

1 **I. Factual Background**

2 Plaintiff alleges that on or about December 2, 2009, Plaintiff
3 and Defendant 916 Electric, Inc. ("916 Electric") entered into a
4 written agreement/credit application (the "Agreement/Credit
5 Application") whereby Plaintiff agreed to provide equipment and
6 materials to 916 Electric for the construction and improvement of
7 cell phone towers and real properties. (Compl. at ¶ 10 (#1-3).)
8 Under the terms of the Agreement/Credit Application, 916 Electric
9 was to pay Plaintiff the rental cost of the equipment and the
10 purchase cost of the materials within ten days of invoicing as well
11 as interest upon past due amounts and attorney's fees in the event
12 of default. (Id. at ¶¶ 12-13.) Defendant John Banse ("Banse")
13 personally guaranteed payment of all goods sold or rented to 916
14 Electric. (Id. at ¶ 21.) Plaintiff alleges that it has performed
15 its obligations under the Agreement/Credit Application fully but 916
16 Electric has failed to make payments in the amount of \$340,649.69
17 plus interest.

18 On or about June 25, 2008, and prior to the execution of the
19 Agreement/Credit Application, Defendant Navigators Insurance Company
20 ("Navigators") provided 916 Electric with Bond No. 04BC001874 in the
21 amount of \$12,500.00 (the "Bond") for the purpose of obtaining a
22 necessary license. (Id. at ¶ 35.) Plaintiff alleges that one of
23 the purposes of the Bond was to provide payment to claims such as
24 Plaintiff who are not paid by 916 Electric for work done under
25 contract with 916 Electric. (Id. at ¶ 36.)

1 Plaintiff alleges that Defendant WPCS International
2 Incorporated ("WPCS") contracted with 916 Electric, Defendant BBS
3 Communications, Inc. ("BBS"), and Defendant Roe Ericsson Entities
4 for work related to the construction and/or improvement of the
5 property at issue, and now owns, operators/and or manages the
6 property which was constructed and/or improved using Plaintiff's
7 equipment and materials. (Id. at ¶ 4.) BBS also owns, operators,
8 and or manages the property which was constructed and/or improved
9 with Plaintiff's equipment and materials. (Id. at ¶ 5.)

10

11

II. Procedural Background

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

On April 5, 2011, Plaintiff filed a complaint (#1-3) in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. On May 6, 2011, Defendant WPCS filed a petition for removal (#1) to this Court on the basis of diversity jurisdiction.

Defendant 916 Electric answered (#12) the complaint (#1-3) on June 10, 2011.

On June 13, 2011, Defendant WPCS filed a Motion to Dismiss for Failure to State a Claim, or in the Alternative, for a More Definite Statement, and Motion to Transfer Venue (#13). Plaintiff responded (#19) on June 29, 2011, and WPCS replied (#31) on November 29, 2011.

On December 7, 2011, the Clerk entered default (#34) as to Defendant BBS.

1 **III. Legal Standard**

2 Title 28 U.S.C. § 1404(a) provides as follows: "For the
3 convenience of parties and witnesses, in the interest of justice, a
4 district court may transfer any civil action to any other district
5 or division where it might have been brought." Under section
6 1404(a), a district court has discretion to decide motions for
7 transfer on an individualized, case-by-case consideration of
8 convenience and fairness. Jones v. GNC Franchising, Inc., 211 F.3d
9 495, 498 (9th Cir. 2000). When a court evaluates a section 1404(a)
10 motion, the "plaintiff's choice of forum is entitled to 'paramount
11 consideration,' and the moving party must show that a balancing of
12 interests weighs heavily in favor of transfer." Galli v.
13 Travelhost, Inc., 603 F. Supp. 1260, 1262 (D. Nev. 1985) (quoting
14 Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981)). The burden
15 therefore falls on the moving party to make the showing that a
16 change of venue is warranted. See Decker Coal Co. v. Commonwealth
17 Edison Co., 805 F.2d 834, 843 (9th Cir. 1986); Galli, 603 F. Supp.
18 at 1262.

