

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE AMKOR TECHNOLOGY, INC.
SECURITIES LITIGATION

Civil Action No. 06-298

OPINION

POLLAK, J.

December 28, 2006

Defendants move for transfer of venue in this securities fraud proposed class action against Amkor Technology, Inc. and some of its current and former officers. For the reasons set forth herein, the motion will be granted and the case transferred to the District of Arizona.

I. Facts

This action is comprised of three separate securities actions filed in this court and later consolidated into the above-captioned class action.¹ Plaintiffs contend that during the class period of July 26, 2001 to July 26, 2006² defendants issued false and misleading

¹ The original cases are:

Weiss v. Amkor, et al. (06-298) (filed January 23, 2006)

Hoerr v. Amkor, et al. (06-381) (filed January 27, 2006)

Rozakis v. Amkor, et al. (06-610) (filed February 9, 2006).

² Plaintiffs filed an amended complaint on August 15, 2006 setting forth a new class period that ranges from July 26, 2001 to July 26, 2006. The original class period was October 27, 2003 to July 1, 2004.

statements concerning customer demand and profit margins. This is not the only securities fraud action that Amkor is facing: On February 24, 2006, Amkor shareholders filed a derivative action in the District of Arizona, naming each of the defendants in the present action and alleging similar misconduct during the same class period.³ On March 2, 2006, a second shareholder derivative action naming the same defendants and class period as the other two actions was filed in the Superior Court of the State of Arizona, Maricopa County.⁴

II. Discussion

In their complaint, plaintiffs assert that venue is proper in the Eastern District of Pennsylvania “pursuant to Section 27 of the Exchange Act and 28 U.S.C. § 1391.” Am. Compl. at 6. Section 27 of the Exchange Act contains a liberal venue provision, permitting a case to be brought in “any such district [wherein any act or transaction constituting the violation occurred] or in the district wherein the defendant is found or is an inhabitant or transacts business.” 15 U.S.C. § 78aa (2000). Plaintiffs contend that many of the acts and transactions related to the action occurred in the Eastern District because Amkor maintained an executive office in West Chester, PA during the class period. Am. Compl. at 6.

³ *Scimeca v. Kim, et al.* (06-00562) (D. Az., Feb. 24, 2006).

⁴ *Khan v. Kim, et al.* (06-3380) (Super. Ct., Mar. 2, 2006).

Defendants agree that venue is proper in the Eastern District of Pennsylvania, but are seeking a transfer of venue under 28 U.S.C. § 1404(a) (2000), which provides: “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.”

In deciding a motion to transfer under § 1404(a), the burden of establishing the need for transfer rests on the movant, in this case, the Amkor defendants. *See Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970). These motions are not to be granted liberally, *Weber v. Basic Comfort, Inc.*, 155 F. Supp. 2d 283, 284 (E.D. Pa. 2001); however, the Supreme Court emphasizes that section 1404(a) is intended to vest broad discretion in the district court to conduct an “individualized, case-by-case consideration of convenience and fairness.” *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). Here, defendants have made an initial showing that transfer could be warranted, and it is now within the court’s discretion to consider whether such a transfer could be more convenient and fair than retaining the litigation in the Eastern District of Pennsylvania.

The Third Circuit employs a two-step analysis in deciding a motion to transfer, asking first whether venue would be proper in the proposed transferee district. If that test is satisfied, then the court should determine whether the transfer would satisfy the standard set in § 1404(a). *Cf. Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir.

1995) (applying this test); *Weber v. Basic Comfort, Inc.*, 155 F. Supp. 2d 283, 284 (E.D. Pa. 2001). Due to the Exchange Act’s liberal venue provision, venue is proper in both the Eastern District of Pennsylvania and the District of Arizona, and both parties concede that venue is appropriate in Arizona. Thus, the primary concern for this court is the second step of the analysis: whether a transfer of venue would achieve the interests of justice articulated in § 1404(a).

In conducting its case-by-case analysis of convenience and fairness considerations, the Third Circuit goes beyond the three factors enumerated in § 1404(a) (convenience of parties, convenience of witnesses, interests of justice) by “consider[ing] all relevant factors to determine 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 Wright, Miller & Cooper § 3847). The calculus involves consideration of private factors affecting those involved in the lawsuit as well as the public’s interest in resolving a suit or vindicating the rights of those harmed in a particular forum:

The private interests have included: plaintiff’s forum preference as manifested in the original choice; the defendant’s preference; whether the claim 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 (similarly limited to the extent that the files could not be produced in the alternative forum).

