

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ACCELER-RAY, INC.,
Plaintiff,
v.
IPG PHOTONICS CORPORATION,
Defendant.

Case No. [5:16-cv-02352-HRL](#)

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS**

Re: Dkt. No. 8

In this diversity action, plaintiff Acceler-Ray, Inc. (Acceler-Ray) sues for alleged breach of contract, fraud, and unfair business practices arising out of Acceler-Ray’s purchase of lasers from defendant IPG Photonics Corp. (IPG). IPG moves to dismiss the complaint, arguing that a forum selection clause requires this suit to be litigated in Massachusetts. Alternatively, IPG moves for an order transferring this case there pursuant to 28 U.S.C. § 1404(a). Plaintiff opposes the motion. Upon consideration of the moving and responding papers, as well as the oral arguments presented, this court grants the motion.¹

BACKGROUND

Acceler-Ray is a California precision machine laser shop. IPG manufactures and markets lasers. IPG is headquartered in Massachusetts, but it also has two smaller facilities here.

¹ All parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73.

1 In 2010, plaintiff was looking to purchase additional and upgraded lasers. Acceler-Ray
2 says that it was contacted by one Tom Babcock, who was at that time an IPG sales manager based
3 in California.² Plaintiff was interested in purchasing lasers with a pulse shaping feature.
4 However, IPG’s lasers with pulse shaping were not yet in production and were not anticipated to
5 be ready until sometime in 2011. As will be discussed more fully below, the parties dispute
6 whether IPG’s Terms and Conditions (T&Cs) containing the forum selection clause were part of
7 their contract. But, for present purposes, there appears to be no dispute as to the general
8 parameters of the agreement re Acceler-Ray’s purchase. In sum, Acceler-Ray wanted to buy
9 lasers before the end of 2010 in order to be able to take a tax write-off, and IPG wanted to record a
10 sale on its books for the 2010 calendar year. So, according to the complaint, plaintiff agreed to
11 purchase three lasers that it didn’t actually want, with the understanding that two of those lasers
12 would be returned to IPG unused and unopened, and IPG would then send Acceler-Ray new lasers
13 with pulse shaping sometime around March or April 2011.

14 The lasers were purchased and delivered. Acceler-Ray says that the first one didn’t work
15 properly. As for the two “placeholder” lasers, plaintiff says that they were delivered months after
16 the (allegedly promised) March/April 2011 timeframe. Plus, Acceler-Ray says that the
17 replacement lasers were supposed to be two brand new ones with pulse shaping. Instead, plaintiff
18 says IPG sent old, retrofitted lasers that did not function as specified or promised.

19 In an attempt to resolve the parties’ ongoing issues, plaintiff says that in October 2013 an
20 IPG salesperson offered to provide Acceler-Ray with four new pulse shaping lasers, and Acceler-
21 Ray accepted. However, plaintiff says that IPG subsequently advised in July 2014 that “current
22 management disagree[d]” with that arrangement. (Dkt. 1-1, Complaint ¶ 39).

23 This lawsuit followed. Acceler-Ray filed its complaint in California state court, asserting
24 breach of contract and other contract-based claims. Plaintiff also asserts fraud-based claims,
25 alleging that IPG never actually intended to provide the lasers Acceler-Ray wanted and instead
26 made a “bait-and-switch” by trying to foist old retrofitted, nonworking lasers on plaintiff.

27 _____
28 ² Babcock no longer works for IPG.

1 IPG removed the matter here, invoking diversity jurisdiction, 28 U.S.C. § 1332. It moves
2 to dismiss the complaint, arguing that Acceler-Ray assented to its T&Cs that contain a forum
3 selection clause requiring this suit to be litigated in Massachusetts state court. The pertinent
4 language states:

5 The validity, interpretation and performance of this Agreement shall be
6 governed by the laws of Massachusetts, as if performed wholly within the
7 state and without giving effect to the principles of conflict of laws. The
8 parties specifically disclaim the application of the United Nations
9 Convention on Contracts for the International Sale of Goods [CSIG]. IPG
and Buyer hereby irrevocably and unconditionally submit to the courts of
the Commonwealth of Massachusetts and all courts competent to hear
appeals therefrom.

10 (Dkt. 17-1, Kelly Decl., Ex. A).³ Alternatively, IPG moves for an order transferring this case to
11 Massachusetts pursuant to 28 U.S.C. § 1404(a). Acceler-Ray contends that IPG’s T&Cs were
12 never part of the parties’ deal and that it would be unreasonable, in any event, to require that this
13 litigation proceed in Massachusetts. For the reasons to be discussed, this court grants the motion.

