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

NAVAJO HEALTH FOUNDATION – SAGE MEMORIAL HOSPITAL, INC.,

Plaintiff,

v. No. 1:14-cv-958 JB/GBW

SYLVIA MATHEWS BURWELL et al.,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiff cannot establish venue here. Plaintiff argues that Mr. Dayish is a New Mexico resident for purposes of this official capacity suit because of a 2011 amendment to 28 U.S.C. § 1391(c), which governs the residency of natural persons. That is incorrect. Official capacity suits are the equivalent of suing the government agency, not a natural person. Subsection (c) therefore does not apply. Plaintiff additionally claims that two Defendants "reside" in New Mexico because their duties relate to the Navajo Nation, which spans part of New Mexico in addition to Arizona and Utah. But there is no dispute that these two Defendants' official duty station is Arizona and they performed all duties related to this lawsuit in Arizona. Finally, Plaintiff points to three "events" in New Mexico that allegedly gave rise to this suit: the signing of a contract six years before the events relevant to this lawsuit, a communication to a New Mexico supplier about the Arizona hospital at issue, and communications to patients in Arizona about medical care available in New Mexico. But this lawsuit is not about any of those things. It is about Defendants' decision not to contract with Plaintiff. These three events thus have nothing to do with this suit, and cannot support venue in New Mexico.

Alternatively, if this Court determines that venue is proper in New Mexico, the case should be transferred to Arizona. All operative facts of this case occurred in Arizona, the Plaintiff is located in Arizona, and the Defendant who signed the letter declining to contract with Plaintiff resides in Arizona. Plaintiff's attempt to avoid its home forum at all costs—even at the cost of litigating halfway across the country, in the District of Columbia—should not be countenanced. This case has no substantial ties to New Mexico and should not be here.

ARGUMENT

I. Venue Does Not Lie in New Mexico.

A. Mr. Dayish does not reside in New Mexico.

Plaintiff invokes 28 U.S.C. § 1391(c) to support its theory that Mr. Dayish's residence for purposes of this case is his personal residence, rather than his official residence. Doc. 14 at 4. But subsection (c) defines the residency of "natural person[s]." 28 U.S.C. § 1391(c)(1). It is not applicable to this case; Defendants are all sued in their official capacity, so they are not "natural person[s]." Instead, this case is governed by subsection (e), which applies to "[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States." *Id.* § 1391(e)(1).

In support of its argument that subsection (c) governs this case, Plaintiff cites *Mohamad v. Palestinian Authority*, which holds that Congress' use of the term "individual" means "natural person" and not a corporation. 132 S. Ct. 1702, 1707 (2012); *see* Doc. 14 at 4. That case did not deal with the venue statute, government officials sued in their official capacity, or the definition of a "natural person." It therefore cannot shed much light on the instant matter. More pertinently, the Supreme Court has also held that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," and do not

constitute an action against the officer him or herself. *Monell v. N.Y. Dep't of Social Servs.*, 436 U.S. 658, 690 n.55 (1978); *Brandon v. Holt*, 469 U.S. 464, 472 (1985). In other words, "[s]tate officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them." *Hafer v. Melo*, 502 U.S. 21, 27 (1991).

Suing Mr. Dayish in his official capacity is the legal equivalent of suing the Indian Health Service ("IHS"), his employer. There could be no argument that IHS is a "natural person" to whom subsection (c) applies. It follows that there is no basis for the argument that subsection (c) applies to Mr. Dayish as an official-capacity defendant. The 2011 amendment to subsection (c) thus has no bearing on this case, and Plaintiff has offered no other reason to distinguish the long line of cases holding that the relevant residence for purposes of subsection (e) is the government employee's official, rather than personal, residence. *See* Doc. 8 at 5. Mr. Dayish's residence is Arizona, not New Mexico.

B. Mr. Hubbard does not reside in New Mexico.

Plaintiff alternatively argues that Mr. Hubbard, and possibly Mr. Dayish, "reside" in New Mexico because they perform "a significant amount of [their] official duties in" New Mexico. Doc. 14 at 6. It appears to be undisputed that Mr. Hubbard and Mr. Dayish have official duty stations in Window Rock, Arizona, and that Arizona is thus their official residence. Dayish Decl. ¶ 3 (Doc. 8-4); Hubbard Decl. ¶ 5 (Doc. 8-5). Plaintiff, however, relies on the minority side of a split of authority as to whether an official-capacity defendant can have more than one residence. Doc. 14 at 6 & n.6. Under that authority, Plaintiff argues that Mr. Hubbard and Mr. Dayish are residents of New Mexico as well as Arizona. But this Court should adopt the majority view described in Defendants' motion, not the minority view espoused by Plaintiff. *See* Doc. 8 at 6 (citing a line of cases representing the majority view).