The public interests have included: the enforceability of the 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. at 879–80 (citations omitted). Each of these factors will be examined in turn.

1. Private Factors

The private-factors analysis concentrates on the interests of the litigants and their witnesses to hold the trial in the forum more convenient for all of the involved parties. The plaintiff’s preference is entitled to considerable weight, but countervailing factors, if quite strong, may be sufficient to overcome that preference.

a. Plaintiffs’ forum preference as manifested in original choice

A plaintiff’s choice of venue, as manifested by where the suit was originally brought, is given great deference and “should not be disturbed lightly.” *See Weber*, 155 F. Supp. 2d at 285. A plaintiff’s choice of forum will, however, be given less deference when the chosen forum is not the plaintiff’s home. *See First Union Nat’l Bank v. United States*, 55 F. Supp. 2d 331, 332–33 (E.D. Pa. 1999). The plaintiffs that originally opposed the Amkor defendants’⁵ motion to transfer venue—the State-Boston Retirement System and Scott Bishins—are not Pennsylvania residents. *See Pls.’ Opp’n* at 10. These non-resident plaintiffs were joined in their opposition in the surreply by plaintiffs

⁵ Defendants’ motion to transfer venue was filed on behalf of all defendants—Amkor Technology, James J. Kim, Kenneth T. Joyce, Bruce Freyman, and John N. Boruch; however, for the purposes of this opinion, they will be collectively referred to as “the Amkor defendants.”

Westmoreland County and the City of Wilkes-Barre, neither of which is in the Eastern District. Thus, none of the primary plaintiffs can claim the Eastern District as their home-district; accordingly, their choice of forum is entitled to less weight.

There is much conflicting case law with regard to what level of deference a plaintiff's choice of forum should be accorded in a federal securities fraud class action suit.⁶ Defendants cite a significant body of case law according less weight to the plaintiff's choice of forum in securities class actions. Defs.' Mot. at 8; *see Bolton v. Tesoro Petroleum Corp.*, 549 F. Supp. 1312, 1313–14 (E.D. Pa. 1982) (“It has been consistently held, however, that the weight accorded to plaintiff's choice of forum is considerably reduced in class and derivative actions, where each of many potential plaintiffs may claim the right to have the action heard in his home forum, and where the nominal plaintiff's role in the litigation is likely to be quite minimal.”); *see also Koster v.*

⁶ Compare *O'Hopp v. ContiFinancial Corp.*, 88 F. Supp. 2d 31, 35 (E.D.N.Y. 2000) (“Another factor which weighs against giving any significance to plaintiffs' choice of forum is the fact that plaintiffs are seeking relief under the federal securities laws in a case that involves multiple putative class actions.”), and *Blender v. Sibley*, 396 F. Supp. 300, 302 (E.D. Pa. 1975) (“Although a plaintiff's choice of forum normally is a paramount consideration in any determination of a request to transfer, far less weight is accorded that factor in a derivative suit or class action.” (citation omitted)), with *Peil v. Speiser*, 1982 U.S. Dist. LEXIS 17429 at *6–7 (E.D. Pa. 1982) (“[T]he crux of defendant's motion to transfer is that, since plaintiff Peil is merely a ‘nominal plaintiff’ in a class action, his choice of forum is not entitled to the same weight usually accorded a plaintiff. I am aware of those cases which have held that, in certain cases, the choice of forum of a plaintiff in a class action or derivative suit should be given little weight. Nevertheless, I do not believe that the circumstances of this action warrant a devaluation of plaintiff's choice.” (citations omitted)).

Lumbermen's Mut. Cas. Co., 330 U.S. 518, 524 (1947) (shareholder derivative class action), *Polin v. Conductron Corp.*, 340 F. Supp. 602, 605 (E.D. Pa. 1972) (derivative class action).

