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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NIAGRA BOTTLING, LLC, Plaintiff, v. ORION PACKAGING SYSTEMS, LLC, et al. Defendants.))))))))))	Case No. EDCV 12-00498 VAP (DTBx) ORDER TRANSFERRING CASE TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA [Motion filed on April 11, 2012]
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This breach of contract case arises from the alleged malfunctioning of several stretch wrapping machines used to wrap palettes of bottled water in clear plastic film for shipping. The machines were built by Defendant Orion Packaging Systems, LLC ("Orion") and sold by Defendant National Packaging Specialists, Inc. ("NPS") to Plaintiff Niagara Bottling, LLC. ("Niagara"). Niagara alleges various maladies ranging from the unusual (e.g., an uninstalled "hot knife guard") to the mundane (e.g., rust) afflicted the machines from the outset.

1 On April 11, 2012, Orion filed the Motion to Dismiss
2 (Doc. No. 6) for lack of venue now before the Court; in
3 it, Orion argues it is absent from this judicial district
4 entirely, as are the allegedly faulty machines.
5 Alternatively, Orion seeks a transfer of the case to a
6 different forum, pursuant to 28 U.S.C. § 1404(a).
7 Niagara filed a timely Opposition (Doc. No. 9) on April
8 23, 2012, and Orion filed a Reply (Doc. No. 10) on April
9 30, 2012. As discussed below, the Court GRANTS Orion's
10 Motion and transfers this case to the United States
11 District Court for the Eastern District of Pennsylvania.
12

13 **I. BACKGROUND**

14 **A. Factual Background**

15 By purchase order dated October 26, 2007, Niagara,
16 styling itself "Buyer," requested five "Orion Model MA-44
17 Stretchwrapping Systems" from NPS and Orion, collectively
18 styled "Seller." (See Ex. 1 to Compl. (Doc. No. 1).)
19 The purchase order specified that two of the machines
20 were to be shipped to Niagara facilities in Allentown,
21 Pennsylvania; two to Groveland, Florida; and one to
22 Ontario, California. (See id.) It also set forth
23 various delivery and warranty requirements Niagara
24 imposed on the "Vendor," though nowhere in the document
25 was any party identified as the "Vendor." (See id.)
26 Finally, the purchase order incorporated Niagara's
27 "Standard Purchase Terms & Conditions," accessible to the
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1 order's recipient via the Internet, and then insisted
2 that the order's terms control in the face of any of the
3 Vendor's contrary terms. (See id.) Of note, the
4 Standard Purchase Terms & Conditions contained a forum
5 selection clause by which the parties submitted to the
6 jurisdiction of California's state and federal courts,
7 and agreed that the proper venue for resolution of any
8 dispute arising out of their transaction would be "in the
9 County of Orange, only." (See Ex. 2 to Compl. ¶ 16.)

10
11 Niagara created a revised purchase order, dated March
12 28, 2008, in which it noted that the two machines
13 destined originally for Groveland, Florida, would instead
14 be sent to Dallas, Texas, and that it would be entitled
15 to liquidated damages of 5 percent of the purchase price
16 per day if the machines did not arrive by April 25, 2008.
17 (See id.) The revised purchase order otherwise retained
18 the terms of the original order. (See id.)

19
20 Niagara contends when the stretch wrapping machines
21 arrived, they tore plastic film excessively; lacked
22 installed "hot knife guards," had sensors and controls
23 that performed inadequately, and had damaged conveyor
24 rollers and broken bolts; were rusty and cracked,
25 overheated and seized, and otherwise failed to perform to
26 specification. (Compl. ¶ 19.) Moreover, the machines

1 sent to Dallas arrived late. (Id. ¶ 20.) This lawsuit
2 followed.

3

4 **B. Procedural History**

5 On February 21, 2012, Niagara filed suit against
6 Orion and NPS in the California Superior Court for the
7 County of San Bernardino, apparently in contravention of
8 its own forum selection clause. Niagara's Complaint
9 raises claims for breach of written contract, breach of
10 express warranty, breach of warranty of merchantability,
11 and breach of warranty of fitness for a particular
12 purpose. (See generally Compl.)