19 In assessing whether to grant a motion to transfer, the Court
20 is presented with two questions: whether the action "might have been
21 brought" in the proposed transferee district; and whether the
22 transferee forum is more convenient. See 28 U.S.C. § 1404(a).
23 Here, neither party disputes that this case could have been brought
24 in the Eastern District of California. Determining whether to
25 transfer a civil action to another forum "for the convenience of the
26
27
28

1 parties and witnesses" and "in the interest of justices" requires
2 the Court to consider the following factors:

- 3 (1) the location where the relevant agreements were
4 negotiated and executed,
- 5 (2) the state that is most familiar with the governing
6 law,
- 7 (3) the plaintiff's choice of forum,
- 8 (4) the respective parties' contacts with the forum,
- 9 (5) the contacts relating to the plaintiff's cause of
10 action in the chosen forum,
- 11 (6) the differences in the costs of litigation in the two
12 forums,
- 13 (7) the availability of compulsory process to compel
14 attendance of unwilling non-party witnesses, and
- 15 (8) the ease of access to sources of proof.

16 Id. at 498-99. The Court now turns to these factors to analyze the
17 issue of convenience.

18 **IV. Discussion**

19 Here, neither party disputes that this case could have been
20 brought in the Eastern District of California. The Court therefore
21 now turns to the Jones factors to analyze the issue of convenience.

22 **A. Location Where the Agreement was Negotiated and Executed**

23 Defendants aver that the Agreement/Credit Application was
24 negotiated and formed in Northern California. (Evans Decl. (#14) at
25 ¶ 8.) It appears that Plaintiff does not dispute that the
26 Agreement/Credit Application was executed by signatory Defendant
27 Banse on behalf of Defendant 916 Electric in Northern California;
28 however, Plaintiff qualifies that the Agreement/Credit Application

1 was faxed to Plaintiff's Las Vegas headquarters and approved there
2 because store branches do not have authority to enter into such
3 agreements. (Garcia Decl. (#19-A) at ¶¶ 7-9.) However, Plaintiff
4 does not dispute that Jeff McGregor, the salesman most responsible
5 for 916 Electric's account with Plaintiff (Id. at ¶ 10), was based
6 out of Plaintiff's Sacramento branch office and resides in Northern
7 California. It therefore appears to the Court that the
8 Agreement/Credit Application was negotiated and executed in the
9 Eastern District of California, albeit conditioned on the approval
10 of employees located at Plaintiff's Las Vegas headquarters. This
11 factor therefore falls in favor of transfer to the Eastern District
12 of California.

13 **B. State Most Familiar With the Governing Law**

14 Section 3(e) of the Agreement/Credit Application provides that
15 it "will be governed by the laws of the state in which the equipment
16 is rented or the State of Nevada, whichever Ahern prefers." (Credit
17 Application/Customer Agreement (#19-A1) at 2.) It appears from the
18 filings that Ahern has elected to proceed pursuant to the laws of
19 the State of Nevada, therefore the District of Nevada is the forum
20 most familiar with the governing law.

21 Defendant counters that both California and Nevada acknowledge
22 apply the Restatement (Second) Conflict of Laws, which in relevant
23 part provides that a choice of law provision need not be complied
24 with if the following conditions are met:

25 application of the law of the chosen state would be
26 contrary to a fundamental policy of a state which has a
27 materially greater interest than the chosen state in the
28 determination of the particular issue and which . . . would

1 be the state of the applicable law in the absence of an
2 effective choice of law by the parties.
3 Restatement (Second) Conflict of Laws, § 187(2)(b) (1971). Even
4 if California has a materially greater interest than Nevada in
5 the determination of the issue, Defendant WPCS has not shown
6 that a fundamental policy of the state of California would be
7 foiled by the application of Nevada law. The Court will
8 therefore assume, without deciding, that Section 187 therefore
9 does not apply and the choice of law provision found in the
10 Agreement/Credit Application should be honored. For the
11 foregoing reasons, this factors falls favor of maintaining the
12 action in the District of Nevada.

13 **C. Plaintiff's Choice of Forum**

14 Plaintiff has chosen to litigate the issue in the state of
15 Nevada. This factor therefore falls in favor of maintaining the
16 action in the District of Nevada.

