

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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ANTHONY CHIARENZA, individually and on  
behalf of all others similarly situated,

Plaintiffs,

- against -

IBSG INTERNATIONAL, INC., MICHAEL  
RIVERS, GEOFFREY BIRCH and JEWETT,  
SCHWARTZ, WOLFE & ASSOCIATES,

Defendants.

**MEMORANDUM & ORDER**  
**09-CV-408 (RRM) (MDG)**

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**MAUSKOPF, United States District Judge.**

Plaintiffs Anthony Chiarenza, Jeffrey Bonvallat, and Pierce Lord (“Plaintiffs”) bring this securities class action complaint alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5, on behalf of themselves and all persons who purchased common stock of IBSG International, Inc. (“IBSG”) during the period from April 1, 2008 through and including January 12, 2009, against defendants IBSG, IBSG’s former Chief Executive Officer, Michael Rivers, IBSG’s former Chief Financial Officer, Geoffrey Birch, and IBSG’s former accountants, Jewett, Schwartz, Wolfe & Associates (“JSWA”) (collectively, “Defendants”). On July 8, 2009, this Court appointed plaintiffs Chiarenza, Bonvallat, and Lord as Lead Plaintiffs, and Levi & Korsinsky, LLP as Lead Counsel for the putative class. Presently before this Court are motions by Defendants Birch and JSWA<sup>1</sup> seeking to dismiss the Complaint for *forum non conveniens*, or, in the alternative, transfer this action to the United States District Court for the Southern District of Florida, pursuant to 28 U.S.C. § 1404(a), as well as Plaintiffs’ response and

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<sup>1</sup> Defendant Rivers has not yet appeared, and has not been served as he is reportedly outside of the country. (See Pls.’ Resp. (Doc. No. 23-4) at 1.) Defendant IBSG also has not appeared, and apparently has dissolved or is in the process of dissolving. (Id. at 2.)

a reply by Defendant JSWA. Having considered the papers, the convenience of the parties and witnesses, and the interest of justice, it is ORDERED that this action be transferred to the Southern District of Florida.

### **BACKGROUND**

Plaintiffs filed this putative securities class action on January 30, 2009, alleging material misstatements by Defendants in violation of Section 10(b) of the Exchange Act and Rule 10b-5, and in violation of Section 20(a) of the Exchange Act against the individual Defendants Rivers and Birch as control persons of IBSG. Defendant IBSG is a Florida corporation with its principal executive offices located at 1132 Celebration Boulevard, Celebration, Florida. IBSG is a holding company for four software subsidiaries, which provide various software solutions and services for businesses. Defendants Rivers, IBSG's CEO, and Birch, IBSG's Treasurer and CFO, are Florida residents. Defendant JSWA is a full-service accounting and tax advisory firm with a principal place of business located at 200 South Park Road, Suite 150, Hollywood, Florida. JSWA was hired to audit IBSG's annual financial statements for the fiscal year 2007. Lead Plaintiff Chiarenza resides in Queens, New York, Lead Plaintiff Lord resides in Manhattan, New York, and Lead Plaintiff Bonvallat resides in Massachusetts. Class Counsel Levi & Korsinsky LLP is located in Manhattan, New York.

Plaintiffs allege that Defendants issued false and misleading financial statements throughout the proposed class period of April 1, 2008 through January 12, 2009, mainly by materially misstating IBSG's revenues and cash on hand. Additionally, IBSG's CEO, Rivers, was relieved by the Board of Directors of his position as CEO on January 6, 2009, and IBSG's CFO, Birch, resigned on December 23, 2008. On January 12, 2009, IBSG filed a Form 8-K announcing that there were "possible issues underlying the recording of the proceeds from business transactions as revenue," and that the "Company's previously issued financial

statements during the 2008 fiscal year should not be relied upon at this time.” (Compl. ¶ 31.) Furthermore, Plaintiffs allege that during the Class Period, IBSG’s stock traded as high as \$1.54 per share, but that after the January 12 disclosures, the stock price fell to \$0.27 per share on January 12, \$0.14 on January 13, and \$0.07 on January 26, following high trading volumes. (*Id.* ¶ 35.) IBSG filed another Form 8-K on January 27, 2009, confirming that its 2008 financial statements should not be relied upon and were inaccurate, that there were material discrepancies in reported cash on hand and other assets, and that it would need to restate its 2008, and possibly prior year, financials. (*Id.* ¶ 36.)