13

14 Orion, with NPS's concurrence, removed Niagara's
15 Complaint to this Court on April 4, 2012, alleging that
16 its removal was timely because Niagara did not serve
17 Orion until March 5, 2012. (Not. of Removal ¶ 2 (Doc.
18 No. 1).) Orion contends the Court has subject-matter
19 jurisdiction over this action because the parties are of
20 diverse citizenship: Orion is a Minnesota limited
21 liability corporation whose sole member is Pro Mach,
22 Inc., a Delaware corporation that conducts business
23 principally in Ohio; NPS is a Delaware corporation with
24 its principal place of business in New Jersey. Niagara
25 is a California limited liability corporation; none of
26 the materials before the Court at the time of removal,
27 however, indicated the citizenship of Niagara's owners or

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1 members - the relevant factor in determining the
2 citizenship of a limited liability corporation when
3 establishing diversity jurisdiction. Johnson v. Columbia
4 Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006).
5

6 The Court therefore ordered the disclosure of the
7 citizenship of Niagara's owners or members on or before
8 Monday, May 7, 2012; those members are a California
9 corporation and two California trusts. Consequently, it
10 appears to the Court that the parties are of diverse
11 citizenship.
12

13 Meanwhile, Orion filed the instant Motion to Dismiss
14 for lack of venue, under Federal Rule of Civil Procedure
15 12(b)(3), or in the alternative, to transfer the action
16 to either the Eastern District of Pennsylvania or the
17 District of New Jersey, pursuant to 28 U.S.C. § 1404(a).¹
18 The standard for analyzing Orion's Motion is as follows.
19

20 **II. LEGAL STANDARD**

21 When a defendant moves to dismiss a case under
22 Federal Rule of Civil Procedure 12(b)(3), the plaintiff
23 bears the burden of showing it sued the defendant in an
24 appropriate venue. Prawoto v. PrimeLending, 720 F. Supp.
25

26 ¹ While both parties discuss transfer of the case to
27 the Middle District of Pennsylvania (see Mot. at 2; Opp'n
28 at 1), the Court notes that Allentown, the site of the
allegedly defective stretch wrapping machine, is actually
in the Eastern District of Pennsylvania.

1 2d 1149, 1151 (C.D. Cal. 2010) (citing Piedmont Label Co.
2 v. Sun Garden Packing Co., 598 F.2d 491, 496 (9th Cir.
3 1979)). An appropriate venue, in turn, is a judicial
4 district: (1) in which "any defendant resides, if all
5 defendants are residents of the State in which the
6 district is located"; (2) in which "a substantial part of
7 the events or omissions giving rise to the claim
8 occurred"; or, only if venue is improper in any other
9 district, (3) in which "any defendant is subject to the
10 court's personal jurisdiction with respect to" the action
11 before the court. 28 U.S.C. § 1391(b). For defendants,
12 other than natural persons, "with the capacity to sue and
13 be sued . . . under applicable law," residency is
14 established, for venue purposes, in any district where
15 those defendants are subject to the court's personal
16 jurisdiction. 28 U.S.C. § 1391(c)(2); see 14D Charles
17 Alan Wright, et al., Federal Practice and Procedure §
18 3811.1 (3d ed.) (discussing the clarifying amendments to
19 28 U.S.C. § 1391, effective in January 2012, which
20 provide, among other things, that the residency rule
21 established in the former Section 1391(c) applies to all
22 non-natural entities with the capacity to litigate, and
23 not solely corporations).

24

25 In disputing whether it was sued in the appropriate
26 venue, a moving defendant may rely on evidence outside
27 the pleadings, which are not accepted as true. Doe 1 v.

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1 AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009) (citing
2 Arqueta v. Banco Mexicano, S.A., 87 F.3d 320, 323 (9th
3 Cir. 1996)). Nevertheless, a court should draw all
4 reasonable inferences and resolve all factual conflicts
5 in the non-moving party's (*i.e.*, the plaintiff's) favor.
6 See Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1138
7 (9th Cir. 2004) (holding that, "in the context of a Rule
8 12(b)(3) motion based upon a forum selection clause," the
9 non-moving party should have reasonable inferences drawn,
10 and factual disputes resolved, in its favor); Allstar
11 Mktg. Group, LLC v. Your Store Online, LLC, 666 F. Supp.
12 2d 1109, 1126 (C.D. Cal. 2009) (applying the rule in
13 Murphy without regard to whether venue was premised on a
14 forum selection clause).

