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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL PFEIFER,
individually and on behalf
of all others similarly
situated,

Plaintiff,

v.

HIMAX TECHNOLOGIES, INC.,
MAX CHAN, and JORDAN WU,

Defendants.

) Case No. CV 07-05468 DDP (AGRx)

)
) **ORDER DENYING DEFENDANT'S MOTION**
) **TO TRANSFER VENUE**

) [Motion filed on October 24,
) 2007]

This matter is before the Court on Defendant Himax Technologies, Inc.'s ("Himax") motion to transfer venue to the Southern District of New York pursuant to 28 U.S.C. §1404(a), Plaintiffs' motion to consolidate related cases. After reviewing the papers filed by the parties and considering the arguments therein, the Court denies the motion to transfer venue to the Southern District of New York.

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1 **I. BACKGROUND**

2 This action arises from alleged violations of the Securities
3 Act of 1933 with respect to Defendant Himax's initial public
4 offering ("IPO") of American Depositary Shares. Plaintiff Michael
5 Pfeiffer seeks to certify a securities class action, on behalf of
6 purchasers of the Himax shares, in the Central District of
7 California. Plaintiffs in a related case, Oh v. Chan, CV 07-4891
8 DDP (AJWx), seek to certify a securities class action for
9 substantially similar claims.¹

10 Plaintiffs in these two actions have filed a motion to
11 consolidate the purported class actions. Defendant Himax,
12 meanwhile, has filed a motion to transfer venue to the Southern
13 District of New York. Plaintiff Michael Pfeiffer, joined by the
14 plaintiffs in the Oh action, opposes transfer of venue.

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16 **II. DEFENDANT'S MOTION TO TRANSFER VENUE**

17 A. Legal Standard

18 "For the convenience of parties and witnesses, in the interest
19 of justice, a district court may transfer any civil action to any
20 other district or division where it might have been brought." 28
21 U.S.C. § 1404(a). Transfer is appropriate when the moving party
22 shows: (1) venue is proper in the transferor district court; (2)
23 the transferee district court has personal jurisdiction over the
24 defendants and subject matter jurisdiction over the claims; and (3)
25 transfer will serve the convenience of the parties and witnesses,

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27 ¹ The two actions allege that Himax customers had high
28 inventory levels at or near the time of the IPO, which Himax failed
to disclose when it initiated the IPO.

1 and will promote the interests of justice. Goodyear Tire & Rubber
2 Co. V. McDonnell Douglas Corp., 820 F. Supp. 503, 506 (C.D. Cal.
3 1992)

4 A court ruling on a motion to transfer must balance the
5 convenience of parties and witnesses, and the interests of justice.
6 28 U.S.C. § 1404(a). The Court may also consider the following
7 factors: (1) the location where the relevant agreements were
8 negotiated and executed, (2) the state that is most familiar with
9 the governing law, (3) the plaintiff's choice of forum, (4) the
10 respective parties' contacts with the forum, (5) the contacts
11 relating to the plaintiff's cause of action in the chosen forum,
12 (6) the differences in the costs of litigation in the two forums,
13 (7) the availability of compulsory process to compel attendance of
14 unwilling non-party witnesses, and (8) the ease of access to
15 sources of proof. Jones v. GNC Franchising, Inc., 211 F.3d 495,
16 498-99 (9th Cir. 2000). Further, the presence of a forum selection
17 clause, or a relevant public policy of the forum state, may be
18 "significant factor[s]." *Id.* at 499.

19 B. Analysis

20 The parties do not dispute that venue would be proper in this
21 district or in the Southern District of New York, nor do they
22 dispute the Southern District of New York's jurisdiction. The
23 parties contest whether transfer of venue will serve the
24 convenience of the parties and witnesses, and promote the interests
25 of justice.

26 1. Plaintiffs' Choice of Forum and the Central District
27 of California's Connection to the Action

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1 Himax maintains that Plaintiff's choice of forum, normally
2 entitled to deference, should be accorded minimal consideration
3 because no plaintiffs reside in the district, plaintiffs' choice of
4 forum in class action lawsuits is not accorded significant weight,
5 and the operative facts of this case did not occur in the district.
6 Plaintiffs indicate that their choice of forum is entitled to
7 deference because the action has a connection to the Central
8 District of California.