Since the filing of this lawsuit, Plaintiffs allege that Defendant IBSG has dissolved, or is in the process of dissolving. They also allege that Defendant Rivers has fled the country and cannot be located, although there have apparently been communications with an attorney representing him. (Pls.’ Resp. at 1.) Defendant Birch and Defendant JSWA have appeared, but have each filed motions to either dismiss this case for *forum non conveniens* or to transfer the case to the Southern District of Florida, which they claim would be a more convenient forum for Defendants and other likely witnesses (although neither Defendant specifically identifies any non-party witnesses residing in Florida, or elsewhere), because the events underlying Plaintiffs’ claims occurred in Florida, and because the documents and other physical evidence in the possession of IBSG are in Florida.

Plaintiffs respond that the balance of conveniences is at worst a toss-up, as the Eastern District of New York is more convenient for Plaintiffs, and the inconvenience to Defendants (the only identified witnesses) is thus balanced out, and that any documents or other evidence can easily be transported to New York; accordingly, they argue that this Court should ordinarily retain this action on its docket. Plaintiffs, however, also note that they have reached an

agreement with Defendant Birch to compensate them for certain expenses that they will incur if this action is transferred, and to make certain other concessions.<sup>2</sup> Notably, Defendant JSWA does not join in this agreement, and it is unclear at this time whether Defendant Birch can unilaterally concede to all of his stipulations. In any case, as stated below, it is unnecessary for this Court to pass on the validity of the agreement between Defendant Birch and Plaintiffs, as the instant motions can be disposed of without reliance on the stipulation.

### DISCUSSION

The Defendants move for dismissal on the basis of *forum non conveniens*, or, in the alternative, for transfer to the Southern District of Florida under 28 U.S.C. § 1404(a). Federal courts “have generally held that the doctrine of *forum non conveniens* is inapplicable, and dismissal inappropriate, in cases in which transfer to another federal forum is possible.” *Nun v. Telectronics Pacing Sys., Inc.*, No. 93 Civ. 5434 (KMW), 1994 U.S. Dist. LEXIS 9373, at \*7 (S.D.N.Y. July 7, 1994); *see also Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 n.4 (2d Cir. 2001) (*en banc*) (noting that it will often be preferable to transfer venue under § 1404(a) rather than dismissing a case for *forum non conveniens*). Here, it is conceded that this case could have been brought in the Southern District of Florida,<sup>3</sup> and, accordingly, this Court will analyze the

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<sup>2</sup> Specifically, the agreement states that: “Defendant Birch agrees to depose Lead Plaintiffs in their home States of New York and/or Massachusetts; 2. Defendant Birch agrees to waive the Private Securities Litigation Reform Act of 1995’s discovery stay, and shall promptly provide discovery to Lead Plaintiffs; 3. Defendant Birch agrees to not object to any request of Lead Plaintiffs to appear telephonically at any hearing or proceeding, or telephonic attendances permitted by the U.S. District Court in Florida. If the U.S. District Court in Florida will not allow such telephonic attendance, Birch agrees to reimburse Lead Plaintiffs’ reasonable coach airfare and hotel (at no greater than a three (3) star hotel for all Court required attendance and mandatory appearances for hearings and trial); 4. Birch shall promptly notify Lead Plaintiffs’ counsel of any information which Birch or his agents may possess or which comes into Birch or his agents’ possession regarding the whereabouts of defendant Michael Rivers and regarding insurance coverage which may be applied to Lead Plaintiffs’ claims.” (*See* Jt. Stip. (Doc. No. 19) at 4–5.)