15
16 If the court determines a plaintiff has selected an
17 improper venue, it may either dismiss the case or
18 transfer it to a proper venue. 28 U.S.C. § 1406. In
19 determining whether to transfer a case, courts typically
20 consider: (1) the place where any relevant agreements
21 were negotiated or executed; (2) the state most familiar
22 with the law governing the case; (3) the forum chosen by
23 the plaintiff; (4) the parties' contacts with the
24 prospective forum; (5) the contacts in the current forum
25 relating to the plaintiff's claim; (6) the difference in
26 litigation costs between the two forums; (7) the ability
27 of the respective forums to compel the attendance of non-

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1 party witnesses; and (8) the ease of access to various
2 sources of proof. See Jones v. GNC Franchising, Inc.,
3 211 F.3d 495, 498-99 (9th Cir. 2000) (reciting the
4 factors a court should consider before transferring a
5 case under the similar 28 U.S.C. § 1404(a)).

6
7 If the parties' dispute concerns a contract in which
8 they negotiated a forum selection clause, that clause is
9 "a 'significant factor'" in determining whether to
10 transfer the dispute to the negotiated forum, id.
11 (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22,
12 31 (1988)); indeed, such clauses "'should be enforced
13 absent strong reasons to set them aside,'" E. & J. Gallo
14 Winery v. Andina Licores S.A., 446 F.3d 984, 992 (9th
15 Cir. 2006) (quoting Northrop Corp. v. Trial Int'l Mktg.,
16 S.A., 811 F.2d 1265, 1270 (9th Cir. 1987)).

17
18 Having set forth the relevant legal standard, the
19 Court turns now to the question before it: whether
20 Niagara has established venue successfully for bringing
21 its contract claims against Orion in the Central District
22 of California.

23 24 **III. DISCUSSION**

25 Niagara can establish venue properly in one of three
26 ways; the question before the Court is whether,
27 construing the available evidence in Niagara's favor, it
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1 has succeeded in doing so. As discussed below, it has
2 not.

3
4 Given the incorporeal nature of both NPS and Orion,
5 the overarching question for the Court - though Orion's
6 Motion is nominally about proper venue - is whether the
7 Court can exercise personal jurisdiction properly over
8 Orion. See 28 U.S.C. § 1391(c)(2) (residency of
9 artificial entities is, for venue purposes, coextensive
10 with personal jurisdiction over such entities). Here, if
11 Niagara can show that any court in California could
12 assert personal jurisdiction over both NPS and Orion in
13 this case, and that this Court can assert personal
14 jurisdiction over one or the other, then it can show that
15 this Court is a proper venue in which to sue Orion. 28
16 U.S.C. §§ 1391(b)(1), (c)(2). Alternately, Niagara may
17 show that its claims arose substantially from Orion's
18 acts or omissions in this district. 28 U.S.C. §
19 1391(b)(2). Only if there is no other appropriate venue
20 in which to sue Orion may Niagara proceed via the third
21 method of establishing venue before this Court, i.e.,
22 relying solely on the Court's jurisdiction over Orion's
23 co-defendant, NPS. 28 U.S.C. § 1391(b)(3).

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1 **A. Venue under Section 1391(b)(1)**

2 Assuming that this Court has personal jurisdiction
3 over NPS, which NPS has conceded implicitly in its Answer
4 by omitting the proper objection (see Doc. No. 13), then
5 to establish this district as the appropriate venue for
6 its suit against Orion, the burden falls to Niagara to
7 show that Orion is subject to the personal jurisdiction
8 of any California court. 28 U.S.C. §§ 1391(b)(1), (c)(2)
9 That court's jurisdiction over Orion may be either
10 general or specific. CollegeSource, Inc. v. AcademyOne,
11 Inc., 653 F.3d 1066, 1074-75 (9th Cir. 2011);
12 Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797,
13 800-02 (9th Cir. 2004).

