred in New Mexico.

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[1] Sage understands that the motion to transfer is based on 28 U.S.C. § 1404(a). *See* Motion at 10-11.

[2] This provision was enacted on December 7, 2011 in the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. 112-63, 125 Stat. 758.

The 2008 Annual Funding Agreement ("AFA") under the original three-year Indian Self-Determination Act[3] agreement between Sage and IHS was negotiated in Shiprock, New Mexico. Ex. C. As a component of Defendants' unlawful declination of Sage's renewal of that agreement and also without prior notice to Sage, Defendants instructed the Gallup, New Mexico, Regional Supply Service Center ("GRSSC"), Sage's federal supplier of pharmaceuticals, to cease delivering drugs and medical supplies to Sage. Sage's ability to purchase pharmaceuticals from the GRSSC under IHS' Prime Vendor contract had been secured in Section 14 of Sage's approved 2013 AFA. *See* Ex. F (excerpt). Defendants then published full-page advertisements in newspapers circulated in New Mexico urging Sage's patients to go to IHS' own hospital in Gallup, the *Gallup Independent* headline reading "**Patients at Sage Told to Go Elsewhere**" and stating that Navajo Area IHS "has advised chapter residents [served by Sage] to seek outpatient, behavioral health, optometry, dental, and other services at IHS facilities in Chinle, Gallup and Fort Defiance." *See* Ex. D, B ¶ 9. The patients whom IHS seeks to divert from Sage to IHS' Gallup hospital necessarily include Sage's Navajo patients who live in New Mexico. Sage has served 1773 such New Mexico patients since 2007 and has received reimbursement from Navajo Area IHS for those services under the Sage/IHS agreement at issue in this case. Ex. B.

The Government's request for transfer under 28 U.S.C. § 1404(a) necessarily posits

[3] Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 *et seq.*

that venue is proper in this Court, and the request for transfer is supported by little more than conclusory statements in the Government's brief. Transfer should be denied. Sage's choice of forum is entitled to significant weight. As recounted above, operative facts occurred in both New Mexico and Arizona. Sage is located about 30 miles from the New Mexico/Arizona border in the Navajo Reservation and the main Navajo Area IHS office is located about 2 miles from that border in Window Rock, Arizona. Ex. B. This Court is much closer to *both* IHS' main office and Sage than the Arizona federal District Court, and this Court is far more convenient for both parties and potential witnesses. *Id.* This Court's docket is less congested than the Arizona federal District Court, Ex. E, and, in consideration of all of the relevant factors, the interests of justice favor adjudication of this time-sensitive case in this Court.

II. VENUE IS PROPER UNDER 28 U.S.C. § 1391(e)(1)(A) and (B).

A. Suits Against Federal Agencies and Officials May Be Brought in Any Judicial District where Any Defendant Resides or where a Substantial Part of the Events Giving Rise to the Claim Occurred.

In actions where a defendant is an officer or employee of the United States, venue is proper "in any judicial district in which (A) a defendant in the action resides, [or] (B) a substantial part of the events or omissions giving rise to the claim occurred . . ." 28 U.S.C. § 1391(e)(1). In deciding whether venue is appropriate, trial courts "must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party." *Hancock v. AT&T*, 701 F.3d 1248, 1260 (10th Cir. 2012),

cert. denied, 133 S. Ct. 2009 (2013) (*citing Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004)).

The venue statute was amended and clarified by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("Clarification Act"), Pub. L. 112-63, 125 Stat.758. One of those clarifications is found in 28 U.S.C. § 1391(c)(1), which now reads: "*For all venue purposes* - (1) a natural person . . . shall be deemed to reside in the judicial district in which that person is *domiciled*." *Id.* (emphases added). The language of this provision is plain enough, and the legislative history confirms that it is intended to "apply to *all venue statutes*." S. Rep. No. 112-10 at 20 (2011) (emphasis added).