14 DISCUSSION

15 A. Whether IPG’s T&Cs were part of the parties’ contract

16 There is no dispute that forum selection clauses are evaluated under federal law. However,
17 as a threshold matter, Acceler-Ray disputes that IPG’s T&Cs containing the Massachusetts forum
18 selection clause were ever part of the parties’ contract. As to the matter of contract formation,
19 plaintiff argues that state (California) law applies. IPG does not exactly dispute that assertion,
20 although it argues that the cases on which Acceler-Ray chiefly relies are inapposite. In any event,
21 there is no dispute that the essential elements of contract formation are offer, acceptance, and
22 consideration. Here, the parties disagree whether Acceler-Ray accepted IPG’s T&Cs (and, hence
23 the forum selection clause) as part of the laser purchase. Acceler-Ray says it never negotiated the
24 T&Cs, much less accepted them. IPG says that the T&Cs were included in all quotations sent to
25 Acceler-Ray over the course of the parties’ negotiations; and, it contends that Acceler-Ray
26 assented to the T&Cs by issuing purchase orders and paying for the lasers without ever objecting

27 _____
28 ³ Forum selection clauses referring to courts “of” a particular state refer to the state, not federal,
courts located there. Doe 1 v. AOL, LLC, 552 F.3d 1077, 1079 (9th Cir. 2009).

1 to the T&Cs.

2 The record indicates that the parties' reached their laser purchasing agreement through oral
3 discussions and emails, primarily between IPG salesperson Babcock and Acceler-Ray's President,
4 George Ludwig. The key events and documents⁴ are as follows:

5 On November 11, 2010, November 18, 2010, and November 19, 2010, IPG sent Acceler-
6 Ray Formal Quotations---the first was for 2 lasers; the second and third were for one laser of that
7 same model, plus a collimator. All three quotes appended IPG's T&Cs, including the
8 Massachusetts forum selection clause, as well as a number of other sales-related documents (a
9 credit form; a warranty sheet; and licensing agreements). All three quotes provided for a 1-year
10 warranty. (Dkt. 17-1, Declaration of Jillian Kelly (Kelly Decl.) ¶¶ 2-4, Exs. A-C, E; Dkt. 16-2,
11 Declaration of George Ludwig (Ludwig Decl.) ¶ 4, Ex. C).

12 On November 19, 2010, Ludwig emailed Babcock stating that Acceler-Ray "need[s] a
13 coupler, the on board modulation and two years of software upgrades," as well as a 2-year
14 warranty. (Ludwig Decl. ¶ 5, Ex. D). Babcock replied that he was waiting to hear from his boss
15 "on our ability to commit to the up-grad of on-board modulation," as well as the coupler. (Id.).

16 Subsequently, on November 23, 2010, Babcock sent an email to Ludwig re "QCW deal,"
17 stating:

18 Here's the deal, just to make sure there is no confusion.

19 1-You provide a check for a single unit of the YLP-15-1500-QCW-AC and
20 we can ship tomorrow, Wednesday Nov 24.

- 21 a. \$40,000 for the laser
- 22 b. \$1944 less 10% OEM for \$1749.60
- 23 c. \$3861.84 Tax
- 24 d. \$46561.44 Total
- 25 e. Shipping by your UPS-ground account number W56-811
- 26 f. PO Number 3982

27 2-Assuming you are happy with the laser you will provide a second check
28 for 2 more units that we will delivery [sic] in December.

27 ⁴ The court has considered the exhibits submitted by both sides. To the extent plaintiff objects to
28 the exhibits appended to the Declaration of Bill Shiner, those objections are overruled. Any
objections to the parties' or declarants' characterization of the exhibits are deemed moot, as the
court finds it unnecessary to rely on the parties' characterization of those documents.

1 3-We will take the 2 lasers back in January, unopened/unused, and replace
them with 2 units including on-board pulse shaping

2 a. Delivery uncertain, March/April timeframe

3 4-Don't know why your quote doesn't spec 2 year Warranty, I'll get that in
4 writing to you.

5 (Ludwig Decl. ¶ 7, Ex. E).

6 The next day, November 24, 2010, IPG sent Acceler-Ray a "Formal Quotation" for 1
7 YLR-150-1500-QCW-AC laser and 1 collimator. Appended to the quote are the same T&Cs and
8 other sales-related documents that were attached to IPG's prior quotes. This time, however, the
9 quote provided a 2-year warranty. (Kelly Decl. ¶ 2, Ex. D). That same day, Acceler-Ray issued a
10 purchase order for the laser and collimator. IPG issued an invoice (which noted that the
11 sale/delivery of the goods were subject to the T&Cs) and related sales documents, and Acceler-
12 Ray prepaid for the laser by check dated November 23, 2010. (Dkt. 8-5, Declaration of Bill
13 Shiner (Shiner Decl.), ¶ 13, Ex. C).