17 **D. The Parties' Contacts With the Forum**

18 Defendant contends that its only contacts with the state of
19 Nevada are comprised of the following: (1) Plaintiff Ahern's
20 headquarters are located in Las Vegas, and (2) approximately 2%
21 of the 345 cell sites improved with equipment rented from
22 Plaintiff were located in Northern Nevada, with the remaining
23 98% located in California. (Krouse Decl. (#15) at ¶ 2.) With
24 the exception of Defendant Navigators Insurance, a New York
25 corporation, all the other Defendants are California citizens.
26 (Evans Decl. (#14) at ¶ 2,4-7.) Additionally, Plaintiff Ahern
27 operates seventy-four branch locations in twenty-two states,

1 seventeen of which are located in California and ten in Nevada.
2 (Id. at ¶ 3.) Defendant avers that all rental contracts
3 subsequent to the Agreement/Credit Application were executed in
4 California and nearly all the equipment rented from Plaintiff
5 came from its California branches. Defendant further points out
6 that while Plaintiff claims it is owed \$340,649.69 in unpaid
7 sums, only \$22,215.16 is for equipment rented out of Plaintiff's
8 Nevada locations. (Garcia Decl. (#19-A) at ¶ 21.)

9 Plaintiff, a Nevada corporation, argues that employees in
10 Las Vegas had to approve every request for credit before
11 allowing 916 Electric to rent the equipment, and Las Vegas
12 employees had to contact branches in Nevada and California to
13 ensure the right equipment was available for pick up. Further,
14 Defendants WPCS and 916 Electric are licensed to do business in
15 Nevada.

16 Given these facts, this factor falls in favor of transfer:
17 Plaintiff has extensive contacts with California, including
18 maintaining the branch office involved in the transaction
19 underlying this suit, while the Defendants' contacts with Nevada
20 appear to be limited to dealings with Plaintiff.

21 **E. Contacts Relating to the Plaintiff's Cause of Action**
22 **in the Chosen Forum**

23 Plaintiff's causes of action, for the most part, arise from
24 its dealings with Defendants in California. Plaintiff's first
25 cause of action against Defendant 916 Electric relates to the
26 Agreement/Credit Application that was negotiated and executed in
27 the Eastern District of California, as determined above.

1 Plaintiff's second cause of action arises against Defendant
2 Banse as a personal guarantor of the Agreement/Credit
3 Application he executed on behalf of 916 Electric. Plaintiff's
4 third cause of action for unjust enrichment and fourth cause of
5 action for "monies due and owing" arise out of the
6 Agreement/Credit Application whereby Plaintiff rented out its
7 equipment for the improvement of cell phone tower sites, 98% of
8 which are located in California. Plaintiff's fifth cause of
9 action against Defendant Navigators Insurance also arises out of
10 Plaintiff's dealings with Defendant 916 Electric relating to the
11 Agreement/Credit Application. Plaintiff's entire case arises
12 out of its dealings with citizens of California, the
13 Agreement/Credit Application that was negotiated and executed
14 there, and the improvement of cell sites in California. As
15 such, this factor falls squarely in favor of transfer to the
16 Eastern District of California.

17 **F. Cost of Litigation in the Two Forums**

18 Defendants submit that litigation will be more costly in
19 Nevada given that all of their witnesses and evidence are
20 located in California. All of the Defendants, with the
21 exception of Navigators insurance, hail from California.
22 Plaintiff Ahern, which is located in twenty-two states with
23 seventeen California branch offices, does not argue that
24 litigation would be less costly in Nevada. The Court therefore
25 finds that this factor falls in favor of transfer.

26

27

28

1 **G. Availability of Compulsory Process to Compel**
2 **Attendance of Unwilling Non-Party Witnesses**

3 Federal Rule of Civil Procedure 45 provides that civil
4 subpoenas may be served at any place: (1) within the district of
5 the issuing court, (2) within 100 miles of the court where the
6 case is to be tried; or (3) within the state if a state statute
7 or rule of court permits service of a subpoena issued by a state
8 court of general jurisdiction sitting in the place of the trial.
9 FED. R. CIV. P. 45(b) (2). The California Code of Civil Procedure
10 authorizes state wide service. Cal. Code Civ. P. § 1989; see
11 also Cambridge Filter Corp. v. Internat'l Filter Co., Inc., 548
12 F. Supp. 1308, 1331 (D. Nev. 1982). Attendance of witnesses
13 from throughout California could therefore be compelled via
14 subpoenas issued by the proposed transferee court.