14
15 For a defendant to be subject to general personal
16 jurisdiction in a state, its contacts with that state
17 must be so pervasive that it would be fair to subject it
18 to suit there for its conduct anywhere in the world.
19 Schwarzenegger, 374 F.3d at 801. Put succinctly, "[a]
20 court may assert general jurisdiction over foreign
21 (sister-state or foreign country) corporations to hear
22 any and all claims against them when their affiliations
23 with the State are so 'continuous and systematic' as to
24 render them essentially at home in the forum State."
25 Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.
26 Ct. 2846, 2851 (2011) (citing Int'l Shoe Co. v.
27 Washington, 326 U.S. 310, 317 (1945)).

1 Here, there is no evidence from which to conclude
2 realistically that Orion is so at home in California that
3 it could be haled into court here for its conduct
4 anywhere in the world. Niagara's evidence of Orion's
5 contacts with California consists of statements from its
6 website that it does business in all 50 states; that one
7 of its customers is Walt Disney Co. (owner and operator
8 of the Disneyland Resort, in this judicial district); and
9 that it has a sales representative located somewhere in
10 southern California whose territory is the entire western
11 United States. (See Opp'n at 2-3.) Given the "exacting"
12 nature of the standard for establishing general
13 jurisdiction over a defendant, Schwarzenegger, 374 F.3d
14 at 801, and that courts normally consider the
15 "'longevity, continuity, volume, economic impact,
16 physical presence, and integration into the state's
17 regulatory or economic markets,'" CollegeSource, Inc.,
18 653 F.3d at 1074 (quoting Tuazon v. R.J. Reynolds Tobacco
19 Co., 433 F.3d 1163, 1172 (9th Cir. 2006)), of a
20 defendant's contacts with a state in determining whether
21 that defendant is subject to the general jurisdiction of
22 the state's courts, the Court cannot conclude from
23 Niagara's meager evidence that Orion could be fairly made
24 to answer in California for any of its activities
25 anywhere in the world.

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1 Orion, however, may still be subject to the
2 jurisdiction of a California court (and venue laid
3 properly against it here) for specific claims arising
4 from its activities in California. To establish specific
5 jurisdiction in a contract dispute (like this one), a
6 plaintiff must show that the defendant availed itself
7 purposefully of the privilege of conducting business in
8 California - such as by "executing or performing a
9 contract there" - and that the plaintiff's claim arises
10 out of the defendant's California-related activities.
11 Schwarzenegger, 374 F.3d at 801-02; see Yahoo! Inc. v. La
12 Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d
13 1199, 1206 (9th Cir. 2006) (distinguishing the
14 "purposeful availment" prong of the jurisdictional
15 inquiry in a contract case from the purposeful direction
16 prong of the same inquiry in a tort case). If the
17 plaintiff succeeds in making that showing, a defendant
18 may still escape California's jurisdiction by
19 "'present[ing] a compelling case'" that it would be
20 unfair to subject it to proceedings in this state. Id.
21 at 802 (quoting Burger King Corp. v. Rudzewicz, 471 U.S.
22 462, 476-78 (1985)).

23

24 Orion argues it did not execute or perform any
25 contract in California; instead, Orion sold stretch
26 wrapping machines to NPS, NPS resold those machines to
27 Niagara, and none of the allegedly malfunctioning

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1 machines were sent by either NPS or Orion to California.
2 (Decl. of Larry Pappenfus (Doc. No. 6-1) ¶¶ 5, 6.)² As a
3 matter of Ninth Circuit precedent, these facts are
4 insufficient to confer specific jurisdiction over Orion.
5

6 In Gray & Co. v. Firstenberg Machinery Co., 913 F.2d
7 758, 759 (9th Cir. 1990) (per curiam), Gray, an Oregon
8 corporation (doing business principally in Oregon) bought
9 a used filter from Firstenberg, a California corporation
10 (doing business principally in California), which in turn
11 acquired the filter via the efforts of Polk, an Illinois
12 corporation (doing business principally in Illinois).
13 When the filter malfunctioned, Gray sued Firstenberg and
14 Polk in Oregon; the district court denied Firstenberg's
15 and Polk's motion to dismiss for lack of personal
16 jurisdiction, and found them liable for breach of
17 warranty. Id. at 759-60.
18