14 On December 3, 2010, IPG sent an email to Acceler-Ray re "Sales Order
15 Acknowledgement for PO #3982 from IPG Photonics." Appended to the email were a sales order
16 acknowledgement, along with the T&Cs and other warranty and licensing documents that were
17 appended to IPG's prior quotes. The email states: "Please note this order has already shipped;
18 this is not a new order." (Ludwig Decl., ¶ 9, Ex. F).

19 On December 20, 2010, Ludwig emailed Babcock re "Next two lasers," and asked: "Are
20 we still doing the next two lasers? Or is that a dead deal?" (Ludwig Decl., ¶ 10, Ex. G). Babcock
21 replied by email that same day:

22
23 To your point on Friday, yea, holding to [sic] lasers for you went out the
24 window when one of the other guys brought in a PO for a volume on a
totally clean deal. I wasn't consulted, it was just done.

25 I can't you [sic] any kind of escrow, so if you want the laser we have in
26 stock (or 2 if I can get you a second one) we can proceed as previously
27 discussed. We'll deliver the laser this year, you leave it in the box and send
it back for 'upgrade' in the new year, and we'll ship a laser with on-board
pulse shaping as soon as they are available (March/April estimated).

28 (Ludwig Decl. ¶ 10, Ex. G).

1 The next day, December 21, 2010, Acceler-Ray issued two purchase orders for two
2 additional lasers. IPG issued invoices (again noting that sale and delivery were subject to the
3 T&Cs) and related sales documents, with 2-year warranties. The documents indicate that Acceler-
4 Ray prepaid for the two lasers. (Dkt. 8-7, Shiner Decl. ¶ 15, Exs. D & E).

5 IPG argues that the November 24 quotation is the offer for sale, which plaintiff accepted
6 through subsequent purchase orders for the three lasers. (Defendant disputes that the parties'
7 contract could be characterized as an oral one, inasmuch this concerned plaintiff's purchase of
8 goods over \$500.) Because plaintiff never objected to the T&Cs, IPG contends that Acceler-Ray
9 cannot now object to the forum selection clause contained in those T&Cs.

10 Pointing out that the November 24 quote references only the first laser, Acceler-Ray says
11 that this was not an ordinary transaction where one party may be held to have assented to terms if
12 it does not object to them. Rather, plaintiff maintains that the parties' contract was an oral one,
13 manifested solely by Babcock's November 23, 2010 email, which referenced three lasers, but did
14 not mention or append defendant's T&Cs. In Acceler-Ray's view, all of the quotes are extraneous
15 and unrelated to the actual agreement. And, citing *C9 Ventures v. SVC-West, L.P.*, 136 Cal.
16 Rptr.3d 550 (Cal. Ct. App. 2012) and *Chateau des Charmes Wines Ltd. v. Sabate USA, Inc.*, 328
17 F.3d 528 (9th Cir. 2003), Acceler-Ray argues that the T&Cs it received with IPG's December 3
18 confirmation of sale email were additional, after-the-fact terms that cannot be part of the parties'
19 contract. In those cases, the courts concluded that the disputed terms (i.e., an indemnification
20 clause and a forum selection clause) were not part of the parties' contract because the terms were
21 included on invoices presented only after the parties formed an oral agreement. *C9 Ventures*, 136
22 Cal. Rptr.3d at 558; *Chateau des Charmes Wines*, 328 F.3d at 531.

23 The situation here is not as straightforward as *C9 Ventures* or *Chateau des Charmes Wines*.
24 The record shows that IPG provided its T&Cs to plaintiff a number of times during the parties'
25 negotiations, suggesting that those T&Cs were always intended to be part of any deal to which
26 IPG would agree. Although plaintiff protests that those quotes did not concern the lasers it
27 actually wanted, those quotes cannot be divorced from the parties' agreement. Nor can the
28 contract be limited solely to the November 23 email. The course of events demonstrate that the

1 parties struck the deal that they did so that plaintiff could (eventually) get the lasers it wanted and
2 so that plaintiff could take a tax write-off and defendant could record a sale for 2010. IPG’s
3 quotes with the T&Cs, including the forum selection clause, reflect how defendant was willing to
4 implement that agreement. The T&Cs were sent to plaintiff over the course of the parties’
5 negotiations, and Acceler-Ray acquiesced by proceeding with the purchase of lasers it didn’t
6 actually want. Accordingly, the parties entered into a valid contract containing a forum selection
7 clause. See, e.g., *LP Digital Solutions v. Signifi Solutions, Inc.*, 921 F. Supp.2d 997, 1007-08
8 (C.D. Cal. 2013) (concluding that a forum selection clause on defendant’s invoice was part of the
9 parties’ contract, even though plaintiff never signed the invoice, because the invoice was sent to
10 plaintiff prior to the sale, plaintiff had a duty to read the invoice’s terms and conditions, and
11 plaintiff acquiesced to the terms and conditions by proceeding with the transaction).

