



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
October 17, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 18-15410-MKN
)	Chapter 7 Involuntary
JUDY LUELL,)	
)	
Petitioning Creditor,)	
)	
YVONNE JOHNSON-LUELL,)	
)	ORDER REGARDING ALLEGED
Petitioning Creditor,)	DEBTOR'S MOTION FOR EXPEDITED
)	TRANSFER OF VENUE TO THE
JUDY PELTON,)	NORTHERN DISTRICT OF TEXAS¹
)	
Petitioning Creditor,)	
)	Date: October 10, 2018
REGENERATIVE MEDICINE)	Time: 2:30 p.m.
ORGANIZATION,)	
)	
Petitioning Creditor,)	
)	
CARDIOVASCULAR BIOTHERAPEUTICS,)	
INC.)	
)	
Alleged Debtor.)	

¹ In this Order, all references to "ECF No." are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. For documents appearing on the docket in other cases, the reference will be preceded by the name of the other case. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 On October 10, 2018, the court heard the Alleged Debtor's Motion for Expedited
2 Transfer of Venue to the Northern District of Texas. The appearances of counsel were noted on
3 the record. After arguments were presented, the matter was taken under submission.

4 **BACKGROUND**

5 On September 10, 2018, an involuntary Chapter 7 bankruptcy petition ("Involuntary
6 Petition") against Cardiovascular Biotherapeutics, Inc. ("CVBT") was filed by Judy Luell,
7 Yvonne Johnson-Luell, Judy Pelton, and Regenerative Medicine Organization (hereafter,
8 "Petitioning Creditors"). (ECF No. 1). In Section 9 of the Involuntary Petition, two matters
9 were listed as pending bankruptcy cases by or against a partner or affiliate of the CVBT: Tauren
10 Exploration, Inc., Case No. 18-03039-HDH (Bankr. N.D. Tex. 06/03/2016)² and Daniel
11 Carmichael Montano, Case No. 13-16289-GS (Bankr. D.Nev. 07/19/2013).

12 On September 21, 2018, CVBT filed a motion to transfer the involuntary proceeding
13 ("Transfer Motion") to the United States Bankruptcy Court for the Northern District of Texas in
14 Dallas, Texas ("Dallas Bankruptcy Court"). (ECF No. 4). The Transfer Motion is supported by
15 the affidavit of Calvin A. Wallen, III ("Wallen Affidavit").³ (ECF No. 5). On the same date, a
16 request was made to have the Transfer Motion heard on shortened time. (ECF Nos. 6 and 7).

17 On September 26, 2018, an order was entered granting CVBT's ex parte motion to have
18 the Transfer Motion heard on an expedited basis. (ECF No. 9). That order scheduled the
19 Transfer Motion to be heard on October 10, 2018. It also established a deadline for opposition to
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21 ² This appears to be an incomplete listing of an adversary proceeding commenced on
22 March 22, 2018, arising out of a Chapter 11 proceeding filed in June 2016 on behalf of Tauren
23 Exploration, Inc., Case No. 16-32188-hdh11. A liquidating trust created under a confirmed
24 Chapter 11 plan apparently is suing Calvin A. Wallen, III ("Wallen"), as the former sole
25 shareholder, officer and director of the debtor. The complaint alleges that Wallen benefitted
26 from various avoidable transfers of the debtor's assets.

27 ³ Attached as Exhibit "A" to the Transfer Motion is a list of "Creditors and Critical
28 Vendors" that are alleged to be the only creditors of CVBT that hold liquidated, undisputed
claims. See Wallen Affidavit at ¶ 9. Attached as Exhibit "B" to the Transfer Motion is a copy of
an online printout of a search of the Nevada Secretary State website for a business entity known
as Regenerative Medicine Organization.

1 be filed by the Petitioning Creditors.