B. Defendants Hubbard and Dayish Reside in New Mexico for Purposes of 28 U.S.C. § 1391(e)(1)(A).

Dayish is a natural person. *See Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702, 1707 (2012) ("individual" equated to a "natural person" and a "human being"). Under the 2011 Clarification Act, venue is proper where Dayish is domiciled. 28 U.S.C. § 1391(c)(1) (natural person deemed to reside where domiciled). Dayish is domiciled in New Mexico. Motion Ex. 4 ¶ 3. That is sufficient to establish venue in this Court under 28 U.S.C. § 1391(e)(1)(A) (venue in case against federal officials is proper where "a defendant in the action resides"). The language of 28 U.S.C. §§ 1391(c)(1) and (e)(1)(A) is plain and unequivocal. This Court takes Congress at its word in construing venue statutes, because doing otherwise would "trench upon the mandate of the Congress as to venue and thereby

would be an intrusion into the legislative field." *United States v. Kinley Constr. Co.*, 816 F.Supp. 2d 1139, 1169 (D.N.M. 2011) (Browning, J.) (internal quotation marks omitted).[4]

In addition, even under the pre-2011 standards advanced by the Defendants, both Hubbard and Dayish reside in New Mexico for venue purposes. Unique among all IHS Area offices, the Navajo Area Indian Health Service ("Navajo Area IHS") serves primarily one Indian Reservation, the Navajo Nation. Motion Ex. 5 ¶ 1; Ex. A.[5] The Navajo Nation includes the formal Navajo Reservation in New Mexico, Arizona, and Utah, and the Navajo "checkerboard" area in New Mexico of approximately 2.7 million acres. *See, e.g., Navajo Nation v. Urban Outfitters, Inc.*, 918 F.Supp. 2d 1245, 1255 (D.N.M. 2013) (New Mexico portion of formal Navajo Reservation contains about 4 million acres); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1231 (10th Cir. 2000) (concerning 1.9 million-acre portion of Navajo checkerboard area in New Mexico).

Cases construing pre-2011 venue statutes ruled that the residence of federal officials was their "official" residence. Assuming for the sake of argument that these rulings survive

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[4] One court appears to have discounted the applicable provisions of the Clarification Act in a case involving state officials, but the Complaint in that case was filed on January 11, 2011, prior to the effective date of the Clarification Act. *See Springle v. City of New York*, No. 11 Civ. 8827(NRB), 2013 WL 592656 at *1, 8 (S.D.N.Y. Feb. 14, 2013); Clarification Act § 205(1), 125 Stat. 764.

[5] The Navajo Area IHS also serves the San Juan Paiute and Hopi Indians, whose reservations are within the boundaries of the Navajo Reservation, and the Zuni Reservation adjacent to the Navajo Reservation in New Mexico. *See id.*

the 2011 Clarification Act, the proper test is whether an officer performs a significant amount of his or her official duties in a district, and, if an official performs a significant amount of his duties in two or more districts, then that official has more than one "official" residence for venue purposes. *E.g., Bartman v. Cheney*, 827 F.Supp. 1, 2 (D.D.C. 1993).[6]

Hubbard and Dayish perform their duties within the Navajo Nation and necessarily perform a significant amount of their duties in New Mexico. *See Urban Outfitters*, 918 F.Supp. 2d at 1254-56 (observing that, although the Navajo Nation capital is in Window Rock, Arizona, the District of New Mexico is "certainly also a forum easily deemed convenient for [Navajo] Plaintiffs and is not merely a forum that is largely fortuitous"; and upholding the Plaintiffs' choice of venue in this Court where the Defendants also had a connection to New Mexico because they sold goods here through the internet and in two stores). In this case, five of the twelve health facilities listed by IHS for the Navajo Area are located in New Mexico, including hospitals in Gallup, Crownpoint, and Shiprock, and clinics at Tohatchi and Dzilth-Na-O-Dith-Hle (near Huerfano in the checkerboard area). Ex. A. Hubbard directs programs and staff at these facilities, Motion Ex. 5 ¶ 1, and "40% of

[6] *Accord Dehaemers v. Wynne*, 522 F.Supp. 2d 240, 248 (D.D.C. 2007); *A.J. Taft Coal Co. v. Barnhart*, 291 F.Supp. 2d 1290, 1307 (N.D. Ala. 2003); *Smith v. Dalton*, 927 F.Supp. 1, 6 (D.D.C. 1996); *Doe v. Casey*, 601 F.Supp. 581, 584 (D.D.C. 1985), *rev'd on other grounds*, 796 F.2d 1508 (D.C. Cir. 1986), *aff'd in part and rev'd in part,* 486 U.S. 592 (1988). This is true for state officials, also. *See, e.g., Cook Group, Inc. v. Purdue Research Found.*, No. IP 02-0406-C-M/S, 2002 WL 1610951 at *5 (S.D. Ind. June 24, 2002) (citing numerous authorities).

