EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Unique Product Solutions, Ltd.,	)	CASE NO.: 5:10CV1471
	)	
	)	
Plaintiff-Relator,	)	JUDGE JOHN ADAMS
	)	
v.	)	**ORDER**
	)	
Otis Products, Inc.,	)	(Resolves Doc. 5)
	)	
Defendant.	)	

This matter appears before the Court on Defendant Otis Products' ("Otis") motion to change venue. Plaintiff Unique Product Solutions ("UPS") has opposed the motion. For the reasons that follow, the motion is GRANTED.

I. Facts

Plaintiff-Relator UPS brought this *qui tam* action on behalf of the United States on July 1, 2010. In its complaint, UPS contends that Otis has been falsely marking its products with an expired patent and at least one product with an inapplicable patent. In response to the complaint, Otis moved to dismiss the matter in its entirety. UPS then amended the complaint, and this Court denied the motion to dismiss as moot. While its motion to dismiss remained pending, Otis also sought to transfer this matter to the Northern District of New York. In its motion, Otis asserts that all relevant discovery will take place at or near its headquarters in Lyons Falls, New York. UPS has responded in opposition to the motion. The Court now resolves the matter.

II. Legal Standard

"For 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). "As the permissive language of the transfer statute suggests, district courts have 'broad discretion' to determine when party 'convenience' or 'the interest of justice' make a transfer appropriate." *Reese v. CNH America LLC*, 574 F.3d 315, 320 (6th Cir. 2009) (quoting *Phelps v. McClellan*, 30 F.3d 658, 663 (6th Cir. 1994)). In ruling on this motion, the Court must consider six factors: "the convenience of the parties and witnesses," the accessibility of evidence, "the availability of process" to make reluctant witnesses testify, "the costs of obtaining willing witnesses," "the practical problems of trying the case most expeditiously and inexpensively" and "the interests of justice." *Reese*, 574 F.3d at 320 (citations omitted).

A colleague on this Court has explained the analysis as follows:

> District courts vary in their enumeration of the specific factors to consider when ruling on a motion to transfer pursuant to § 1404(a), but such factors can include: (1) the plaintiff's choice of forum, (2) the residence of the parties, (3) the nature of the suit, (4) the place where events took place, (5) the possibility of inspecting the premises, (6) the ease of access to sources of proof, (7) the location of material witnesses, (8) the availability of compulsory processes for the attendance of those witnesses, (9) other problems that may contribute to litigation expenses, (10) the local interest in deciding the controversy locally, (11) the burden of jury duty on the community, and (12) the congestion of court dockets. From this variation, it is clear that there is no definitive list of private and public factors in the 1404(a) calculus. Courts need not discuss every factor that may influence the balance of conveniences and the interest of justice, but rather should focus their analysis on those factors that are particularly relevant to a given transfer determination.

Schindewolf v. Seymour Constr., Inc., 2010 WL 2290803, at *7 (N.D.Ohio June 3, 2010) (citations, quotations, and alterations omitted).

III. Analysis

The parties have divergent views on the weight that should be given to each factor and the applicable facts that the Court should consider with regard to each factor. Initially, the parties disagree over the weight that is due to UPS' choice of forum. Accordingly, the Court first resolves that issue.

1. Plaintiff's Choice of Forum

UPS relies upon *Hollander v. Etymotic Research, Inc.*, 2010 WL 2813015, at *7 (E.D.Pa. July 14, 2010), for the proposition that a plaintiff's choice of forum should remain a paramount consideration even in a *qui tam* action. In contrast, Otis asserts that courts have routinely given less deference to a plaintiff's choice of forum in *qui tam* actions. See Doc. 5-1 at 14 (citing numerous cases). In this regard, the Court finds itself most in agreement with the opinion expressed in *FLFMC, LLC v. Ohio Art Co.*, 2010 WL 3155160, at *2 (W.D.Pa. July 30, 2010). In resolving this issue, that court held as follows:

> As Defendant thoroughly discusses, under the circumstances of this case, the factor most likely to favor [relator] is its decision to file this action in its home district. In general, a plaintiff's choice of forum is given significant weight as reflecting either a home forum or dispute-resolution preference. It is, however, given less weight when fewer of the operative facts took place in that forum, and the defendant indicates a strong preference for another district. Secondly, in a *qui tam* action the real party in interest is the United States and, accordingly, the relator's choice of venue is not entitled to the same level of deference. And thirdly, in this case, Plaintiff was apparently recently created in Pennsylvania by Pennsylvania lawyers to bring cases for alleged violations of the [false marking statute]. It appears to exist for no other purpose and to conduct no other business in Pennsylvania. The law is clear that the location or convenience of litigation counsel does not merit consideration in a discretionary transfer evaluation. To give significant, as opposed to lesser, weight to Plaintiff's choice of forum in these circumstances would effectively permit circumvention of these parameters through the creation of a shell-corporation plaintiff.