<sup>3</sup> Plaintiffs bring their claims under the Exchange Act, which provides for venue in any district “wherein the defendant is found or is an inhabitant or transacts business.” 15 U.S.C. § 78aa. Defendant JSWA is located in the Hollywood, Florida, within the Southern District. It is unclear which district Defendant Birch, a Florida resident, resides in, but he agrees that this case could have been brought in the Southern District. Where it is undisputed that a securities action sought to be transferred could have been filed in the proposed transferee district, the transferor

pending motions pursuant to the dictates of § 1404(a), rather than under the doctrine of *forum non conveniens*.

**I. This Action Should Be Transferred to the Southern District of Florida**

**A. Legal Standard**

Section 1404(a) states 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 . . . where it might have been brought.” “[T]he purpose of [28 U.S.C. § 1404(a)] is to prevent the waste ‘of time, energy and money’ and ‘to protect litigants, witnesses and the public against unnecessary inconvenience and expense.’” *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (quoting *Continental Grain Co. v. Barge F.B.L.-585*, 364 U.S. 19, 21 (1960)). In deciding a motion to transfer, a district court must determine whether the proposed transfer meets the two-part test set out by the case law, *i.e.*, “‘first, whether the action to be transferred might have been brought in the transferee court; and second, whether considering the conveniences of parties and witnesses, and the interest of justice, a transfer is appropriate.’” *Truk Int’l Fund, LP v. Wehlmann*, No. 08 Civ. 8462 (PGG), 2009 U.S. Dist. LEXIS 47772, at \*5 (S.D.N.Y. May 20, 2009) (quoting *Fuji Photo Film Co., Ltd. v. Lexar Media, Inc.*, 415 F. Supp. 2d 370, 373 (S.D.N.Y. 2006)).

Once a district court has found that, as here, an action to be transferred could have been first brought in the transferee court, it must then determine whether a transfer is appropriate in light of the following factors:

- (1) the convenience of the witnesses,
- (2) the convenience of the parties,
- (3) the location of relevant documents and the relative ease of access to sources of proof,
- (4) the locus of operative facts,
- (5) the availability of process to compel the

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court need not further examine the issue. *See, e.g., In re Global Cash Access Holdings, Inc. Secs. Litig.*, No. 08 Civ. 3516, 2008 U.S. Dist. LEXIS 70367, at \* 11 (S.D.N.Y. Sept. 18, 2008); *Citibank, N.A. v. Affinity Proc. Corp.*, 248 F. Supp. 2d 172, 176 (E.D.N.Y. 2003). Further, it is apparent that at least some of the events giving rise to Plaintiffs’ claim occurred in the Southern District of Florida. Accordingly, this action could have been brought in the transferee district.

attendance of unwilling witnesses, (6) the relative means of the parties, (7) the forum's familiarity with the governing law, (8) the weight accorded to plaintiff's choice of forum, and (9) trial efficiency.

*Id.* at \*5–6. The party seeking transfer has the burden of making a “clear-cut” showing that transfer is warranted. *See O’Hopp v. ContiFinancial Corp.*, 88 F. Supp. 2d 31, 34 (E.D.N.Y. 2000). The decision whether to transfer an action, however, “lie[s] within the broad discretion of the district court and [is] determined upon notions of convenience and fairness on a case-by-case basis.” *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 117 (2d Cir. 1992).

**B. Transfer of This Action Is Appropriate**

Following consideration of the relevant factors, the Court has determined that transfer is appropriate. First, consideration of convenience to witnesses, the location of relevant documents and the relative ease of access to sources of proof, and the “locus of the operative facts” favors transfer to the Southern District of Florida. Second, the remaining factors are either neutral, or are outweighed by the factors favoring transfer. Finally, given the unique circumstances here, where Plaintiffs have agreed to the transfer sought by Defendants, transfer is especially warranted.<sup>4</sup>

1. Three Factors Favor Transfer to the Southern District of Florida

Defendants, including CEO Rivers and CFO Birch, are all Florida residents. While Defendants have not specifically identified any witnesses who will likely testify, it is clear from the pleadings that, at least, the testimony of Rivers and Birch will be central to Plaintiffs' case, and also that it will be more convenient for them to provide such testimony in Florida.