Plaintiffs respond to this proposition by relying largely on unpublished case law favoring the plaintiff's choice of venue in federal securities class actions. *See* Pls.' Opp'n at 7–8; *In re Laidlaw Sec. Litig.*, 1991 U.S. Dist. LEXIS 11950 at *4–5 (“Ordinarily a court should not lightly disturb plaintiffs’ choice of forum and should hold defendants to establishing a strong preponderance in favor of transfer. Plaintiffs’ choice of forum is particularly preferred in federal securities actions. . . . The Act’s venue provision is designed to serve the policy of providing plaintiffs with the broadest possible forum choices. If transfers were liberally granted in securities cases, courts would be undermining Congress’ goal of minimizing the burden on plaintiffs who are seeking to enforce federal securities laws.” (citations omitted)); *see also* Pls.’ Surreply at 4; *Sovereign Bank, F.S.B. v. Rochester Cmty. Sav. Bank*, 907 F. Supp. 123, 126 (E.D. Pa. 1995) (“Indeed, the presumption in favor of plaintiff's choice of forum is even stronger in cases brought under the Exchange Act’s liberal venue provision, since it ‘represents an affirmative congressional policy choice to allow plaintiffs in securities cases the widest possible choice of forums in which to sue.’”(quoting *SEC v. Elecs. Warehouse, Inc.*, 689 F. Supp. 53, 74 (D. Conn. 1988), *aff'd*, 891 F.2d 457 (2d Cir. 1989))).

Whether to accord greater or lesser deference to the plaintiff's choice of forum in a securities class action appears to be a context-specific determination. On balance, I believe the best guidance comes from a case in the District of New Jersey, in which the court considered the Exchange Act's special venue provision against the strong line of cases rejecting deference to the plaintiff's choice of forum in class and derivative actions. *See Job Haines Home for the Aged v. Young*, 936 F. Supp. 223, 228–29 (D.N.J. 1996).

The court concluded:

[T]he factors to balance are convenience and justice, as required under section 1404(a). Even if this Court adopts the standard as proposed by the Plaintiff and requires that the balance weigh heavily in favor of transfer before granting Defendants' motions, Section 78aa clearly does not "prohibit the transferring of a . . . [federal securities] class action to another jurisdiction which is clearly a more convenient jurisdiction for litigating the dispute."

963 F. Supp. at 229 (quoting *Harris v. Am. Inv. Co.*, 333 F. Supp. 325, 327 (E.D. Pa. 1971)). Starting with the point that § 78aa does not prohibit the transfer of venue, and looking at the context-specific factors of this case, plaintiffs' choice of the Eastern District should not receive great deference. First, none of the co-lead plaintiffs can claim the Eastern District as their home district. Next, the co-lead plaintiffs allege a large number of as-yet-unknown plaintiffs, many of which may be located nationwide.⁷ It would be an entirely different matter if this were a class action involving multiple

⁷ In the amended complaint, plaintiffs explain that "Amkor shares were actively traded on NASDAQ" and speculate that "there are hundreds or thousands of members in the proposed class." Am. Compl. at 12.

plaintiffs all residing in the Eastern District, in which case, plaintiffs' choice of venue would be entitled to very great weight.

b. The defendants' preference

The defendants' preference is most certainly the District of Arizona, where defendant Amkor Technology and three of the four individual defendants reside.⁸ It would clearly be more convenient to hold the trial in Arizona where two individual defendants who are senior officers of the corporation would be available to testify without causing disruption to their daily management of Amkor. *See Polin*, 340 F. Supp. at 606 (considering ability of defendants to "pursue their duties at the corporate headquarters" during course of litigation as a factor favoring transfer of venue to location of corporate headquarters).

Subsequent to the filing of the initial submissions on the venue issue, plaintiffs filed an amended complaint, naming Winston Churchill, a committee member of the Amkor Compensation Committee and resident of the Eastern District of Pennsylvania, as

⁸ Defendants contend that four of the five defendants live in Arizona, while the fifth resides in nearby Southern California. Defs.' Mot. at 8. Plaintiffs counter that only two of the four individual defendants are full-time Arizona residents. Pls.' Opp'n at 13 ("Moreover, of the Individual Defendants, only two are full time residents of Arizona, Kenneth Joyce, Amkor's Chief Financial Officer, and John Boruch, Amkor's President and Chief Operating Officer. For the other two Individual Defendants, however, either district is equally convenient. As Defendants have conceded, Defendant James Kim has residency in both districts. . . . The remaining Individual Defendant, Bruce Freyman, is currently retired from Amkor and resides in Orange County, California. As Defendant Freyman would have to travel to either district via airplane in the event of trial, he is not inconvenienced in having to travel to the EDPA as opposed to the District of Arizona.").