The minority view originated with (and with one exception, *see* Doc. 14 at 6 n.6, appears to be confined to) the District Court for the District of Columbia. That court imported the reasoning that a public official can have more than one residence from the state context into the federal context. *See Doe v. Casey*, 601 F. Supp. 581, 585 (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 Court should not follow that approach. As Wright and Miller have explained, the *Doe* court reached this conclusion on the strength of "two cases that do not support the quoted statements." *See* Wright & Miller, 14D Federal Practice and Procedure: Jurisdiction § 1318 n.16 (4th ed., Westlaw 2014). In fact, one of the cited cases directly *contradicts* the rule in *Doe*: "The Fifth Circuit decision cited in *Doe* says that a federal official has only one official residence, but that this is not necessarily true of a state official." *Id.* (referring to *Fla. Nursing Home Ass'n v. Page*, 616 F.2d 1355, 1360 (5th Cir. 1980), *rev'd on other grounds*, 450 U.S. 147 (1981)). And the other cited case has nothing to do with the issue at hand: "The case cited from the District of Columbia Circuit holds only that an officer's official residence, not his or her personal residence, controls in a suit against an officer." *Id.* (referring to *Lamont v. Haig*, 590 F.2d 1124, 1128 n.19 (D.C. Cir. 1978)). In other words, the rule lacks any support beyond the District Court for the District of Columbia.

And as other courts have explained, the reasoning behind the *Doe* rule does not quite work. "[T]he potential inconvenience to federal officials resulting from a rule recognizing multiple official residences is far greater than for state officials, who can never be deemed to reside in another state." *Cheeseman v. Carey*, 485 F. Supp. 203, 207 (S.D.N.Y. 1980). "Moreover, the fact that a plaintiff can generally sue federal officials in the district in which the plaintiff resides, 28 U.S.C. § 1391(e), makes a multiple-residence rule far less necessary in cases

against federal officials." *Id.*; *see also Republican Party of N.C. v. Martin*, 682 F. Supp. 834, 836 (M.D.N.C. 1988) (same). "Thus, there are "good reasons for following a broader rule with regard to state officers or agencies and holding, under proper circumstances, that a state officer or agency may have more than one official residence.'" *Cook Grp., Inc. v. Purdue Research Found.*, No. 02-0406, 2002 WL 1610951, at *5 (S.D. Ind. June 24, 2002) (quoting 15 Wright, Miller, & Cooper, Federal Practice and Procedure § 3805, at 38). That is the case here: Mr. Hubbard and Mr. Dayish work in Arizona, and could reasonably expect to be sued in Arizona for matters arising out of their performance of official duties. It is far less reasonable to expect them to answer suit in Arizona, New Mexico, or Utah simply because the Navajo Nation spans all of those states.

Even if the Court disagrees with the majority rule and follows the District of Columbia, it should still hold that Mr. Hubbard and Mr. Dayish do not reside in New Mexico. In support of its argument, Plaintiff appears to rely solely on the fact that the Navajo Nation is located partly in New Mexico. *Id.* at 6-7. While Mr. Hubbard and Mr. Dayish may have duties *relating to* New Mexico because of that circumstance, they do not *perform* a significant part of their duties *in* New Mexico. Dayish Decl. ¶ 3 (Doc. 8-4) ("I perform all of my official duties in Window Rock, Arizona."); Hubbard Decl. ¶ 5 (Doc. 8-5) ("My official duty station is in Window Rock, Arizona and I perform the significant part of my official duties in Window Rock, Arizona."). Venue is proper in the state where Defendants "perform[] [their] official duties," not in any state to which Defendants' duties may occasionally relate. *Reuben H. Donnelley Corp. v. FTC*, 580 F.2d 264, 266 n.3 (7th Cir. 1978).