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<sup>4</sup> Notably, while Plaintiffs discuss the stipulation they signed with Defendant Birch as to certain concessions with respect to their expenses and other issues, they also state that “Plaintiffs are also willing to rely on their independent agreement with Birch, and Plaintiffs are willing to consent to an unconditional transfer.” (Pls.’ Resp. at 10.) Because this Court has determined that a transfer under § 1404(a) is appropriate even without considering the agreement between Birch and Plaintiffs, that agreement is not material to this decision to transfer, and has not been incorporated into the decision and order as a condition to the transfer.

Furthermore, JSWA, which also has not identified any specific witnesses who will testify, is located in Florida, and the testimony of one of its employees or some other designee is also highly likely to be relevant. Finally, any non-party witness employees of either JSWA or IBSG are more likely to be found in or near the Southern District of Florida than in the Eastern District of New York. Moreover, while Plaintiff Chiarenza resides in the Eastern District of New York, Plaintiff Lord is in the Southern District of New York and Plaintiff Bonvallat is in Massachusetts; in any case, the importance of Plaintiffs' testimony is less than that of the Defendants and other related Florida-based witnesses because, in determining whether the convenience of witnesses militates in favor of transfer, "it is the nature of the testimony and not the number of prospective witnesses on each side that is important." *See In re Nematron Corp. Secs. Litig.*, 30 F. Supp. 2d 397, 402 (S.D.N.Y. 1998). Here, Plaintiffs' claims turn on the acts and intent of Defendants and employees or affiliates of Defendants. Accordingly, the convenience of the witnesses tilts in favor of transfer.

In addition to the location of material witnesses in Florida, the documents, financial information, and other evidence likely to be relevant to Plaintiffs' case are also located in Florida, either in the Middle District, where IBSG is headquartered,<sup>5</sup> or in the Southern District, at the offices of JSWA. Plaintiffs do not contend otherwise, nor do they identify any evidence that is located in the Eastern District of New York, or even in the State of New York. Accordingly, this factor also favors transfer.

Finally, the locus of operative facts is also in Florida. Plaintiffs' theory is that Defendants Birch and Rivers were "undoubtedly aware of or recklessly disregarded" revenue recognition

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<sup>5</sup> Defendant Birch argues in his memorandum of law that a bank regularly utilized by IBSG, Federal Trust Bank, is located in the Middle District of Florida. (Def. Birch's Mem. L. Supp. (Doc. No. 23-3) at 2.) This allegation, however, is not supported by affidavit or otherwise.

problems with IBSG's financial statements, and that Defendant JSWA failed to correct these errors. (Compl. (Doc. No. 1) ¶¶ 37–41.) The financial statements were issued from and approved in Florida, and accordingly the locus of operative facts is in Florida, not New York.<sup>6</sup> *See, e.g., Elec. Workers Pension Fund, Local 103 v. Nuvelo, Inc.*, No. 07 Civ. 975 (HB), 2007 U.S. Dist. LEXIS 52246, at \*15–16 (S.D.N.Y. July 17, 2007) (“Misrepresentations and omissions are deemed to ‘occur’ in the district where they are transmitted or withheld, not where they are received.”); *see also Truk*, 2009 U.S. Dist. LEXIS, at \*17–19 (collecting cases). This is the case even though IBSG's stock was traded in New York. *See, e.g., In re Nematron*, 30 F. Supp. 2d at 404.

2. The Remaining Factors Are Neutral

The remaining factors are neutral as to transfer of this action. As is evident from the briefs of Plaintiffs and Defendants and the facts summarized above, the Eastern District of New York is a more convenient forum for Plaintiffs, all of whom are based in the Northeast, while the Southern District of Florida is more convenient for Defendants, all Florida residents. Accordingly, this factor favors neither side.