a defendant in the action. In their supplemental memorandum on the venue issue, dated August 23, 2006, plaintiffs assert that this counts in their favor under *Jumara*. Pls.' Supp. Mem. at 4. Indeed, it would, but for the fact that Mr. Churchill joins the Amkor defendants in support of a venue transfer to Arizona. *See* Defs.' Supp. Mem. at 2. Thus, all defendants clearly prefer to litigate in the District of Arizona.

c. Where the claim arose

Typically the most appropriate venue is where a majority of events giving rise to the claim arose. *See Siegel v. Homestore, Inc.*, 255 F. Supp. 2d 451, 456 (E.D. Pa. 2003). Plaintiffs assert a fraud on the market theory, alleging that the wrongdoing occurred “in every jurisdiction across the country.” Pls.' Opp'n at 11. However, it is well established that in securities cases “misrepresentations and omissions are deemed to occur in the district from which they are transmitted or withheld, not where they are received.” *Laborers Local 100 & 397 Pension Fund v. Bausch & Lomb, Inc.*, No. 06-1942, slip. op., 2006 WL 1524590, at *5 (S.D.N.Y. June 5, 2006); *see also Wojtunik v. Kealy*, No. 02-8410, 2003 WL 22006240, at *8 (E.D. Pa. 2003) (securities fraud claim “arose” in the state where “SEC filings and alleged misrepresentations were made”). Amkor did have offices in West Chester during the class period, but “the vast majority of events and public statements alleged in the Complaint occurred or ‘were made’ in Arizona from the

Company's Arizona Headquarters." Defs.' Mot. at 9.⁹

On August 16, 2006, Amkor issued a press release from its Arizona office to announce that it would restate its previously-issued financial statements from 1998–2005 to correct the errors underlying the current litigation. Plaintiffs allege this supports their proposition that the wrongdoing, at least originally, occurred in the Eastern District of Pennsylvania. *See* Pls.' Supp. Mem. at 4. While it may be true that the wrong-doing from 1998–2001 occurred exclusively in Amkor's West Chester offices, that has little bearing on what should be the appropriate venue for litigation alleging securities fraud during the class period of July 26, 2001 to July 26, 2006. Of much greater significance is the documentation provided by the Amkor defendants showing that Amkor's transition from West Chester, Pennsylvania to Chandler, Arizona began in September 2001, which bolsters the contention that a great bulk of the challenged acts and omissions occurred in the District of Arizona rather than the Eastern District of Pennsylvania. Thus, defendants prevail on this *Jumara* factor, weighing in favor of transferring the case to the District of Arizona.

⁹ Plaintiffs cite materials to the effect that Amkor's headquarters were not moved to Arizona until 2005 (the class period runs from July 2001 until July 2006), but defendants provide declarations quoting multiple press releases all bearing a dateline from Arizona. *See, e.g.*, Allison Decl. ¶ 6. Additionally, the relevant SEC documents were all "coordinated" from the Arizona office. *See* Defs.' Mem. at 9.

d. Convenience of parties

Undoubtedly, the Eastern District of Pennsylvania is a more convenient forum for the co-lead plaintiffs, all of whom reside in this part of the country. This is a proposed class action, however, and plaintiffs allege that hundreds or thousands of as-of-yet unknown plaintiffs are involved. Amkor stock was traded on NASDAQ, so these potential class plaintiffs could reside anywhere in the country. By contrast, Arizona is home to Amkor and three of the four individual defendants (the fourth, Bruce Freyman, lives in nearby California, *see supra*, note 8), and, of course, Amkor's records are located in Arizona. In terms of the relative logistics, moving this litigation to Arizona would be somewhat of a convenience to the Amkor defendants, while the co-lead plaintiffs would be modestly disadvantaged.

e. The convenience of witnesses and the location of books and records

Under *Jumara*, the convenience of witnesses and the location of books and records enter into the calculus only to the extent that the witnesses, books and/or records would be unavailable in the other venue. *See* 55 F.3d at 879. Many recent cases have expanded this prong to include the convenience of witnesses or relative ease of transporting books and records to one venue vis-à-vis the other. *See Homestore*, 255 F. Supp. 2d at 457 (holding that while it was “certainly possible that these documents could be transported [from California] to Pennsylvania for trial” consideration should be given to the fact that it would be more convenient to arrange for their transport intrastate). Under this broader

analysis, access to sources of proof weighs in favor of the defendants, as Amkor's records—like Amkor's personnel—are located in Arizona.

