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**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

TIANHAI LACE USA INC.,  
*a New York corporation,*

Plaintiff,

v.

FOREVER 21, INC.,  
*a Delaware corporation* and DOES 1-10,  
Defendants.

Civil Action No. 1:16-cv-05950-AJN

ECF Case

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TRANSFER VENUE**

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**PRELIMINARY STATEMENT**

This Court can and should decline to hear this case—which involves the “U.S. enforcement arm” of what appears to be a Chinese conglomerate suing a California defendant for copyright infringement—and instead transfer it to the Central District of California, where it can be more conveniently heard.

The most important factor in the transfer analysis under 28 U.S.C. § 1404, which is committed to the sound discretion of this Court, is the convenience of the witnesses. Here, all of the key party witnesses, who will provide testimony about Defendant’s allegedly infringing activities, work at Forever 21’s headquarters in California and reside in or near Los Angeles. Furthermore, key non-party witnesses, namely, employees of the vendors who provided the designs in the accused garments to Forever 21, and who owe Forever 21 an indemnity obligation, reside in California. Meanwhile, Plaintiff’s witnesses will likely testify regarding copyright ownership and the purportedly validity of its registrations, issues that by comparison are “relativity easily established” or not. *See, e.g., Capitol Records, LLC v. VideoEgg, Inc.*, 611 F.Supp.2d 349, 367 (S.D.N.Y. 2009).

Because the key party and non-party witnesses reside in or near Los Angeles, the Central District of California would be a far more convenient forum for them. That level of convenience far outstrips the minimal level of deference that should be given to Plaintiff’s choice of forum, since the operative facts upon which Tianhai’s claims rest have no material connection here. Conversely, the primary locus of operative facts lies in Los Angeles, California.

Moreover, since this case is at its outset, it would be efficient to transfer it now to the district in which most of the party and non-party witnesses reside, most of the sources of proof are located, and whose local interests in the case's outcome are the strongest. At bottom, trying this case before a district court within the Central District of California would promote efficiency, judicial economy, and convenience.

This Court should therefore transfer this case to the Central District of California.

### **FACTS**

#### **A. Allegations Of The Complaint.**

Plaintiff Tianhai Lace USA Inc. ("Tianhai") claims to be the copyright owner of original lace designs directed at women's apparel. (Dkt. No. 1, ¶¶ 1, 10.) Tianhai contends that it is the co-author of the various lace fabric designs asserted here along with two of its "sister companies[,] " Tianhai Lace Co. Ltd. ("TLC") and Tianhai Lace (Guangdong) Ltd. ("TLG"), which are not located in the U.S. (*Id.* ¶¶ 10-11.) Tianhai, purportedly with the knowledge and consent of its overseas sister companies, serves as "the U.S. enforcement arm of the operation in terms of procuring and protecting the group's intellectual property rights . . . ." (*Id.* ¶ 11.)

In this action, Tianhai has asserted five different lace designs, each of which it contends Forever 21 has infringed. (*See id.* ¶¶ 15-65.) Tianhai has attached in its complaint the purported copyright registrations for each of the five designs. TLC and TLG, Tianhai's "sister companies," are identified as co-authors for each of the claimed designs. (*See* Dkt. No. 1, Exhs. B, D, F, H, J.) TLC and TLG are both identified as being

domiciled in China. (*Id.*) For each of the claimed designs, the nation of first publication is identified as China. (*Id.*)

**B. This Action's California Ties.**

Forever 21 has its headquarters and principal place of business in Los Angeles, California. (*See* Declaration of Michael Roberts [“Roberts Decl.”] ¶ 2.) All of Forever 21's corporate employees work in California; Forever 21 has no corporate employees residing in New York State. Its only connection to New York State is the retail stores operated by its subsidiary in the state. (*Id.* ¶¶ 2-3.)