Finally, Plaintiff does not address Defendants' argument that, if this Court adopts the multiple-residences rule from the state context, it should also adopt the test for determining

which residences matter for state officials. *See* Doc. 8 at 6-7; *Republican Party of N.C. v. Martin*, 682 F. Supp. 834, 836 (M.D.N.C. 1988) (examining, among other things, "the relationship of the defendant's activities within the district to the cause of action"). Plaintiff makes no attempt to argue that any of Defendants' official duties in New Mexico have anything to do with Sage Memorial Hospital or the declination decision. That is because they do not. Venue is not proper in New Mexico.

C. No acts or omissions giving rise to this suit occurred in New Mexico.

Plaintiff argues that "a substantial part of the relevant events occurred in New Mexico" on the strength of three events: (1) the signing of a 638 contract in New Mexico, six years prior to the declination decision at issue here; (2) IHS's instructions to a Gallup, New Mexico medical center to stop supplying Sage after the declination decision; and (3) IHS statements to Navajo area patients that medical care after the declination decision was available in two locations in Arizona and one in New Mexico. Doc. 14 at 8-9.

The problem with Plaintiff's argument is two-fold. *First*, none of these events "g[ave] rise to the claim[s]" in this case. *Cf.* 28 U.S.C. § 1391(e)(1)(B) (venue is proper in any district where "a substantial part of the events or omissions *giving rise to* the claim occurred" (emphasis added)). The signing of a previous 638 contract has nothing to do with the decision *not* to sign a different contract six years later. Plaintiff has no claims based on the signing of a 638 contract. (Nor could it; such an action is favorable to it.) That decision simply has nothing to do with the claims in this case. *Cf.* Am. Compl. ¶¶ 52-79. Similarly, Plaintiff's claims are not founded on IHS statements made to or about medical providers other than Sage. Again, Plaintiff challenges only the declination decision itself. *Id.*

Second, none of these events are "substantial," for the same reason. *Cf.* 28 U.S.C. § 1391(e)(1)(B) (venue is proper in any district where "a *substantial* part of the events or

omissions giving rise to the claim occurred" (emphasis added)). Events that did not "give rise to" a claim are, plainly, unlikely to be "substantial." The signing of a contract six years prior to the decision at issue is not a substantial event. And a few communications about healthcare available elsewhere are not substantial. *Cf. Tillotson v. City of El Paso*, No. 09-cv-0963 JB/CG, 2010 WL 597993, at *4 (D.N.M. Jan. 29, 2010) (where "[a]lmost every event described in the Amended Complaint occurred in El Paso," except the plaintiff's "dismissal from Thriftway Supermarkets" in New Mexico, no "substantial" part of the events or omissions giving rise to the claim occurred in New Mexico).

II. Alternatively, the Court Should Transfer Venue Because the Relevant Factors Weigh Heavily in Favor of Venue in Arizona.

In the alternative, Defendants have moved to transfer this case to Arizona. Because all underlying operative facts occurred in Arizona, and New Mexico is not a more convenient forum than Arizona, the Court should grant the motion.

Plaintiff argues that the Court should apply an eight-factor test in deciding whether to transfer the case:

> (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.

Doc. 14 at 10-11 (citing *Silver v. Brown*, 678 F. Supp. 2d 1187, 1204 (D.N.M. 2009)). This test is not all that helpful because the main reason the case should be transferred lies with factors two and three: the locus of operative facts and the convenience of the parties. The balance of the remaining factors is largely neutral.

The plaintiff's choice of forum. Plaintiff argues that its choice of forum is entitled to deference. Doc. 14 at 11-12. But as one of the cases cited by Plaintiff explains, "[w]hen the

operative facts underlying the cause of action did not occur within the forum chosen by the Plaintiff, the choice of forum is entitled to less consideration." *A.J. Taft Coal Co. v. Barnhart*, 291 F. Supp. 2d 1290, 1310 (N.D. Ala. 2003) (internal quotation marks omitted) (cited by Plaintiff, Doc. 14 at 6 n.6). As explained above, *no* operative facts occurred in New Mexico because the three events Plaintiff points to did not give rise to the claim in this case, and are not substantial. *See supra* pp. 6-7. And, as *A.J. Taft Coal* stressed, "even the consequences of the [Defendants'] decision have not occurred within this District." *Id.* Rather, the consequences of the decision have occurred in Arizona, where Sage is located.