12 **B. Whether the forum selection clause should be enforced**

13 “Forum selection clauses are prima facie valid, and are enforceable absent a strong
14 showing by the party opposing the clause ‘that enforcement would be unreasonable or unjust, or
15 that the clause [is] invalid for such reasons as fraud or overreaching.’” *Manetti-Farrow, Inc. v.*
16 *Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) (quoting *The Bremen v. Zapata Off- Shore*
17 *Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 1916, 32 L.Ed.2d 513 (1972)). There are three reasons that
18 would make enforcement of a forum selection clause unreasonable: “(1) ‘if the inclusion of the
19 clause in the agreement was the product of fraud or overreaching’; (2) ‘if the party wishing to
20 repudiate the clause would effectively be deprived of his day in court were the clause enforced’;
21 and (3) ‘if enforcement would contravene a strong public policy of the forum in which suit is
22 brought.’” *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (quoting
23 *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1294 (9th Cir. 1998)). The party challenging the
24 clause bears a heavy burden of proof. *Id.* (citing *The Bremen*, 407 U.S. at 15, 92 S. Ct. 1907).

25 **1. Forum Non Conveniens Analysis**

26 “[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign
27 forum is through the doctrine of forum non conveniens.” *Atlantic Marine Construction Co., Inc. v.*
28 *U.S. Dist. Ct. for Western Dist. of Texas*, 134 S. Ct. 568, 580 (2013). If the motion is granted, then

1 the case should be dismissed without prejudice to re-filing it in the relevant forum.

2 Under a traditional forum non conveniens analysis where there is no forum selection
3 clause, courts must evaluate both the convenience of the parties (i.e., private interest factors) as
4 well as various public interest factors. *Id.* at 581. However, where the parties’ contract contains a
5 valid forum selection clause, that “clause [should be] given controlling weight in all but the most
6 exceptional cases.” *Id.* at 581. Thus, the presence of a valid forum selection clause changes the
7 forum non conveniens analysis in three ways: (1) the plaintiff’s choice of forum merits no weight;
8 (2) the court does not consider the parties’ private interests and deems those factors to weigh
9 entirely in favor of the preselected forum; and (3) the agreed-upon forum need not apply the law
10 of the court where the suit was filed. *Id.* at 581-82. “As a consequence, a district court may
11 consider arguments about public-interest factors only.” *Id.* at 582. “Because those factors will
12 rarely defeat a transfer motion, the practical result is that forum-selection clauses should control
13 except in unusual cases.” *Id.*

14 The public interest factors courts consider include “the administrative difficulties flowing
15 from court congestion; the local interest in having localized controversies decided at home; [and]
16 the interest in having the trial of a diversity case in a forum that is at home with the law.” *Id.* at
17 581 n.6; see also *Boston Telecommunications Group, Inc. v. Wood*, 588 F.3d 1201, 1211 (9th Cir.
18 2009) (identifying five public interest factors: “(1) local interest in the lawsuit; (2) the court’s
19 familiarity with the governing law; (3) the burden on local courts and juries; (4) congestion in the
20 court; and (5) the costs of resolving a dispute unrelated to a particular forum.”).

21 Plaintiff has not met its heavy burden to show that this is the exceptional or unusual case
22 where public interest factors defeat a transfer motion. The parties agree that issues of burden and
23 court congestion are neutral. As for the court’s familiarity with the governing law, the clause
24 provides that Massachusetts law governs this dispute. While this court is capable of applying
25 Massachusetts law, it also has no particular familiarity with it. Massachusetts courts are
26 undoubtedly more experienced in applying their own law. There is a local interest here because
27 plaintiff is a California corporation, and litigating in Massachusetts might be more expensive.
28 But, this dispute is not unrelated to a Massachusetts forum where IPG is based. And, as has been