[Navajo Area IHS'] user population resides in New Mexico," *id.* ¶ 4. Indeed, the 2008 AFA under the original three-year ISDEAA agreement at issue was negotiated by Sage and IHS *in Shiprock, New Mexico*. Ex. C. State lines do not define the geographic extent of where Defendant Hubbard performs his official duties; rather, the boundaries of the Navajo Nation do.

"The Navajo Area IHS's area of responsibility for health care services corresponds with the boundaries of the Navajo Nation." Hubbard Decl., Motion Ex. 5 ¶ 1. Therefore, in this case, state boundary lines do not limit even the "official" residence of Defendants Hubbard and Dayish for venue purposes. *See Urban Outfitters*, 918 F.Supp. 2d at 1255.[7] The specific, unique geographical area defined by IHS as the area where Hubbard and Dayish perform their official duties is the Navajo Nation, which is located primarily in New Mexico and Arizona. So even if, as the Defendants posit and notwithstanding the Clarification Act, the residence of Hubbard and Dayish for venue purposes is their "official" residence, then they reside in New Mexico and venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A).

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[7] *See also Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n of Kansas*, 891 F.2d 1473, 1479 (10th Cir. 1989) (observing that the relevant market area "happens to be divided by the Kansas/Missouri state line" and reversing Kansas federal court's venue-based dismissal of suit against defendants that owned cemeteries only in Missouri), *cert. denied*, 495 U.S. 930 (1990); *Pennwalt Corp. v. Purex Indus., Inc.*, 659 F.Supp. 287, 289 (D. Del. 1986) (in case where plaintiff's principal place of business was in Philadelphia, "Delaware qualifies as [plaintiff's] 'home turf'") (internal quotations and citations omitted).

C. A Substantial Part of the Relevant Events Occurred in New Mexico, and Venue is Therefore Proper under 28 U.S.C. § 1391(e)(1)(B).

As shown above, venue in this Court is proper based on Hubbard's and Dayish's residence. In addition, a substantial part of the events giving rise to Sage's claim occurred in New Mexico, providing an independent basis for upholding venue in this Court.

The 2008 AFA under the original three-year agreement was negotiated by Sage and Navajo Area IHS in New Mexico. Ex. C. That fact supports the propriety of Sage's choice of venue in this Court. *See Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1168 (10th Cir. 2010) (locus of operative facts may be either the location of a contract's execution or the location where decision to deny coverage under it was made); *Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 978 (7th Cir. 2010) (situs of "negotiation of the original agreement" was a "material event" for venue purposes).

As a component of its final decision declining to renew Sage's Self-Determination Act contract, IHS instructed the Gallup, New Mexico, Regional Supply Service Center to cut off pharmaceutical supplies to Sage. Ex. B, F. This is a material event for venue purposes. *See Silver v. Brown*, 678 F.Supp. 2d 1187, 1199 (D.N.M. 2009) (Browning, J.) ("A defendant's communications directed at the district where venue is sought by the plaintiff may constitute the events or omissions that satisfy the venue requirements of 28 U.S.C. § 1391(a)(2).")[8]

[8] 28 U.S.C. §§ 1391(e)(1)(B) and 1391(b)(2), formerly § 1391(a)(2), use identical language: "a substantial part of the events or omissions giving rise to the claim." The statute

aff'd in part and rev'd in part on other grounds, 382 Fed. Appx. 723 (10th Cir. 2010). IHS also directed its communications to Sage's many New Mexico patients to "go elsewhere" – *i.e.*, to IHS' own hospital at Gallup, among other locations – through the *Gallup Independent* and the *Navajo Times*, both of which have large circulations in New Mexico. Ex. B. That, too, is a material event for venue purposes. *Id.* The fact that Sage serves a substantial New Mexico patient population is another factor supporting venue in this Court. *See Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n of Kansas*, 891 F.2d 1473, 1479 (10th Cir. 1989) (fact that a part of the relevant market area was in Kansas supported venue in Kansas over defendants who owned cemeteries only in Missouri).

