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United States District Court, D. New Jersey.  
**LUCENT TECHNOLOGIES INC.**, Plaintiff,  
v.  
**DICON FIBEROPTICS, INC.**, Defendant.  
**No. Civ.A. 05-2534(HAA).**

Aug. 8, 2006.

[John H. Schmidt, Jr.](#), Stacey K. Boretz, Lindabury, McCormick & Estabrook, Westfield, New Jersey, for Plaintiff.

[Joseph L. Buckley](#), Sills Cummis Epstein & Gross P.C., Newark, New Jersey, for Defendant.

#### OPINION AND ORDER

[ACKERMAN](#), Senior District Judge:

\*1 This matter comes before the Court on Defendant DiCon Fiberoptics, Inc.'s ("DiCon") motion to transfer pursuant to [28 U.S.C. § § 1404\(a\)](#) and [1406\(a\)](#) or, in the alternative, to dismiss for improper venue pursuant to [Federal Rule of Civil Procedure 12\(b\)\(3\)](#). For the following reasons, DiCon's motion to transfer to the Northern District of California is GRANTED.

#### Background

Plaintiff Lucent Technologies Inc. ("Lucent") designs and delivers systems, services, and software in the communications network industry. DiCon supplies passive components, modules, and test instruments for the fiberoptic industry. This dispute arises from Lucent's purchase of DiCon's 1x8 Prism Switches ("Switches"), which are incorporated into Lucent's WS400G OMON Circuit Packs ("OMON Packs") for sale to third-party customers. DiCon manufactured the Switches at its headquarters in Richmond, California, located in the Northern District of California. DiCon shipped the Switches to a Lucent facility in North Andover, Massachusetts, and the Switches were assembled into OMON Packs in Massachusetts.

From November 1998 to September 2002, Lucent bought 6,437 Switches from DiCon. Lucent contends that 1,460 of its OMON Packs failed due to defective

Switches and were returned for repair and/or replacement. Lucent allegedly investigated the problems with the Switches and examined the allegedly defective Switches at its facility in Murray Hill, New Jersey. Of the 6,437 Switches Lucent purchased from DiCon, 5,373 units were purchased under two separate but similar Consignment Contracts dated December 3, 1999 and July 26, 2000, respectively. According to the Consignment Contracts, DiCon was to ship goods to the Lucent facility in Massachusetts. Lucent signed the Consignment Contracts in Massachusetts, and DiCon signed them in Berkeley, California. Lucent allegedly instructed DiCon to send invoices to Lucent's location in Atlanta, Georgia. The Consignment Contracts include the following provision:

CHOICE OF LAW-This Agreement and all transactions under it shall be governed by the laws of the State of New Jersey excluding its choice of laws rules and excluding the Convention for the International Sale of Goods.... With respect to disputes between the parties, the parties agree to submit to the jurisdiction of the state and federal courts of New Jersey.

(*E.g.* Schleicher Decl. Ex. E ("Consignment Contract") at 5.).

Lucent alleges that under the Consignment Contracts, Lucent had the option of returning defective Switches to DiCon for refund, repair, or replacement. Therefore, Lucent sought a refund for 4,791 Switches that had yet to be incorporated into its products. However, DiCon refused to accept such a return from Lucent.

On May 16, 2005, Lucent filed a Complaint with this Court, asserting three counts against DiCon: 1) breach of warranty; 2) breach of contract; and 3) failure to mitigate damages. Lucent seeks to recover \$10 million for repairs for installed Switches and \$8,911,260 in refunds on uninstalled Switches. DiCon then filed the instant motion to transfer this matter to the Northern District of California, or alternatively to dismiss for improper venue.