15 Defendant has noted that all of its witnesses reside in
16 California, which follows from the fact that the incidents
17 forming the basis of this suit occurred in California. A number
18 of these witnesses are no longer employed by Defendants and
19 therefore may only be subpoenaed by a California court.¹ This
20 Court is without the power to subpoena witnesses residing in the
21 Sacramento area, as they do not reside within 100 miles of this
22 Court. Plaintiff has alleged no such witnesses who are no
23 longer employees. This factor therefore falls in Defendant's
24 favor.

25
26 ¹ The Court notes that, contrary to Defendant WPCS's assertion,
27 Defendant Banse has been served with process as of September 22, 2011.
28 (Proof of Service John Banse (#27).)

1 Further, the Court finds it necessary to address the
2 overall convenience of the witnesses at this juncture. See
3 Cambridge Filter, 548 F. Supp. at 1311 ("A primary concern is
4 the convenience of the witnesses."). Plaintiff lists a number
5 of its Reno and Las Vegas employees that were involved with
6 approving rental agreements submitted from the branch offices
7 and/or contacting branch offices to ensure that the rental
8 equipment would be available to Defendants for pick-up.
9 However, Plaintiff does not purport to call all of these
10 employees as witnesses. Further, the Reno employees, should
11 they be called as witnesses, would be more inconvenienced by
12 travel to Las Vegas than by travel to Sacramento, which is much
13 closer geographically. Moreover, the facts indicate that
14 Plaintiff may wish to call as witnesses some of its California
15 branch office employees. As noted previously, all the
16 Defendants, with the exception of New York resident Navigators
17 Insurance, and all their witnesses reside in Northern
18 California. Further, because the incidents underlying this suit
19 occurred for the most part in the Northern California, the Court
20 finds that it would be more convenient for the witnesses to this
21 suit to transfer the case to the Eastern District of California.

22 8. Ease of Access to Sources of Proof

23 With regard to ease of access to sources of proof, the
24 location of the witnesses is an important factor and falls in
25 favor of transfer, as outlined above. Defendant further argues
26 the besides the fact that Plaintiff's billing is located in its
27

1 Las Vegas headquarters, all remaining proof is located in
2 California. Plaintiff counters that "[t]his case is primarily
3 an accounting case," and therefore the information regarding
4 Defendants' failure to pay is located primarily at Plaintiff's
5 headquarters in Las Vegas. The Court finds that this factor
6 favors Defendants, as ease of access to witnesses would be
7 promoted by transfer. Further, a change of venue would not
8 change Plaintiff's access to its own documentary evidence.

9 It is true that a plaintiff's choice of forum should not be
10 lightly disturbed. However, the Court finds that most of the
11 Jones factors favor transfer and that it would be more
12 convenient for the parties and witnesses to litigate this case
13 in the Eastern District of California, where most of the parties
14 and witnesses reside, and where the facts underlying this suit
15 occurred. The Court finds it compelling that it would be unable
16 to subpoena a number of important non-party witnesses should
17 they refuse to testify, witnesses that would be subject to the
18 subpoena power of the transferor court. To deny Defendants
19 access to these witnesses would not be in the interests of
20 justice. The fact that Plaintiff's headquarters are located in
21 Las Vegas and Plaintiff's choice of law provision provides for
22 Nevada law is not enough to override the fact that the
23 transferee forum would be vastly more convenient for the reasons
24 listed above, especially given Plaintiff's extensive contacts
25 with the forum, out of which this suit arises.

26

27

28

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

V. Conclusion

Defendants have satisfied their high burden of showing that this case should be transferred to the Eastern District of California out of convenience to the parties and witnesses and in the interests of justice pursuant to 28 U.S.C. § 1404(a).

IT IS, THEREFORE, HEREBY ORDERED that Defendant WPCS's Motion to Transfer Venue for Convenience (#13) is **GRANTED**. This case is hereby transferred to the Eastern District of California.

IT IS FURTHER ORDERED that Defendant WPCS's Motion to Dismiss, or in the Alternative, for a More Definite Statement (#13) is **DENIED** without prejudice as moot. Defendant WPCS may renew its motion in the transferee court.

DATED: February 22, 2012.


UNITED STATES DISTRICT JUDGE