Sage does not dispute that some of the events giving rise to this suit occurred in Arizona. However, "[t]he fact that substantial activities took place in district B does not disqualify district A as proper venue as long as 'substantial' activities took place in district A, too. Indeed, district A should not be disqualified even if it is shown that the activities in district B were more substantial, or even the most substantial." *First of Mich. Corp. v. Bramlet*, 141 F.3d 260, 263-64 (6th Cir. 1998); *Ibrahim v. Chertoff*, No. 06-cv2071-L (POR), 2007 WL 1558521 at *5 (S.D. Cal. May 25, 2007) (relying on *Bramlet* and other decisions in finding that 28 U.S.C. § 1391(e)(2) provided a proper basis for venue, even if substantial

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was so amended to broaden venue options and "avoid excessive litigation over venue," and it rendered obsolete the former test of which venue was the "best" venue. *E.g., First of Michigan Corp. v. Bramlet*, 141 F.3d 260, 263 & n.3 (6th Cir. 1998) (*citing Report of the Federal Courts Study Committee* (1990) at 94).

events or omissions took place in other districts); *Bartile*, 618 F.3d at 1165-68 (in addressing the "substantiality" test under 28 U.S.C. § 1391(a)(2), "venue is not limited to the district with the *most* substantial events or omissions") (emphasis in original); *see also Urban Outfitters*, 918 F.Supp. 2d at 1256 (fact that "some" relevant acts occurred in the forum state is a "significant enough connection" to honor plaintiff's choice of forum).

III. THIS CASE SHOULD NOT BE TRANSFERRED TO ARIZONA UNDER 28 U.S.C. § 1404(a).

The Government's motion to transfer under 28 U.S.C. § 1404(a) necessarily assumes that venue is proper in this Court, and indeed it is. *See, e.g., Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964); Part II, *supra*. Contrary to the implications in the Motion, "there is nothing . . . in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue." *Id.*, 376 U.S. at 633-34. In any event, New Mexico is a far *more* convenient forum for both parties and the likely witnesses, and the interests of justice favor a New Mexico forum in this case.

The factors to be considered under § 1404 are (1) the plaintiff's choice of forum, (2) the locus of operative facts, (3) the convenience and relative means of the parties, (4) the convenience of witnesses, (5) the availability of process to compel the attendance of witnesses, (6) the location of physical evidence, including documents, (7) the relative familiarity of the courts with the applicable law, and (8) the interests of justice, including the

interest of trial efficiency. *Silver*, 678 F.Supp. 2d at 1204. It is the Government's burden here to demonstrate that the balance of the factors strongly favors a transfer of venue; unless it does, the plaintiff's choice of forum should rarely be disturbed. *Wm. A. Smith Contracting Co., Inc. v. Travelers Indem. Co.*, 467 F.2d 662, 664 (10th Cir. 1972); *Bartile*, 618 F.3d at 1167 n.13. Conclusory affidavits do not satisfy that heavy burden, *see Scheidt v. Klein*, 956 F.2d 963, 966 (10th Cir. 1992); *Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 148 (10th Cir. 1967), and the trial court must draw all reasonable inferences in favor of Sage as the non-moving party and resolve all factual conflicts in Sage's favor, *Hancock*, 701 F.3d at 1260-61.