#### Analysis

\*2 Pursuant to [28 U.S.C. § 1404\(a\)](#), a district court has the discretion to transfer a civil action to any

other district where the action could have been brought “[f]or the convenience of parties and witnesses, in the interest of justice.” [Section 1404\(a\)](#) allows a court to “avoid the waste of time, energy and money and, in addition, to safeguard litigants, witnesses and the public against avoidable inconvenience and expense.” [Liggett Group Inc. v. R.J. Reynolds Tobacco Co.](#), 102 F.Supp.2d 518, 525-26 (D.N.J.2000) (citations omitted). A court must adjudicate a motion to transfer venue based on an “individualized, case-by-case consideration of convenience and fairness.” [Van Dusen v. Barrack](#), 376 U.S. 612, 622 (1964). The party seeking transfer bears the burden to establish the need for a transfer. [Jumara v. State Farm Ins. Co.](#), 55 F.3d 873, 879 (3d Cir.1995). This burden requires the movant “to show the proposed alternative forum is not only adequate, but also more appropriate than the present forum.” [Hoffer v. InfoSpace.com, Inc.](#), 102 F.Supp.2d 556, 572 (D.N.J.2000).

In determining whether to transfer a matter pursuant to [§ 1404\(a\)](#), a court must first decide whether the action could have been brought in the transferee district. [Id.](#) at 570; see also [Shutte v. Armco Steel Corp.](#), 431 F.2d 22, 25 (3d Cir.1970). The movant must show “the propriety of venue in the transferee district and jurisdiction over all of the defendants.” [LG Elecs., Inc. v. First Int’l Computer, Inc.](#), 138 F.Supp.2d 574, 586 (D.N.J.2001). Once the court finds that the transferee district has proper jurisdiction and venue, it then must consider a range of private interest and public interest factors in determining “whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.” [Jumara](#), 55 F.3d at 879 (quoting 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3847 (2d ed.1986)).

Private interest factors include: plaintiff’s initial forum preference; defendant’s forum preference; whether the claims arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records, also limited to the extent that they could not be produced in the alternative forum. *Id.* Public interest factors include: the enforceability of any judgment; practical considerations that could make trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting

from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases. *Id.* These factors serve merely as guidance for the court’s “flexible” analysis, and “not all the factors may be relevant or determinative in each case.” [LG Elecs.](#), 138 F.Supp.2d at 587 (citations omitted).

#### I. This Case Could Have Been Brought in the Northern District of California

\*3 In order to transfer this matter to the Northern District of California, the Court must first determine whether that District would have proper jurisdiction and venue. Lucent is an international corporation with its United States headquarters located in New Jersey. However, Lucent maintains sufficient minimum contacts with the Northern District of California, as it maintains an office and a presence in the Northern District of California. DiCon maintains its sole United States office in the Northern District of California. Therefore, the Northern District of California could assert personal jurisdiction over the parties. The district court in the Northern District of California could also exercise diversity subject matter jurisdiction, and venue would be proper there because the transactions that gave rise to the claims in the instant action took place there. Therefore, the Northern District of California is a proper transferee forum.

#### II. Private Interest Factors Favor Transfer to the Northern District of California

##### A. Forum Selection Provision

A district court must give “substantial consideration” to the presence of a forum selection clause in its analysis of a motion to transfer venue. [Jumara](#), 55 F.3d at 880. The parties here do not dispute the validity of the forum selection provision contained in the Consignment Contracts, but they disagree as to the mandatory enforceability of the provision. DiCon argues that because the provision lacks exclusive language that would locate exclusive jurisdiction in New Jersey, the provision is merely permissive. DiCon further contends that a permissive forum selection clause is entitled to little or no weight on the motion to transfer. Lucent urges this Court to defer to and enforce the forum selection provision

and deny DiCon's motion to transfer this case out of the District of New Jersey.

The forum selection clause in the Consignment Contracts lacks exclusive language and is clearly permissive. “[A] clause wherein a party consents to the jurisdiction and venue of a remote tribunal without more falls far short of a clause vesting *exclusive* jurisdiction over all the parties' dealings in that tribunal.” [Zokaite v. Land-Cellular Corp.](#), 424 F.Supp.2d 824, 835 (W.D.Pa.2006) (citations omitted) (emphasis added). “[T]his is so even where such a clause is accompanied by a choice of law provision making that state's law applicable to the agreement.” *Id.* The parties here merely agreed “to submit to the jurisdiction” of courts in New Jersey (Consignment Contract at 5), and did not further agree that New Jersey courts would comprise the exclusive venue for litigation under the Consignment Contracts. In any event, while many of the sales at issue arose under the Consignment Contracts, approximately 17% of the Switches sold by DiCon to Lucent were not governed by the Consignment Contracts and those Contracts' permissive forum selection provision. The forum selection clause, while deserving some weight, is not entitled to great deference and does not bar transfer.