The availability of process to compel the attendance of unwilling witnesses is a neutral factor because neither side has identified any witnesses who would be unwilling to testify without compulsion. *See, e.g., Colabufo v. Cont'l Cas. Co.*, No. 04 Civ. 1863 (TCP) (MLO), 2006 U.S. Dist. LEXIS 28957, at \*12 (E.D.N.Y. Apr. 27, 2006) (finding that the ability to compel the attendance of witnesses was not a “determinative factor” because *inter alia*, “Neither

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<sup>6</sup> While the statements likely occurred in the Middle District of Florida, and not the Southern District of Florida to which the parties now seek transfer of this case, the Southern District is certainly closer to the locus of operative facts and will be a more convenient and efficient forum for resolution of the issues in this case than the Eastern District of New York, which is approximately 1,000 miles from where the alleged misstatements or omissions occurred.

Defendants nor Plaintiffs ha[d] identified any witness who would be unwilling to attend the trial of th[e] action absent the compulsion of a subpoena.”)

Similarly, the relative means of the parties is a neutral factor because neither side has alleged that it does not have the financial resources to litigate this action in either forum. While Defendant Birch claims that he would be subjected to financial and logistical hardship if forced to litigate in the Eastern District of New York, he offers no facts to show that the hardship would be any greater for him than it would be for Plaintiffs to litigate the case in Florida. (*See* Def. Birch’s Mem. L. Supp. at 10.)

Nor is the forum’s familiarity with the governing law a relevant factor here. Plaintiffs bring their claims under the federal securities laws, and both the Eastern District of New York and the Southern District of Florida are equally competent to try those claims. *See, e.g.*, *In re Global Cash Access Holding, Inc. Sec. Litig.*, No. 08 Cv. 3516 (SWK), 2008 U.S. Dist. LEXIS 70367, at \*23 (S.D.N.Y. Sept. 18, 2008) (“Federal courts throughout the nation are equally capable of applying federal securities laws.” (citing *In re Collins & Aikman Corp. Sec. Litig.*, 438 F. Supp. 2d 392, 398 (S.D.N.Y. 2006))); *see also Collins & Aikman*, 438 F. Supp. 2d at 398 (collecting cases).

Typically, great weight is accorded to plaintiff’s choice of forum in the context of a § 1404(a) transfer motion. *See D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 107 (2d Cir. 2006). However, where a plaintiff represents a putative class, with members likely to be present in many districts, that choice is given less deference. *See Glass v. S&M NuTec LLC*, 456 F. Supp. 2d 498, 504 (S.D.N.Y. 2006) (holding that the typical maxim “bears little weight, however, in a putative class action involving plaintiffs who are scattered throughout the country.”). Here, the three Lead Plaintiffs each reside in different districts, and only one in the Eastern District of

New York, making Plaintiffs' choice of forum even less entitled to deference. Moreover, Plaintiffs in their response concede that transfer is appropriate, and state that they are willing to consent to trying this case in the Southern District of Florida. (Pls.' Resp. at 10.)

Finally, trial efficiency is a neutral factor here as well. While the Southern District of Florida is less busy on average than the Eastern District of New York, this Court has no reason to believe that this case is more or less likely to proceed expeditiously in either district. *See* Administrative Office of the United States Courts, Federal Court Management Statistics ("FCMS"), available at <http://www.uscourts.gov/cgi-bin/cmsd2008.pl> (last visited Sept. 2, 2009) (reporting that the average number of cases (criminal and civil) pending per judge in the Eastern District of New York was 613, versus 335 for the Southern District of Florida); *see also In re AtheroGenics Sec. Litig.*, No. 05 Civ. 00061, 2006 U.S. Dist. LEXIS 15786 (S.D.N.Y. Mar. 31, 2006) (using FCMS report to compare docket congestion in context of § 1404(a) motion to transfer).

Accordingly, because the number of factors favoring transfer outweigh those opposing it, this action should be transferred to the Southern District of Florida.

SO ORDERED.

Dated: Brooklyn, New York  
September 4, 2009

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ROSLYNN R. MAUSKOPF /  
United States District Judge