

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

<b>LOCKED AND LOADED PRODUCTS</b>	§	
<b>INC.</b>	§	
	§	
<b>v.</b>	§	<b>NO. 6:10-CV-484</b>
	§	
<b>KINEDYNE CORP., CLEVELAND</b>	§	
<b>MACK SALES, INC., and ROARK</b>	§	
<b>MOTOR SUPPLY</b>	§	

**MEMORANDUM OPINION & ORDER**

Before the Court is Defendants Kinedyne Corporation (“Kinedyne”), Cleveland Mack Sales, Inc. (“Cleveland Mack”) and Roark Motor Supply, Inc.’s (“Roark”) Motion To Transfer Venue To The District Of New Jersey (Doc. No. 12, “MOTION”). The parties have presented their positions (Doc. Nos. 13, “PL.’S RESP.,” 14, “DEF.’S REPLY,” 15, “PL.’S SURREPLY”). After careful consideration of the parties’ positions, the Court **DENIES** Defendants’ motion to transfer.

**LEGAL STANDARD**

Section 1404(a) provides that “[f]or 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.” 28 U.S.C. § 1404(a). The goals of § 1404(a) are to prevent waste of time, energy, and money, and also to protect litigants, witnesses, and the public against unnecessary inconvenience and expense. *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

The first determination to be made under §1404(a) is whether the claim could have been filed in the judicial district to which transfer is sought. *In re Volkswagen AG*, 317 F.3d 201, 203 (5th Cir. 2004) (“Volkswagen I”). If so, the party seeking transfer must show good cause for the transfer. *In re Volkswagen of America, Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (“Volkswagen II”). To show

good cause, the movant must demonstrate the proposed transferee venue is clearly more convenient. *Id.* Ultimately it is within a district court's sound discretion to transfer venue pursuant to §1404(a), but the court must exercise its discretion in light of the particular circumstances of the case. *Hanby v. Shell Oil Co.*, 144 F.Supp.2d 673, 676 (E.D.Tex. 2001); *Mohamed v. Mazda Corp.*, 90 F.Supp.2d 757, 768 (E.D.Tex. 2000).

The Fifth Circuit has adopted the *Gilbert* factors, *see Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947), for determining § 1404(a) venue transfer questions. *Id.* at 315 n.9. When deciding whether to transfer venue, a district court balances two categories of interests: the private interests, *i.e.*, the convenience of the litigants, and the public interests in the fair and efficient administration of justice. *Id.* The private interest factors include: “(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Id.* The public interest factors include: “(1) the administrative difficulties flowing from court congestion, (2) the local interest in having localized interests decided at home, (3) the familiarity of the forum with the law that will govern the case, and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law.” *Id.* This list is not exhaustive nor is any single factor dispositive. *Id.*

## **DISCUSSION**

The Court must first address whether this suit could have been filed in the District of New Jersey. 28 U.S.C. § 1404(a). The “critical time” when making this threshold inquiry is the time when the lawsuit was filed. *Balthasar Online, Inc. v. Network Solutions, LLC*, 654 F.Supp.2d 546, 549 (E.D. Tex. 2009) (citing *Hoffman v. Blaski*, 363 U.S. 335, 343, 80 S.Ct. 1084, 4 L.Ed.2d 1254

(1960)). The parties dispute whether this action could have been filed in the District of New Jersey. PL.'S RESP. at 2-4; DEF.'S REPLY at 1-2; PL.'S SURREPLY at 1-3. Plaintiff contends that Defendants Cleveland Mack and Roark are not subject to personal jurisdiction in the District of New Jersey. PL.'S RESP. at 3. Defendants counter that venue is proper in the District of New Jersey pursuant to 28 U.S.C. § 1391(b)(2) because Kinedyne conceived, designed, engineered and distributed the accused products in New Jersey. DEF.'S REPLY at 1-2. Defendants further contend that Cleveland Mack and Roark consent to personal jurisdiction in New Jersey and are indemnified by Kinedyne. *Id.* at 2.

Defendants must make a *prima facie* showing that the transferee court would have personal jurisdiction over all originally-named defendants to satisfy the threshold requirement pursuant to §1404(a). *See Balthasar Online, Inc.* 654 F.Supp.2d at 551; *see also U.S. Ethernet Innovations, LLC v. Acer, Inc.*, 2010 WL 2771842, at \*4 (E.D. Tex. July 13, 2010) (citing *Chirife v. St. Jude Medical Inc.*, 2009 WL 168563, at \*3 (E.D. Tex. June 16, 2009)). In other words, Defendants must demonstrate that Kinedyne, Cleveland Mack and Roark were subject to personal jurisdiction in the District of New Jersey at the time of the filing.