Of the eight *Silver* factors, seven favor venue in this Court and one is irrelevant.[9] Regarding the first factor, although a plaintiff's choice of forum is entitled to less weight when it sues in a foreign district as a forum-shopping exercise, Sage's choice of this Court is entitled to considerable weight. *See Texas Eastern Transmission Corp. v. Marine Office - Appleton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978) (*citing Ritter*, 371 F.2d at 147). As shown below, the District of New Mexico is certainly a forum easily deemed convenient for Sage and is not merely a forum that is largely fortuitous, so the fact that Sage's campus is located about 30 miles from New Mexico on the Navajo Reservation does not defeat the

[9] There is no issue of the availability of process to compel testimony of witnesses in either this Court or the Arizona or Washington, D.C., federal courts where venue would also be proper.

deference accorded to Sage's choice of forum. *See Urban Outfitters*, 918 F.Supp. 2d at 1255; *see generally Monument Builders*, 891 F.2d at 1479-80; *Waste Distillation Tech., Inc. v. Pan American Res., Inc.*, 775 F.Supp. 759, 764 (D. Del. 1991) (in context of 28 U.S.C. § 1404, "it is sufficient that the forum is near the plaintiff's principal place of business" for plaintiff's choice of forum to be entitled to deference) (*citing Pennwalt Corp. v. Purex Industries, Inc.*, 659 F.Supp. 287, 289 (D. Del. 1986), for the proposition that "Delaware qualifies as Philadelphia's 'home turf'").

The second *Silver* factor, the locus of operative facts, is also satisfied. As shown in Part II(C) of this brief, a substantial part of the events giving rise to this suit occurred in New Mexico, including the negotiation of the 2008 AFA and the instructions to the Gallup Regional Supply Service Center to cease delivering pharmaceutical supplies to Sage contemporaneously with the contract renewal declination. The activities of IHS in New Mexico and IHS' communications to and the impact on Sage's many New Mexico patients caused by IHS' unlawful declination satisfy this factor. *See Emberton v. Rutt*, No. CIV 07-1200 JB/RLP, 2008 WL 4093714 at *12-13 (D.N.M. Mar. 31, 2008) (where at least some of the operative events occurred in New Mexico, court found it not in the interest of justice or trial efficiency to transfer the case) (Browning, J.).

The third, fourth, and sixth *Silver* factors are related in this case, and they all support Sage's choice of forum. Of all the factors, the convenience of witnesses is the most

important. *Bartile*, 618 F.3d at 1169. Defendants do not even address this factor, much less satisfy their burden to provide the court with a detailed showing of inconvenience. *Cf. Scheidt*, 956 F.2d at 966 (movant's burden not satisfied by "meager showing" consisting of conclusory assertions and averments); *Urban Outfitters*, 918 F.Supp. 2d at 1257-58 (denying transfer when movant failed to identify witnesses and show why any third-party witnesses would not voluntarily appear at trial or that their deposition testimony would not suffice).

Sage will not assume Defendants' burden to identify witnesses and describe their expected testimony, but it seems probable that IHS decision makers Hubbard and Dayish would be required to testify in order to justify the declination, unless the case is decided summarily. As stated in Exhibits 4 and 5 to the Defendants' Motion, Dayish lives in Gallup and Hubbard's main office is located in Window Rock. Sage's principal witnesses will be its Chief Executive Officer Christi El-Meligi and its Chief Financial Officer Michael Katigbak, both of whom work at the Sage campus. IHS' office in Window Rock is only about 168 miles from this Court, but 282 miles from Phoenix. Ex. B. Sage is also closer to this Court (by about 80 miles) than to the federal District Court in Phoenix. *Id.* Travel to Albuquerque from Window Rock is mostly on Interstate 40; travel to from Window Rock (or from Sage) to Phoenix is mostly on state roads. *Id.* The extra miles and inconvenience translate to additional travel time, meals and lodging expenses, time away from employment and additional attorneys' fees. *Id.* That additional inconvenience and expense to the

witnesses and parties counsels against transfer. *See In re Volkswagen AG*, 371 F.3d 201, 204-05 (5th Cir. 2004); *Flint v. UGS Corp.*, No. C07-04640 MJJ, 2007 WL 4365481 at *4 (N.D. Cal. Dec. 12, 2007). Defendants' decisions have put Sage on its heels financially, and Sage cannot afford the extra expense that it would incur if the case were transferred to Arizona. *See Silver*, 678 F.Supp. 2d at 1204 (relative means of parties may be taken into consideration in deciding whether to transfer); *Urban Outfitters*, 918 F.Supp. 2d at 1259 (same).