2 On October 5, 2018, an opposition was timely filed by Petitioning Creditors
3 (“Opposition”),⁴ along with the declaration of Daniel Montano (“First Montano Declaration”).
4 (ECF Nos. 12 and 13).⁵

5 On October 9, 2018, the Petitioning Creditors also filed a supplemental declaration of
6 Daniel Montano (“Second Montano Declaration”), as well as declarations of John Laub and
7 Judith Luell (“Laub Declaration” and “Luell Declaration,” respectively). (ECF Nos. 14, 15, and
8 16).⁶

9 DISCUSSION

10 The instant Transfer Motion is brought pursuant to 28 U.S.C. § 1408 and 28 U.S.C. §
11 1412. The former provision authorizes venue for bankruptcy cases in the district in which
12 “domicile, residence, principal place of business..., or principal assets...” of the debtor exists
13 during the 180-period before the case is commenced. 28 U.S.C. § 1408(1). It also permits venue
14 in the district where there is a pending bankruptcy case concerning the debtor’s “affiliate, general
15
16

17 ⁴ The Opposition is a 79-page document. Attached as Exhibit “A” to the Opposition is a
18 copy of an exhibit to a motion that CVBT filed in a separate Chapter 7 bankruptcy commenced
19 in Nevada by Daniel Carmichael Montano, denominated Case No. 13-16289-GS. After that
20 exhibit, however, the remaining 71 pages of the 79-page Opposition appears to be documents
21 filed in a completely unrelated and immaterial proceeding entitled Kevin G. Smith, Case No. 10-
20270, pending in this judicial district. Those pages also are not part of the exhibit that was filed
in the Montano case.

22 ⁵ In his current income Schedule “I,” Montano attests that he is the chief executive officer
23 of Cardiovascular Biotherapeutics, Inc., having an address at 9500 Hillwood Drive, Suite 200,
24 Las Vegas, Nevada. (Montano ECF No. 11). In his Statement of Financial Affairs (“SOFA”),
25 Montano attests that he, along with Cardiovascular Biotherapeutics Inc., were the subject of
26 numerous lawsuits in both Clark County, Nevada, and in New York County, New York.
(Montana ECF No. 15). Montano also attests that the attorney’s fees for his voluntary Chapter 7
proceeding were paid by Judy Pelton on July 17, 2013.

27 ⁶ On October 10, 2018, the day of the hearing, CVBT filed a Declaration of Frank L.
28 Boyles in support of the Transfer Motion that refers to certain attached documents, but none of
the documents are attached to the declaration. (ECF No. 17).

1 partner, or partnership.” 28 U.S.C. § 1408(2).⁷ The latter provision authorizes a bankruptcy case
2 to be transferred to another district “in the interest of justice or for the convenience of the
3 parties.” 28 U.S.C. § 1412. The party seeking a transfer of venue bears the burden of proof and
4 persuasion. See In re Consolidated Equity Properties, Inc., 136 B.R. 261, 262-63 (D.Nev. 1991);
5 In re Municipal Corrections, 2012 WL 6737509, at *5 (Bankr. D.Nev. Dec. 28, 2012).

6 As the alleged debtor, CVBT does not currently seek to dismiss the involuntary
7 proceeding on the assertion that venue is inappropriate under 28 U.S.C. § 1408. Rather, CVBT
8 maintains that the involuntary proceeding should be transferred to the Dallas Bankruptcy Court
9 in the interest of justice or the convenience of the parties. In support of these grounds, Wallen
10 attests that he is the current CEO and largest shareholder of CVBT. See Wallen Affidavit at ¶ 3
11 (page 1) and ¶ 11.⁸ He attests that CVBT moved its headquarters from Las Vegas to Dallas in
12 January 2016, and no longer has any operations in Nevada. Id. at ¶ 5 (page 1-2) and ¶10.
13 Wallen acknowledges that CVBT commenced an arbitration proceeding in Clark County,
14 Nevada, but only as required by a mandatory venue provision in a prior arbitration agreement.
15 Id. at ¶ 2 (page 2). He attests that CVBT’s primary legal counsel and primary bankruptcy
16 counsel reside in Dallas, see id. at ¶ 8, and that substantially all of CVBT’s tangible assets and