None of Plaintiff's cited cases support its argument. *Cf.* Doc. 14 at 12. *Navajo Nation v. Urban Outfitters, Inc.* held that the Navajo Nation itself can be considered to be located in New Mexico, and that therefore New Mexico is a suitable forum for the tribe to litigate in as plaintiff. 918 F. Supp. 2d 1245, 1255-56 (D.N.M. 2013). In this case, however, the Navajo Nation is not the plaintiff. The plaintiff is Navajo Health Foundation—Sage Memorial Hospital, and there is no dispute that it is located in and operates a hospital in Arizona, not New Mexico. *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n* held that venue in Kansas was proper under subsection (b) of § 1391 because the effects of defendants' anticompetitive conduct occurred in both Kansas City, Kansas and Kansas City, Missouri. 891 F. 2d 1473, 1478 (10th Cir. 1989). Here, the effects of the declination decision occurred in Arizona, where Sage allegedly suffered or will suffer damages. In addition, *Monument Builders* did not deal with a transfer motion and so did not decide whether Kansas or Missouri was a more suitable forum for purposes of § 1404(a). *Cf. id.*

Finally, *Waste Distillation Technology v. Pan American Resources* highlights the problems with Plaintiff's choice of venue in this case. 775 F. Supp. 759 (D. Del. 1991). In

Waste Distillation, the plaintiff's principal place of business was in a town just north of New York City. *Id.*at 760. The plaintiff first filed suit in the Southern District of New York, but that court dismissed the case for lack of personal jurisdiction. *Id.* at 765. After the plaintiff filed suit in Delaware, the defendant moved to transfer the case to the Central District of California. *Id.* at 760. The court rejected the argument that the plaintiff should be penalized for litigating away from its principal place of business, reasoning that the plaintiff attempted to do so but that its "home turf" was not available. *Id.* at 765. The District of Delaware was thus the "closest District with jurisdiction and selection of this forum was controlled by the plaintiff's rational and legitimate concerns." *Id.* The court then rejected the argument that the Central District of California was just as inconvenient for the plaintiff, because "[t]he plaintiff's President would have an approximate commute to this courthouse of 3 hours by car or 1 ½ hours by train" and by contrast, if the transfer were granted, "[b]oth parties would be forced to attend trial via the air," on the other side of the country. *Id.*

Waste Distillation's concerns cut the opposite way here. Plaintiff did not first attempt to file suit on its "home turf" only to be turned away. Instead, Plaintiff appears to want to avoid its home turf at all costs. Tellingly, if Plaintiff cannot have New Mexico as its forum, it wishes instead to litigate this case in the District of Columbia. Doc. 14 at 16 n.10.[1] The District of Columbia would be considerably more inconvenient for both parties than New Mexico or Arizona because "[b]oth parties would be forced to attend trial via the air" halfway across the country. *Cf. Waste Distillation*, 775 F. Supp. at 765. Clearly, despite its protests, Plaintiff is not primarily concerned with convenience or "the extra expense that it[s witnesses] would incur if

[1] A footnote in a brief is not a proper method for requesting a case be transferred. In any event, Defendants would oppose Plaintiff's request to transfer the case to the District of Columbia, because it is located so far away from the locus of the operative facts.

the case were transferred to Arizona." *Cf.* Doc. 14 at 14. Plaintiff appears to be focused only on avoiding Arizona. That is not a "rational and legitimate concern[]." *Cf. Waste Distillation*, 775 F. Supp. at 765.

The locus of operative facts. As initially explained in Defendants' motion, the locus of the operative facts is Arizona. Doc. 8 at 8-9. And as explained above, three non-significant events that did not give rise to this lawsuit cannot alter that calculus. *See supra* pp. 6-7. In the case cited by Plaintiff, *Emberton v. Rutt*, the "operative fact" weighing against transfer was that the trust at issue had been administered in New Mexico for a time, and thus some of the relevant documents and witnesses could have been located in New Mexico. No. 07-cv-1200 JB/RLP, 2008 WL 4093714, at *12-13 (D.N.M. Mar. 31, 2008). That stands in sharp contrast with this case, which arises from a hospital that is located outside this district and a decision not to contract that was made outside this District.