9 Here, it is true that the Central District has little
10 connection to this action. The Central District does not have a
11 substantial interest in the parties as none of the plaintiffs
12 reside here; rather, the plaintiffs primarily live closer to New
13 York than to California.² Although the district certainly has an
14 interest in enforcement of the securities law, the operative facts
15 of this action did not primarily occur in the district. Further, a
16 substantially larger proportion of IPO shares were purchased in New
17 York, and several other states, as opposed to California.³

20 ² Plaintiff Michael Pfeiffer is a resident of San Diego,
21 California. Plaintiffs Vivian Oh, Marc Masoner, and Abhilash Rao
22 are residents of Connecticut, Illinois, and Virginia respectively.
23 Further, Defendant Himax is a Cayman Islands corporation with its
24 principal place of business in Taiwan, and subsidiaries throughout
25 Asia. Defendants Max Chan and Jordan Wu live outside the United
26 States, as do all of Himax's officers and directors.

27 ³ On March 30, 2006, Himax initiated its IPO of 52 million
28 shares. A substantially larger number of shares were purchased in
New York than in California. The Court notes that the parties
dispute whether the number of shares purchased in New York was
29.2% or 20.7%. Himax states that approximately 0.2% of shares
were purchased in Los Angeles, and Plaintiffs do not challenge this
figure. To date, the allocation of shares remains higher in New
York than in California; as of July 2007, Himax indicates that 15%
of shares are in New York and 3.9% of shares are in California.

1 Accordingly, the Court gives only minimal consideration to
2 Plaintiffs' choice of forum. Ordinarily, a plaintiff's choice of
3 forum is entitled to deference. Lou v. Belzberg, 834 F.2d 730, 739
4 (9th Cir. 1987). This is not the case, however, when plaintiffs do
5 not reside in the district, the operative facts have not occurred
6 within the forum, the forum has no particular interest in the
7 action, and plaintiffs are seeking to bring a class action. See
8 id. This is a purported class action lawsuit where Plaintiffs do
9 not reside in the district, the facts did not occur in the
10 district, and the district does not have a local interest in the
11 action. These factors weigh in favor of transfer of venue.

12 2. Convenience of the Witnesses and the Parties

13 There is no significant difference in convenience of the
14 forum, however, between the Central District of California and
15 Southern District of New York. Himax argues that California is an
16 inconvenient forum because none of the parties reside in the
17 Central District. Plaintiffs counter that California is a more
18 convenient forum than New York, primarily based on its geographic
19 proximity to Taiwan and Hong Kong where witnesses and documents
20 related to the IPO are located.

21 The Court does not view convenience to the witnesses and
22 parties to favor either forum. No named plaintiff or defendant
23 resides in the Central District, but the same is true of the
24 Southern District of New York. The burden of transporting
25 documents and witnesses from Asia will be the same in either
26 district. Neither forum is more favorable in terms of access to
27 evidence or the costs of litigation. Accordingly, this factor is
28 neutral.

1 Without more, the Court will not order transfer of venue.
2 Himax largely stakes its motion for transfer on provisions of the
3 IPO documents that designate an agent for service of process for
4 securities actions in New York and a forum selection clause that
5 contemplates New York as a proper forum for such actions. The
6 Court turns to these provisions.

7 3. Himax's Designation of an Agent for Service of
8 Process and Forum Selection Clause

9 Himax's IPO prospectus designates an agent for service of
10 process for all actions in the courts, state or federal, of New
11 York. (Declaration of Betty Chang Rowe ("Rowe Decl."), Ex. B, at
12 0011.) The IPO's deposit agreement and underwriting agreement
13 further provide that the "federal and state courts in the City of
14 New York shall have non-exclusive jurisdiction" over securities
15 lawsuits. (Rowe Decl., Ex. D, at 0022 and Ex. E ¶ 13.) The
16 reference to "non-exclusive jurisdiction" indicates a permissive
17 forum selection clause. See Hunt Wesson Foods, Inc. v. Supreme Oil
18 Co., 817 F.2d 75, 77 (9th Cir. 1987) (holding that a forum
19 selection clause that does not create exclusive jurisdiction is
20 permissive, not mandatory).