Id. (citations and footnotes omitted). Similar to the relator in *FLFMC*, UPS is comprised largely of Ohio lawyers and exists to file lawsuits enforcing the false marking statute. While the entity president is a non-lawyer, it is clear to the Court that this individual's role is to purchase products to support litigation. Accordingly, the Court agrees that little weight should be afforded to UPS' choice of forum.

2. Place Where the Events Took Place and Location of Evidence and Witnesses

Despite any contentions to the contrary, it is clear that any false marking that occurred in this matter took place in New York. While products may have ultimately been purchased across the country, the products at issue have never been manufactured in Ohio. Otis' product packaging is wholly contained in the state of New York and ninety-five percent of its manufacturing occurs in the state of New York. The primary witnesses with direct knowledge of packaging, marking, and manufacturing are all employed by Otis and reside in New York. Further, the company that provided the design for Otis' packaging is also located in New York state. UPS attempts to avoid this reality by asserting that its president, James Conrad, will testify. Further, UPS alleges that it will call the employee of a sporting goods store to testify about the products that were for sale. Finally, UPS alleges that it will call three expert witnesses, all of which reside in Ohio. The Court finds no merit in UPS' argument.

First, it is somewhat unclear what relevant evidence UPS' fact witnesses could offer. There appears to be no dispute that these products were sold nationwide and were marked with expired patents. For that matter, Otis voluntarily stopped marking the products before this suit was filed after being informed of the expired patent issue.

Accordingly, the Court finds it unlikely that Conrad or the sporting goods store employee could offer evidence materially relevant to the false marking claim.

Additionally, the Court affords little weight to UPS' decision to seek out experts within Ohio. From the manner in which the current motion has been briefed, it is apparent that UPS has chosen a litigation strategy in an attempt to avoid transfer. There is nothing to suggest that UPS could not find similar experts in New York, nor is there anything to suggest that UPS will incur significantly more expense to transport its experts to New York.[1]

The Court also rejects UPS' claim that it is a new, unfunded company that will incur significant expense if this matter is transferred. The court in *FLFMC* rejected a similar argument, concluding: "Plaintiff cannot newly incorporate for the sole purpose of pursuing FMS litigation and plead a poverty-basis for forum preference under the 'convenience of the parties' factor." *FLFMC*, supra, at *2, n. 10. This Court agrees. UPS chose to incorporate to pursue these claims and is comprised of highly knowledgeable attorneys. Those same attorneys may not plead poverty to avoid transfer.

Accordingly, the convenience of the parties and the witnesses strongly favors transferring this matter to the Northern District of New York.

3. Local Interests

UPS contends that Ohio has a local interest in the matter because Conrad purchased the products at issue within this district. However, whatever harm exists from this false marking is shared by the entire country as UPS has demonstrated the

[1] Similar to the fact witnesses above, the Court is strained to believe that three experts are necessary or proper in a simple false marking case.

nationwide distribution of Otis' products. Accordingly, there are no compelling local interests in resolving this matter in Ohio.

4. Interests of Justice

The Court also concludes that the interests of justice strongly support transferring this matter to New York. UPS is correct that this Court has personal jurisdiction over Otis and therefore its original choice of venue was proper. Otis sells products in Ohio and derives revenue from this state. However, for this Court to conclude that venue is more appropriate in Ohio, the Court would have to simply accept UPS' choice of forum and ignore all other factors. The Court declines to do so.

5. Summary

In summary, it is clear that UPS anticipated that a motion to transfer these types of cases would be filed. As a result, UPS created a litigation strategy to bolster its argument that the matter should remain in Ohio. However, its primary arguments revolve around expert witnesses, largely irrelevant fact witnesses, and its own choice of forum. As UPS was created for the express purpose of pursuing litigation and is largely comprised of local attorneys, the weight given to its litigation strategy is minimal. This Court will not permit the system to be gamed. UPS was well within its legal rights to file this matter in the Northern District of Ohio. However, the Court finds no merit in its opposition to the current motion.

IV. Conclusion

While the Court has not opined on every factor sometimes listed by courts as relevant to a motion to transfer, the Court has considered the entirety of every argument offered by the parties. Weighing all of the factors, the relevant factors weigh strongly in

favor of transfer. Accordingly, Otis' motion to transfer is GRANTED. This matter is hereby transferred to the Northern District of New York.

IT IS SO ORDERED.

September 22, 2010

/s/ Judge John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT COURT