#### B. Plaintiff's Choice of Forum

\*4 A district court generally gives deference to the plaintiff's choice of forum. Plaintiff's choice of forum has been deemed a “paramount concern” in deciding whether to transfer a case. [Hoffer](#), 102 F.Supp.2d at 573. Even greater deference is given where a plaintiff chooses its own home forum, as Lucent has done here. *Id.* Plaintiff's choice, however, is not dispositive, and that choice of forum is a preference, not a right. *Id.* Less deference is given when “the case has little connection with the chosen forum.” [Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett, Ltd.](#), 847 F.Supp. 1244, 1246 (D.N.J.1994). “When the central facts of the lawsuit occur outside the forum state, a plaintiff's selection of that forum is entitled to less deference.” *Id.*; see also, e.g., [Clear Techs. v. Khan](#), No. Civ. A. 02-130, 2002 WL 229724, at \*2 (D.N.J. Feb. 14, 2002); [Wm. H. McGee & Co. v. United Arab Shipping Co.](#), 6 F.Supp.2d 283, 290 (D.N.J.1997) (“[D]eference is curbed when a plaintiff's choice of forum has little connection with the operative facts of the lawsuit.”).

Lucent claims that the instant action has significant contacts with New Jersey because Lucent's

headquarters are located in New Jersey and at its New Jersey facility, Lucent conducted a series of experiments which examined and uncovered the alleged defects of the Switches. Lucent also alleges that DiCon discussed issues regarding the Switches with Lucent personnel in New Jersey and DiCon representatives traveled to New Jersey for such consultations on several occasions. However, Lucent's breach of contract and breach of warranty claims depend in large part on facts relating to the design and manufacture of the allegedly defective Switches. While evidence regarding Lucent's investigation of the Switches will certainly form part of this case, the case primarily focuses on design and manufacture issues. The Switches were designed and manufactured in the Northern District of California. While this case has some connection to New Jersey, most of the “central facts” occurred outside the forum state, in the Northern District of California. Thus, Lucent's choice of forum here deserves some weight, but not the extreme deference Lucent urges.

#### C. Convenience of Parties and Witnesses and Location of Records and Books

DiCon contends that because it is headquartered in the Northern District of California and the design and manufacturing of the Switches took place in the Northern District of California, all of its material witnesses are in the Northern District of California. Most of Lucent's material witnesses, on the other hand, may be found in New Jersey or Massachusetts. However, neither Lucent nor DiCon have indicated that their material witnesses would be *unavailable* to testify in either forum. Lucent is an international corporation with offices in several states, including an office in the Northern District of California, whereas DiCon is an international corporation with only two offices: one in the Northern District of California and the other in Taiwan. Thus, Lucent appears to maintain more contact with the Northern District of California than DiCon has with New Jersey, and the Northern District of California would be more convenient for both parties. Furthermore, while neither Lucent nor DiCon are small businesses, Lucent's greater national and international reach serve to render the Northern District of California of California less inconvenient for it than the District of New Jersey would be for DiCon.

\*5 Relevant documents are located in both parties' preferred fora, but many documents regarding the design and manufacture of the Switches undoubtedly may be found at DiCon's headquarters in California.