19 The court of appeals reversed, noting that although
20 Firstenberg had a contract with Gray, that alone would be
21 insufficient to establish specific jurisdiction, and
22 Firstenberg's and Polk's "only contacts [with Oregon] in
23 connection with th[e] sale consisted of Firstenberg's
24

25 ² While the Pappenfus declaration states clearly that
26 Orion sold the stretch wrapping machines to NPS, which
27 resold the machines to Niagara, Orion's moving papers say
28 nearly the opposite: "Contrary to Niagara's contention
that it purchased the equipment from both NPS and Orion,
Orion sold the Systems directly to Niagara." (Mot. at
3.)

1 response to Gray's solicitation for a filter,
2 Firstenberg's telephone conversations with Gray,
3 Firstenberg's mailing the invoice to Gray, and
4 Firstenberg's receipt of payment from Gray." Id. at 760-
5 61. Gray argued "because Firstenberg knew Gray was in
6 Oregon and Gray would bring the filter to Oregon,
7 Firstenberg should have anticipated being sued in Oregon
8 if something went wrong with the filter"; the court of
9 appeals rejected that argument, noting "foreseeability of
10 injury in the forum does not itself establish purposeful
11 availment." Id. at 761.³

12
13 The facts before the Court compel the same conclusion
14 in this case that the court of appeals reached in Gray,
15 perhaps even more clearly than the facts in Gray itself:
16 here, the malfunctioning equipment is, unlike the filter
17 in Gray, not in the forum state. Beyond that, the
18 evidence shows a one time arrangement between Niagara and
19 NPS, by which five Orion stretch wrapping machines would
20 be delivered to various locations, including California.
21 It reveals no other contact between Orion and this state

22 _____
23 ³ In any event, that a defendant causes a plaintiff a
24 pecuniary injury in one forum as a result of its conduct
25 in another forum is insufficient as a matter of law to
26 establish jurisdiction over the defendant in the forum
27 where the pecuniary injury occurred. See Bowen v.
28 Lancaster, No. SACV08-00159-CJC(RNBx), 2008 WL 1986036,
at *4 (C.D. Cal. Apr. 30, 2008) ("The fact of a
plaintiff's residence, and thus the locus of financial
damage, cannot support personal jurisdiction over a non-
resident defendant.") (citing Hunt v. Erie Ins. Group,
728 F.2d 1244, 1247 (9th Cir. 1984)).

1 at all related to the transaction now before the Court.
2 Accordingly, the Court concludes Orion has not availed
3 itself purposefully of the privilege of doing business in
4 California in this case, and therefore cannot be
5 subjected to specific jurisdiction by courts in this
6 state - including this Court.

7
8 As there are no facts before the Court sufficient to
9 demonstrate that Orion is subject to personal
10 jurisdiction (either general or specific) in California,
11 Niagara cannot establish proper venue for its claims
12 against Orion under 28 U.S.C. § 1391(b)(1).

13
14 **B. Venue under Section 1391(b)(2)**

15 If Niagara can demonstrate that "a substantial part
16 of the events or omissions giving rise to" its claims
17 against Orion occurred in this judicial district, it can
18 establish venue before this Court. 28 U.S.C. §
19 1391(b)(2). In a contract case, substantial events to be
20 considered "are where negotiations took place, where the
21 contract was signed, or where performance or breach
22 occurred." Ming Hsu v. VTEX Energy, Inc., No. C 06-07688
23 JW, 2007 WL 1232056, at *1 (N.D. Cal. Apr. 26, 2007)
24 (citing Decker Coal Co. v. Commonwealth Edison Co., 805
25 F.2d 834, 842 (9th Cir. 1986)).