Federal Circuit law governs the issue of personal jurisdiction in patent cases. *Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found.*, 297 F.3d 1343, 1348 (Fed. Cir. 2002). The Court conducts two inquiries to determine whether jurisdiction exists over an out-of-state defendant: “whether a forum state’s long arm statute permits service of process and whether assertion of personal jurisdiction comports with due process.”<sup>1</sup> *Chirife*, 2009 WL 1684563 at \*2; *see also Silent Drive Inc. v. Strong Indus., Inc.*, 326 F.3d 1194, 1201 (Fed. Cir. 2003). However,

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<sup>1</sup> The Federal Circuit defers to the forum state’s interpretation of its long arm statute. *3D Systems, Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1377 (Fed. Cir. 1998).

New Jersey's long-arm statute is coextensive with the limits of due process (*see* N.J. Ct. R. 4:4-4; *Eaton Corp. v. Maslym Holding Co.*, 929 F.Supp. 792, 796 (D. N.J. 1996)); thus, the sole inquiry is whether jurisdiction comports with due process. *Chirife*, 2009 WL 1684563 at \*2. Due process requires that a non-resident defendant have certain "minimum contacts" with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, (1945). Such minimum contacts must generally be purposeful. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) ("purposefully established minimum contacts" remain the "constitutional touchstone") (internal quotation omitted).

Minimum contacts may be met by either "general" or "specific" jurisdiction over a defendant. *Silent Drive, Inc. v. Strong Indus.*, 326 F.3d 1194, 1200 (Fed. Cir. 2003). "General jurisdiction" exists when the defendant's contacts with the forum state are "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). Specific jurisdiction exists where "(1) the defendant purposefully directed its activities at residents of the forum; (2) the claim arises out of or relates to the defendant's activities with the forum; and (3) assertion of personal jurisdiction is reasonable and fair." *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285, 1291 (Fed. Cir. 2001).

Kinedyne was founded, operates in and maintains its principal place of business in New Jersey. Accordingly, Kinedyne is subject to personal jurisdiction in the District of New Jersey. MOTION at 5. Cleveland Mack and Roark operate and maintain their principal places of business in the Eastern District of Texas and, based on the evidence presented by the parties, have no contacts with New Jersey. *Id.* at 5-6; DEF.'S REPLY at 2-4. Cleveland Mack and Roark have provided no

evidence that they direct activities at the residents of New Jersey or that the claims of this suit arise out of their activities with New Jersey. As such, Cleveland Mack and Roark are not subject to personal jurisdiction in the District of New Jersey and Defendants have failed to meet the threshold requirement for application of §1404(a). *Balthasar Online, Inc.*, 654 F.Supp.2d at 551.

Defendants contend this lawsuit could have been filed in New Jersey because Cleveland Mack and Roark consent to jurisdiction in that district. The Court, however, declines to rely on Defendants' consent to personal jurisdiction. In other words, "the thesis urged by [Defendants] would not only do violence to the plain words of § 1404(a), but would also inject gross discrimination. That thesis, if adopted, would empower a District Court, upon a finding of convenience, to transfer an action to any district desired by the defendants and in which they were willing to waive their statutory defenses as to venue and jurisdiction over their persons, regardless of the fact that such transferee district was not one in which the action 'might have been brought' by the plaintiff." *Hoffman v. Blaski*, 363 U.S. 335, 344, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960); *see also Chirfie v. St. Jude Medical, Inc.*, 2009 WL 1684563 (E.D. Tex. 2009).

Defendants cite *Palmer v. Braun*, 376 F.3d 1254 (11th Cir. 2004), to support the proposition that a defendant may consent to personal jurisdiction in a transferee forum to meet the threshold requirement of §1404(a). *Palmer v. Braun*, however, stands for the unremarkable proposition that a defendant waives any objection to personal jurisdiction by not objecting in a responsive pleading or FED.R.CIV.P. 12 motion. *Id.* at 1259 (citing *Lipofsky v. New York State Workers Comp. Bd.*, 861 F.2d 1257, 1258 (11th Cir. 1988)). Defendants' cited case is inapposite to the threshold requirement of §1404(a) under these circumstances.

Defendants also argue that transfer is proper because Kinedyne has agreed to indemnify

Cleveland Mack and Roark. DEF.'S REPLY at 2. Defendants, however, fail to explain or cite any authority as to how one Defendant indemnifying the others solves the jurisdictional defect. Moreover, the "critical time" when making the threshold inquiry is the time when the lawsuit was filed (*Balthasar Online, Inc.*, 654 F.Supp.2d at 549); therefore, any indemnification agreement entered after the filing of suit, even if relevant, would not weigh heavily in the Court's analysis. Accordingly, Defendants have failed to show that this case "could have been filed" in the District of New Jersey. Because Defendants have not met this threshold requirement, the Court need not address the §1404(a) transfer factors.

**CONCLUSION**

For the aforementioned reasons, Defendants' motion to transfer is **DENIED**.

So **ORDERED** and **SIGNED** this 10th day of August, 2011.

  
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JOHN D. LOVE  
UNITED STATES MAGISTRATE JUDGE