21 Himax argues that these provisions are essentially forum
22 selection clauses that designate New York as the proper forum for
23 this action, and strongly favor transfer of venue.⁴ Plaintiffs
24 respond that the clause designating an agent for service cannot be

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26 ⁴ Although not dispositive, "'a forum selection clause is
27 determinative of the convenience to the parties' and is entitled to
28 'substantial consideration.'" Unisys Corp. v. Access Co., No.
C05-3378 THE, 2005 U.S. Dist. LEXIS 31897, at * 12 (N.D. Cal. 2005)
(internal citations omitted).

1 construed as a forum selection clause, and that the other
2 provisions are only permissive forum selection clauses that do not
3 support transfer.

4 First, the Court finds that the clause designating an agent
5 for service of process for actions brought in a particular state
6 cannot be read as a forum selection clause. A company is entitled
7 to have a forum selection clause subject to an analysis of its
8 enforceability. See Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10
9 (1972). But the Court disagrees with Himax's position that
10 designation of an agent for service for a particular jurisdiction
11 can be leveraged to limit the forum for an action, especially when
12 the Securities Act authorizes nationwide service of process. See
13 S.E.C. v. Ross, 504 F.3d 1130, 1139-40 (9th Cir. 2007).

14 Second, the Court finds that other provisions in the IPO
15 documents agreements support denial of this motion, the presence of
16 a permissive forum selection clause notwithstanding. Specifically,
17 the deposit agreement provides:

18 The Company irrevocably and unconditionally waives to the
19 fullest extent permitted by law, any objection that it may now
20 or hereafter have to the laying of venue of any actions, suits
21 or proceeding brought in any court provided in this Section
22 7.6, and hereby further irrevocably and unconditionally waives
23 and agrees not to plead or claim in any such court that any
24 such action, suits or proceeding brought in any such court has
25 been brought in an inconvenient forum.

26 (Rowe Decl., Ex. D, at 0022.) Elsewhere in that section, the
27 deposit agreement refers to "a Holder or Beneficial Owner [that]
28 brings a suit, action or proceeding against (a) the Company . . .

1 in any state or federal court. . . ." (Id.) Read together, the
2 deposit agreement contains a waiver to Himax challenging venue in
3 any such action in federal court by a shareholder.⁵ Although the
4 parties may have considered New York a proper forum for litigation,
5 Himax nevertheless agreed to waive challenges to venue in
6 shareholders' securities actions.

7 The Court, therefore, does not consider the service provision
8 or the permissive forum selection clause to support transfer of
9 venue. This factor favors denial of the motion.

10 4. Transfer of Venue is Not Warranted

11 In balancing the section 1404(a) factors, the Court is
12 inclined to deny transfer venue to the Southern District of New
13 York. The Court finds that (1) the Central District has little
14 connection to the operative facts, the parties, or the subject
15 matter of the action and (2) as a result, plaintiff's choice of
16 forum is entitled to only minimal consideration. However, (3)
17 convenience of parties and witnesses is not served by transfer.
18 Most importantly, (4) the permissive forum selection clause is
19 insufficient to warrant transfer where the IPO documents
20 specifically contemplate Himax's waiver of any challenges to venue
21 in any state or federal court. Accordingly, the Court denies the
22 motion to transfer of venue.

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27 ⁵ The Court additionally notes that the same paragraph of the
28 deposit agreement appears to waive a challenge by Himax to service
of process in such actions by shareholders. (Id.)

1 **III. CONCLUSION**

2 For the foregoing reasons, the Court DENIES the motion to
3 transfer venue.

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6 IT IS SO ORDERED.

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9 Dated: January 8, 2008



DEAN D. PREGERSON
United States District Judge

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