With modern technology, the importance of the physical location of documents is less significant, *see Scheidt*, 956 F.2d at 966; *Urban Outfitters*, 918 F.Supp. 2d at 1258-59, but this factor certainly favors Sage's choice of venue in this Court, since the vast majority of the relevant documents are located at Sage (Sage produced over 23,000 pages of documents for Moss Adams) or at IHS' office in Window Rock and therefore closer to this Court than to any other federal court. Ex. B.

Concerning the seventh factor, although all federal courts are capable of interpreting federal law, this Court has extensive experience interpreting the federal contracting requirements of the ISDEAA. *See, e.g., Southern Ute Indian Tribe v. Leavitt*, 497 F.Supp. 2d 1245 (D.N.M. 2007), *app. dism'd*, 564 F.3d 1198 (10th Cir. 2009), *op. after remand, Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 24 (2012); *Ramah Navajo School Bd. v. Sebelius*, No. CV 07-0289 MV, Dkt. No. 143

(D.N.M. May 9, 2013), *cross appeals filed*, No. 14-2051 and14-2055 (10th Cir. Apr. 4 and 10, 2014), *Crownpoint Inst. of Tech. v. Norton*, Civ. No. 04-531 JP/DJS, Dkt. No. 86 (D.N.M. Sept. 16, 2005). The Arizona District Court and Ninth Circuit do not.

The eighth factor includes considerations of the relative congestion of dockets. *See Juaire v. T-Mobile West, LLC*, No. CIV 12-1284 JB/KBM, 2013 WL 6504326 at *9 (D.N.M. Oct. 31, 2013) (Browning, J.); *Bartile*, 618 F.3d at 1167. This factor also favors Sage's choice of venue. This case is extremely time-sensitive, because Defendants' decision to decline to renew Sage's ISDEAA contract without notice deprives Sage of approximately 53% of its funding for service to its Navajo patient population and threatens Sage with the immediate loss of business and good will, and insolvency within eight months. Ex. B; *see generally Tri-State Gen. and Transm. Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) ("A threat to trade or business viability may constitute irreparable harm."); *Cumberland Heights Found. v. Magellan Behavioral Health, Inc.*, No. 3:10-cv-00712, 2010 WL 3522414 at *7 (M.D. Tenn. Sept. 7, 2010) (loss of 45% of revenues could launch health care business into insolvency, constituting irreparable harm). This Court's docket is, on balance, less congested than the Arizona federal District Court, favoring Sage's choice of venue here. *See* Ex. E (charts from Administrative Office of the United States Courts, showing pending cases and weighted filings per judge of 443 and 787 for the federal District Court in Arizona, 439 and 600 in New Mexico, and 224 and 235 in the District of

Columbia; median times from filing to disposition and from filing to trial are 7.7 and 29.2 months in Arizona, 10.3 months and 26.9 months in New Mexico, and 7.9 and 31.0 months in the District of Columbia);[10] *see Urban Outfitters*, 918 F.Supp. 2d at 1259 (identifying these metrics and *citing Bartile*, 618 F.3d at 1169, for proposition that they are the "most relevant statistics").

The factors under 28 U.S.C. § 1404(a) thus favor this Court as the proper venue.

IV. CONCLUSION

Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) and (B). The Government's request to transfer to the United States District Court for the District of Arizona does not satisfy the standards of 28 U.S.C. § 1404(a). The Government's motion should therefore be denied.

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[10] As Defendants indicate, Motion at 8, the District of Columbia is a proper venue for this case, *see, e.g., Pyramid Lake Paiute Tribe v. Burwell*, No. 1:13-cv-01771 (CRC), __ F.Supp. 3d __, 2014 WL 5013206 (D.D.C. Oct. 7, 2014). If this Court exercises its discretion to transfer this case, the District of Columbia is the preferred venue for Sage. *See Raffile v. Executive Aircraft Maintenance*, No. CIV 11-0459 JB/WPL, 2012 WL 592878 at *7-8 (D.N.M. Feb. 21, 2012) (ordering transfer to Arizona court where plaintiff "now wishes to litigate her claims. . . . [T]o the extent possible, a plaintiff should be the master of her choice of forum") (Browning, J.).

Dated this 11th day of December, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2014, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

s/ Paul E. Frye
Paul E. Frye