The convenience and relative means of the parties, the convenience of witnesses, the availability of process to compel the attendance of witnesses, and the location of physical evidence. Plaintiff is correct that Defendants did not base their motion on the convenience of witnesses. The witnesses in this case will likely primarily be the parties or their employees. The factors of convenience to the parties and the location of physical evidence, in turn, weigh in favor of transfer. Plaintiff does not dispute that its hospital, its employees, and all its documents are located *in Arizona*. Plaintiff does not dispute that the Defendant who signed the declination letter is located *in Arizona*. These factors weigh strongly in favor of transfer. Plaintiff does, however, claim that Albuquerque is a more convenient forum for it because Albuquerque is 80 miles closer to Sage than Phoenix is. One of Sage's own cases, however, indicates that miles become relevant "[w]hen the distance between an existing venue for trial of a matter and a

proposed venue under § 1404(a) is more than 100 miles." *In re Volkswagen AG*, 371 F.3d 201, 204 (5th Cir. 2004) (cited by Plaintiff, Doc. 8 at 14).

In any event, even if mileage is relevant, the District of Arizona has a Flagstaff courthouse. *See* United States District Court, District of Arizona, AWD Building, http://www.azd.uscourts.gov/locations/flagstaff (last visited Dec. 17, 2014). Flagstaff is closer to Sage than Albuquerque is. For its part, the District of New Mexico does not have a Gallup courthouse, or anything closer to the Navajo reservation than Albuquerque. *See* United States District Courts – District of New Mexico, Court Locations, http://www.nmcourt.fed.us/web/Shared%20Files/locations.html (last visited Dec. 17, 2014).

The relative familiarity of the courts with the applicable law. As Plaintiff acknowledges, "all federal courts are capable of interpreting federal law." Doc. 14 at 14. This factor thus is neutral. But Plaintiff goes further and makes the claim that New Mexico "has extensive experience interpreting the federal contracting requirements of the ISDEAA" and "[t]he Arizona District Court and the Ninth Circuit do not." Doc. 14 at 14-15. That is simply wrong. The Ninth Circuit *has* dealt with 638 contracts and declination decisions. *See Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013). The only difference is the Ninth Circuit ruled that the Secretary had properly declined the 638 contract, while the District of New Mexico held that the Secretary violated the ISDEAA. *Compare id.* at 1035-38, *with Ramah Navajo Sch. Bd. v. Sebelius*, No. 07-cv-0289 MV (D.N.M. May 9, 2013) (Doc. No. 143). Whether unfavorable case law for the Plaintiff exists in another forum is, however, not relevant to the decision to transfer a case.

The interests of justice. Plaintiff correctly identifies "the relative congestion of dockets" as a consideration under this factor. Doc. 14 at 15. But Plaintiff's claim that this factor favors its

choice of venue is not persuasive. As Plaintiff points out, for the twelve-month period ending June 2014, New Mexico had *slightly* less pending cases (by a difference of less than one percent) and a faster median time from filing to trial, but Arizona had a significantly better median time from filing to *disposition* (7.9 versus 10.2 months)—as evidenced by the fact that Arizona is ranked 24th in the nation among district courts, while New Mexico came in at 64th. *See* Defs' Ex. 7 (copy of Plaintiff's Exhibit E with red circles highlighting the relevant numbers). Because, as Plaintiff notes, this case will likely be decided on paper, Doc. 14 at 14, perhaps even more relevant for purposes of this case is the respective courts' six-month list (the number of pending motions over six months of age). The latest available numbers indicate that New Mexico's cumulative six-month list was 152—versus 35 in Arizona. *See* Defs' Ex. 8 (Civil Justice Reform Act report dated March 2014). Arizona is well ahead of New Mexico in this sense. Ultimately, because these numbers all point in different directions, this factor "is a wash and has no sway in [the] analysis." *WildEarth Guardians v. U.S. Forest Serv.*, No. 11-cv-3171, 2012 WL 1415378, at *3 (D. Colo. Apr. 24, 2012).

In the end, whether to transfer this case comes down to one truth: the case has nothing to do with New Mexico. Every operative event took place in Arizona. Both parties are located in Arizona. The case therefore belongs in Arizona.

CONCLUSION

The Court should grant the motion to dismiss, or alternatively, to transfer the case to the United States District Court for the District of Arizona.

Respectfully submitted.

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/s/ filed electronically on 12/29/2014
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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014, Defendant filed through the United States District Court CM/ECF System the foregoing document, causing it to be served by electronic means on all counsel of record.

/s/ *filed electronically on 12/29/2014*
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