1 Niagara bears the burden of demonstrating that
2 substantial events occurred in this district; its
3 Opposition, however, cites no authority for the Court to
4 recognize as substantial those events that it lists. For
5 instance, Niagara argues "[a] substantial portion of the
6 contracts for the purchase of the equipment were drafted
7 in Ontario, California" (Opp'n at 5), but no authority
8 for the proposition that sending a form purchase order to
9 NPS has any bearing on Orion's alleged breach of a
10 warranty and thus on Niagara's claims against Orion. So
11 too for every other contention Niagara makes to
12 demonstrate the substance of the events that occurred in
13 this district. A party opposing a motion must submit a
14 "brief but complete memorandum which shall contain a
15 statement of all the reasons in opposition" to the motion
16 being opposed, as well as "the points and authorities
17 upon which the opposing party will rely." L.R. 7-9
18 (emphasis added). Without any legal basis for concluding
19 that any events that occurred in this district are
20 "substantial" vis-à-vis Orion, the Court cannot conclude
21 that venue for claims against Orion is properly laid in
22 this district under 28 U.S.C. § 1391(b)(2).

23

24 **C. Venue under Section 1391(b)(3)**

25 If, and only if, there is no other district in which
26 venue is proper as to both NPS and Orion, Niagara can
27 establish venue in this district if the Court has

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1 personal jurisdiction over either NPS or Orion. Niagara
2 makes no argument as to this prong; hence, the Court
3 assumes its inapplicability.

4

5 As Niagara fails to establish that this district is
6 the proper venue, under 28 U.S.C. §§ 1391(b)(1), (2), or
7 (3), for its claims against Orion, the Court must either
8 dismiss those claims or transfer them elsewhere.

9

10 **D. Transfer of Niagara's Claims Against Orion to Another**
11 **District**

12 Niagara expressed its preference for transfer of this
13 case to the Eastern District of Pennsylvania rather than
14 dismissal of its claims against Orion, should the Court
15 grant Orion's Motion. Many of the factors the Court
16 considers in deciding whether and where to transfer a
17 case are neutral as between this district and that one.
18 For instance, while Niagara is headquartered in Ontario,
19 California, it has a facility, at which one of the
20 defective stretch wrappers is located, in Allentown,
21 Pennsylvania, within the Eastern District of
22 Pennsylvania. As neither party discusses the need to
23 subpoena non-party witnesses, there should be no
24 difficulty compelling the appearance of witnesses in
25 either forum. Presumably the various sources of proof in
26 this case are documents, and thus completely mobile; one
27 of the defective machines itself, however, is in the

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1 transferee forum. Niagara concedes that litigation costs
2 "should be about the same" in either forum. (Opp'n at
3 11.) As for the parties' contacts with Niagara's chosen
4 forum, the Central District of California, Orion appears
5 to have few, while Niagara has many (unsurprisingly,
6 since it chose the forum). But Niagara also has contacts
7 in the Eastern District of Pennsylvania, and Orion
8 consents to venue and jurisdiction in that district.
9 Both California and Pennsylvania have adopted the Uniform
10 Commercial Code in cases involving sales of goods (i.e.,
11 stretch wrapping machines), so the forums' laws should be
12 similar (though their choice of law rules may not be).
13 See generally Cal. Com. Code §§ 2101-2801; 13 Pa. Cons.
14 Stat. Ann. §§ 2101-2725.

15
16 Wrapping up the analysis, while the presence of a
17 forum selection clause would result, typically, in the
18 transfer of this case to the selected forum, Niagara
19 itself brought the case in an improper forum (i.e., not
20 one in Orange County), has not requested its transfer to
21 the proper one, and in any event, has provided no
22 authority undermining Orion's position that Orion is not
23 even a party to a contract with Niagara containing a
24 forum selection clause.

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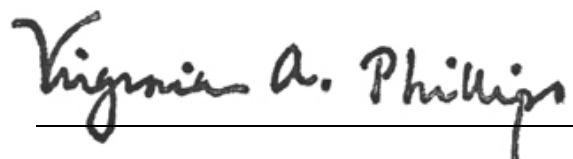
1 Having considered the factors set forth in Jones, the
2 Court ORDERS this matter transferred in its entirety to
3 the United States District Court for the Eastern District
4 of Pennsylvania.

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IV. CONCLUSION

For the foregoing reasons, the Court concludes the Central District of California is an improper venue for Niagara's claims against Orion. The Court therefore GRANTS Orion's Motion; however, rather than dismissing Niagara's claims, the Court ORDERS the matter transferred to the United States District Court for the Eastern District of Pennsylvania.

Dated: May 14, 2012



VIRGINIA A. PHILLIPS
United States District Judge