Plaintiffs claim that their expert witnesses are likely to include “market analysts, damage experts, accounting experts, employees of the SEC investigating Amkor, and/or the class representatives,” who will come primarily from Washington, D.C. and New York, N.Y. Pls.' Opp'n at 15. But the convenience of counsel and of expert witnesses is irrelevant to the calculus. *See Roller Bearing Co. v. Bearings, Inc.*, 260 F. Supp 639, 640 (E.D. Pa. 1966); *see also Solomon v. Cont'l Am. Life Ins. Co.*, 472 F.2d 1043, 1047 (3d Cir. 1973).

2. Public Factors

Consideration of public factors under *Jumara* requires the court to evaluate each forum and determine where the litigation can proceed in the most efficient and inexpensive fashion. Moreover, if one forum has been particularly affected by the underlying wrongdoing, that venue might have a stronger claim to hosting the case. *See Jumara*, 55 F. 3d at 879. A compelling factor in favor of transferring venue in this case to the District of Arizona is that there are currently two cases pending in Arizona—one in federal court and the other in state court—that address the same matter. *See* Defs.' Reply Mem. at 12 (“[T]hese Arizona actions are based upon the same facts, name all five defendants named in the class actions and allege overlapping class periods.”). And while neither forum is the home district to the co-lead plaintiffs, both fora can be regarded as

having an interest in the case, as Amkor used to be headquartered in the Eastern District of Pennsylvania and is now headquartered in the District of Arizona.

a. Related cases pending in Arizona

As noted above, the presence of two related actions in Arizona militates in favor of transferring venue in this case to the District of Arizona. There remains the possibility of consolidating this action with the one currently pending in federal court in Arizona. Even if the two federal actions are not consolidated, having both actions in the same court—whether or not before the same judge—minimizes the possibility that the two actions will generate inharmonious rulings.

b. Interest of each forum in vindicating wrongdoing

Both the Eastern District of Pennsylvania and the District of Arizona have viable claims to hosting the litigation. Defendants note that the District of Arizona has subpoena power over the defendants located in Arizona. Plaintiffs respond that Amkor will be able to compel its present employees to testify wherever the litigation is conducted.

c. Remaining *Jumara* public factors

The remaining *Jumara* public factors do not point significantly in one direction or another. Court congestion appears not to be a problem in either district. Whatever judgment ensues will be honored, as appropriate, in either district. Nor are there significant state law considerations that render one forum more appropriate than the other.

III. Conclusion

Viewed through the *Jumara* prism, both plaintiffs and defendants present good reasons for litigating in their chosen venue. Ultimately, I am convinced that defendants have the better of the arguments. The strongest factors in favor of the defendants are: 1) the presence of two related actions currently pending in Arizona; 2) that Amkor issued a great bulk of the allegedly fraudulent statements from its Arizona offices; 3) that Amkor began to move its headquarters from West Chester to Arizona beginning in September 2001, just two months after the beginning of the class-period alleged by plaintiffs. With regard to plaintiffs, some weight is owed to their choice of forum; however, this is substantially undercut by the fact that none of the co-lead plaintiffs resides in the Eastern District of Pennsylvania. Moreover, because this is anticipated to be a class action, plaintiffs' desire to litigate in this district seems of limited moment given that Amkor's stock was publicly traded, creating a nationwide base of potential plaintiffs.

After considering the public and private factors, as *Jumara* requires, I find that transfer of venue to the District of Arizona is warranted in this case. For the above reasons, defendants' motion to transfer will be granted in an order accompanying this opinion.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE AMKOR TECHNOLOGY, INC.
SECURITIES LITIGATION

Civil Action No. 06-298

ORDER

December 28, 2006

For the reasons stated in the accompanying opinion, it is hereby ORDERED that the “Motion to Transfer Venue to the District of Arizona” (Docket # 11) is GRANTED.

BY THE COURT:

/s/ Louis H. Pollak

Pollak, J.