Lucent contends that the defective Switches are located currently at its headquarters in New Jersey. However, Lucent has not suggested that the transportation of the Switches to the Northern District of California would be unduly burdensome or expensive. Furthermore, the Switches were assembled in Massachusetts, and thus trial in California or New Jersey would be equally inconvenient with regard to issues arising from the status of the Switches once they arrived at Lucent in Massachusetts. Since the design and manufacture of the defective Switches play a major role in Lucent's claims, and all records regarding these processes may be found at DiCon's facility in the Northern District of California, this factor weighs in favor of transfer to the Northern District of California.<sup>[FN1](#)</sup>

<sup>[FN1](#)</sup>. DiCon also contends that in 2002, Lucent entered into an agreement with Solelectron Corporation ("Solelectron") under which Solelectron would assemble the Switches into Lucent's OMON Packs in Massachusetts. (DiCon Br. 8.) DiCon states that it intends to join Solelectron as a third-party defendant in this action. (*Id.* 8-9.) Although Solelectron appears to have performed some work for Lucent in Massachusetts, DiCon contends that Solelectron is a California company based in the Northern District of California, and that all of its relevant witnesses and documents are located in the Northern District of California. Lucent responds that Solelectron also maintains offices in New Jersey, and performed any work relevant to this action in Massachusetts, not California. This Court agrees that the potential involvement of Solelectron does not tip the scales significantly in either direction.

### III. Public Interest Factors Favor Transfer to the Northern District of California

Some of the public interest factors identified as relevant by our Circuit in *Jumara* are neutral here. This Court sees no appreciable difference between the Northern District of California and the District of New Jersey with regard to the eventual enforceability of any judgment or administrative difficulties in handling this matter in an expeditious manner. In addition, while the Consignment Contracts that control the majority of the allegedly defective goods at issue here specify that New Jersey law governs, this Court has confidence that a district judge in the

Northern District of California could faithfully and properly apply New Jersey law in this diversity matter.

With regard to the public policies of the fora and the local interest in deciding local controversies, both New Jersey and California have an interest in having contracts entered into by its citizens (Lucent and DiCon respectively) enforced. *See, e.g., Consol. Rail Corp. v. New England Cent. R.R., Inc.*, 23 F.Supp.2d 549, 553 (E.D.Pa.1998). However, as DiCon argues, California's policy interest is stronger here because most of the transactions and activities that gave rise to this litigation occurred in California. The Switches were designed, manufactured, and shipped from California, and the Consignment Contracts were negotiated and entered into in California and Massachusetts (not New Jersey). While Lucent has its headquarters in New Jersey, most of the conduct relevant to this action occurred either in California or Massachusetts. Thus, the local interest in deciding local controversies locally weighs in favor of trying this matter in California, and not in New Jersey. The Court's above analysis of the private interest factors also supports its view that practical considerations that could make trial easy, expeditious, or inexpensive favor the Northern District of California.

### IV. On Balance, This Litigation Should Proceed in the Northern District of California

\*6 While the permissive forum selection clause and Lucent's choice of its home forum bear significant weight, the convenience of the parties, the location of books and records, and the relative policies at issue outweigh the latter concerns and militate in favor of transferring this action to the Northern District of California. DiCon has met its burden to show that the Northern District of California would be a more appropriate forum than the District of New Jersey for this litigation. After a careful consideration and balancing of the relevant factors, this Court concludes under [§ 1404\(a\)](#) that "[t]his litigation would more conveniently proceed and the interests of justice be better served by transfer to" the Northern District of California. *Jumara*, 55 F.3d at 879 (quotation omitted).<sup>[FN2](#)</sup>

<sup>[FN2](#)</sup>. Because this Court will transfer this matter pursuant to [§ 1404\(a\)](#), it need not reach DiCon's alternative arguments for transfer under [§ 1406\(a\)](#) or dismissal under [Rule 12\(b\)\(3\)](#).

*Conclusion*

For the aforementioned reasons, it is hereby ORDERED that Defendant's motion to transfer pursuant to [28 U.S.C. § 1404\(a\)](#) is GRANTED. This case shall be transferred to the United States District Court for the Northern District of California.

D.N.J.,2006.  
Lucent Technologies Inc. v. Dicon Fiberoptics, Inc.  
Slip Copy, 2006 WL 2290522 (D.N.J.)

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