1 observed by other courts in this district, “the financial cost and inconvenience of litigating the case
2 in [another jurisdiction] . . . are the sorts of ‘practical problems’---related to making ‘trial of a case
3 easy, expeditious and inexpensive’---which have been deemed private interest factors that may not
4 be considered under *Atlantic Marine*.” *Adema Techs., Inc. v. Wacker Chemie AG*, No. No. 13-cv-
5 05599-BLF, 2014 WL 3615799, at *5 (N.D. Cal., July 22, 2014) (quoting *Monastiero v. appMobi,*
6 *Inc.*, No. C 13–05711 SI, 2014 WL 1991564, at *5 (N.D. Cal. May 15, 2014)). More to the point,
7 plaintiff has not identified “any special interest that brings this case into the realm of the
8 exceptional or the unusual.” *Id.* Nor is it apparent that these factors are sufficient to outweigh the
9 strong interest in enforcing a forum selection clause in the parties’ contract.

10 **2. Whether enforcement of the forum selection clause would be**
11 **unreasonable**

12 As discussed above, enforcement of a forum selection clause would be unreasonable if
13 *Accler-Ray* demonstrates that (1) the inclusion of the clause in the agreement was the product of
14 fraud or overreaching; (2) plaintiff would effectively be deprived of its day in court were the
15 clause enforced; or (3) enforcement would contravene a strong California public policy. *Murphy,*
16 *362 F.3d at 1140.*

17 *Acceler-Ray* argues that the forum selection clause was the product of fraud because, it
18 contends, the entire contract was procured by fraud. But, it is not enough for plaintiff to allege
19 that it was misled into entering a contract. “For a party to escape a forum selection clause on the
20 grounds of fraud, it must show that the inclusion of that clause in the contract was the product of
21 fraud or coercion.” *Batchelder v. Kawamoto*, 147 F.3d 915, 919 (9th Cir. 1998) (citation omitted).
22 There has been no such showing here.

23 *Acceler-Ray* nevertheless maintains that the forum selection clause should not be enforced
24 because it is “buried” in IPG’s T&Cs and was never actually negotiated. There is no per se rule
25 that non-negotiated forum selection clauses are never enforceable. *Carnival Cruise Lines, Inc. v.*
26 *Shute*, 499 U.S. 585, 593 (1991). Moreover, this was a deal between sophisticated businesspeople,
27 and IPG sent and *Acceler-Ray* received a copy of IPG’s T&Cs during the parties’ negotiations
28 prior to the sale. See, *LP Digital Solutions*, 921 F. Supp.2d at 1007-08 (C.D. Cal. 2013)

1 (“Contrary to plaintiff’s contentions, [defendant] had no duty to notify plaintiff of the terms and
2 conditions attached to the contract, including the forum selection clause. Upon receiving the
3 invoice, plaintiff had a duty to read the terms and conditions contained therein, because once the
4 parties mutually performed according to its terms, the invoice became the parties’ operative
5 contract.”).

6 Plaintiff contends that litigating in Massachusetts will be inconvenient, but has not shown
7 that enforcing the forum selection clause will deprive plaintiff of its day in court. While plaintiff
8 argues that California has a strong interest in protecting consumers, it has not identified “a
9 fundamental public policy underlying California’s consumer laws with respect to venue.” Adema
10 Techs., Inc. 2014 WL 3615799, at *4.

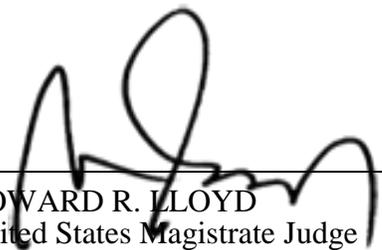
11 Accordingly, the court does not find that this presents an “unusual case” where “public-
12 interest factors overwhelmingly disfavor a transfer.” Atlantic Marine, 134 S. Ct. at 582, 583. Nor
13 does it find a compelling reason why the forum selection clause should not be enforced.

14 **ORDER**

15 Based on the foregoing, defendant’s motion to dismiss is granted and plaintiff’s complaint
16 is dismissed without prejudice.

17 SO ORDERED.

18 Dated: March 31, 2017

19
20
21 
22
23
24
25
26
27
28
HOWARD R. LLOYD
United States Magistrate Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5:16-cv-02352-HRL Notice has been electronically mailed to:

Edward Arthur Kraus ekraus@svlg.com, edn@svlg.com

Jennifer S. Coleman jcoleman@hopkinscarley.com, callen@hopkinscarley.com

John V. Picone , III jpicone@hopkinscarley.com, dhodges@hopkinscarley.com,
jcoleman@hopkinscarley.com

Kathryn E. Barrett keb@svlg.com, amt@svlg.com, caf@svlg.com