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18 ⁷ Under Section 101(2)(A), an “affiliate” in bankruptcy means an “entity that directly or
19 indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding
20 voting securities to the debtor...” Under Section 101(15), an “entity” includes a “person, estate,
21 trust, governmental unit, and United States trustee.” In the Montano bankruptcy proceeding, the
22 Chapter 7 trustee attested that the bankruptcy estate holds “4 million shares of CVBT directly
23 and also holds approximately 15 million shares of CVBT indirectly as a 50% owner of Vizier
24 Investment Capital Limited...” Declaration of Dotan Y. Melech in Support of Motion for
25 Order...Authorizing the Trustee to Take Certain Actions, etc., at ¶¶ 2-3 (Montano ECF No. 67).
As a result of the motion brought by the Chapter 7 trustee, an order was entered on November
19, 2013, authorizing the Chapter 7 trustee to vote the aforementioned shares in connection with
the appointment of officers and directors. (Montano ECF No. 81). It appears that the Montano
case may qualify as pending bankruptcy case in this judicial district concerning an affiliate of
CVBT.

26 ⁸ The Wallen Affidavit consists of separately numbered paragraphs set forth in four
27 pages. Unfortunately, paragraph 5 starting at the bottom on page 1 ends at the top of page 2, and
28 thereafter the affidavit begins with another paragraph 1 and continues in numerical sequence
through the rest of the document. Where paragraphs 1 through 5 from the affidavit are
referenced in this order, a clarifying page number also will be provided.

1 business records are located in Dallas. Id. at ¶ 13 and 14. He maintains that CVBT has no
2 creditors located in Nevada with liquidated, undisputed obligations, and that all such creditors
3 appear on Exhibit “A” attached to the Transfer Motion. Id. at ¶ 9. Wallen attests that certain
4 creditors have suspended credit with CVBT as a result of the involuntary proceedings and that its
5 ability to conduct business has been significantly impacted. Id. at ¶ 4 (page 2).

6 In opposition to the Transfer Motion, Luell attests that she resides in Las Vegas and has a
7 claim for unpaid compensation exceeding \$670,000. See Luell Declaration at ¶¶ 2-3. Laub
8 attests, as executive director of RMO, that it has a claim for unpaid services to CVBT in excess
9 of \$414,685 and that he lives in Las Vegas. See Laub Declaration at ¶ 2. Montano attests that he
10 lives in Las Vegas and that Yvonne Johnson-Luell, also a resident of Las Vegas, has a claim
11 against CVBT for unpaid compensation in excess of \$518,314. See Second Montano
12 Declaration at ¶ 2 and Exhibit “A”; First Montano Declaration at ¶ 4. Montano also attests that
13 Judy Pelton resides in California and that she has a claim against CVBT for unpaid
14 compensation in excess of \$329,996. Id. If the involuntary proceeding is transferred to the
15 Dallas Bankruptcy Court, both Laub and Montano attest that it would be inconvenient for them
16 to participate in the matter. See Laub Declaration at ¶ 3; First Montano Declaration at ¶ 8.

17 On this record, it is not difficult to envision that CVBT will contest the Involuntary
18 Petition, thereby precluding entry of an order for relief unless the Petitioning Creditors prove that
19 CVBT “is generally not paying [its] debts as such debts become due unless such debts are the
20 subject of a bona fide dispute as to liability or amount...” 11 U.S.C. § 303(h)(1). A bona fide
21 dispute as to either liability or amount of a claim is sufficient to disqualify the claim from
22 supporting a petition for involuntary relief. See In re EB Holdings II, Inc., 2017 WL 10187837,
23 at *14 (Bankr. D.Nev. Dec. 15, 2017). Moreover, if CVBT prevails, it is not difficult to envision
24 that CVBT will seek a judgment against the Petitioning Creditors for costs or reasonable
25 attorney’s fees, or for compensatory or punitive damages on a finding of bad faith.⁹ 11 U.S.C. §
26 303(i).

27 ⁹ Wallen already has expressed his opinion that the Involuntary Petition was filed “solely
28 for the purposes of harassing CVBT and impairing its ability to do business...” Wallen Affidavit
at ¶ 5.