As background, Forever 21 commonly acquires its garments, and the designs reflected in those garments, from third-party vendors. (*Id.* ¶ 4.) Those vendors usually owe Forever 21 indemnity obligations in defending against lawsuits relating to those designs. (*Id.*) The garments accused here were supplied by 9 different vendors. Of those 9 vendors, 2 are located in Los Angeles, 1 is located in the United Kingdom, and 6 are located in Asia (5 in China and 1 in Korea). (*Id.* ¶ 5.) In other words, the only U.S.-based vendors for the garments at issue are located in Los Angeles, California. Those Los Angeles-based vendors are Fire (Topson) and Farrah 17. (*Id.*)

Furthermore, the Forever 21 employees involved in the design (or selection of the design), production, and distribution of the accused garments all work at Forever 21's headquarters and reside in or near Los Angeles, California. (*Id.* ¶ 6.) These witnesses include employees who were responsible for procuring the garments accused here, such as Rebecca Rudd, Vonnie Tandra, Winnie Lo, Anthony Chinn, and Elizabeth Beery, the

Forever 21 buyers that acquired the respective garments and incorporated designs. (*Id.*) The witnesses also include the Forever 21 employees responsible for the production and distribution of the garments bearing the accused designs, such as Jennifer Wen and Anna Cordon. (*Id.*) Again, these employees all reside in or near Los Angeles and work at Forever 21's headquarters. Forever 21's anticipated witness on topics relating to the financial benefits (or absence thereof) Forever 21 received from sales of the accused garments, Michael Roberts, also resides and works in Los Angeles. (*Id.*)

### ARGUMENT

Motions for transfer lie within the broad discretion of the district court and are determined upon notions of convenience and fairness, on a case-by-case basis. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988).

A district court has broad discretion to transfer any civil action to any other district or division where it might have been brought for "the convenience of the parties and witnesses, [and] in the interest of justice." 28 U.S.C. § 1404(a). A transfer order under Section 1404 is reviewable only for abuse of discretion. *See Friedman v. Revenue Management of New York*, 38 F.3d 668, 672 (2d Cir. 1994).

A party moving under Section 1404 bears the burden of showing a transfer is proper. *Factors Etc., Inc., v. Pro Arts Inc.*, 579 F.2d 215, 218 (2d Cir. 1978); *Ford Motor Co. v. Ryan*, 182 F.2d 329, 330 (2d Cir. 1950). To carry its burden, the moving party must demonstrate two things: (i) that "the action could have been brought in the district to which transfer is proposed, i.e., 'the transferee forum,'" and (ii) that "the transfer



would serve the convenience of the parties and witnesses and is in the interests of justice.” *Bionx Implants, Inc. v. Biomet, Inc.*, No. 99 Civ. 740, 1999 WL 342306, at \*2-3 (S.D.N.Y. May 27, 1999); accord *Orb Factory Ltd. v. Design Science Toys, Ltd.*, 6 F.Supp.2d 203, 208 (S.D.N.Y.1998).

Here, Forever 21 can make both showings.

**I. This Action Could Have Been Brought In The Central District Of California.**

Venue in a copyright infringement action is governed by 28 U.S.C. § 1400(a), which provides that any civil action relating to copyrights “may be instituted in the district in which the defendant or his agent resides or may be found.” Pursuant to 28 U.S.C. § 1391(c), a defendant corporation resides in any judicial district in which it is subject to personal jurisdiction at the time the action commences. *Wechsler v. Macke Int’l Trade, Inc.*, No. 99 Civ. 5725, 1999 WL 1261251, at \*3 (S.D.N.Y. Dec. 27, 1999). Because Forever 21 is a California-based corporation with its principal place of business in Los Angeles, California, it is subject to personal jurisdiction in the Central District of California, and thus, resides there. Accordingly, venue properly lies in the Central District of California, and this action could have initially been brought in that district.

Hence, the remaining inquiry is whether the inconvenience of trying this case before this Court (instead of in the Central District of California) outweighs the level of deference that should be given to Plaintiff’s choice of forum.

**II. Transfer To The Central District Of California Would Serve The Interests of Convenience And Fairness.**

The moving party must show that, on balance, the following factors clearly favor transfer: (1) the convenience of witnesses; (2) the convenience of the parties; (3) the locus of operative facts; (4) the location of relevant documents and relative ease of access to sources of proof; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the forum's familiarity with the governing law; (7) the relative financial means of the parties; (8) the weight afforded plaintiff's choice of forum; and (9) trial efficiency and the interests of justice generally. *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 695 (S.D.N.Y. 2009) (citing *Anadigics, Inc. v. Raytheon Co.*, 903 F.Supp. 615, 617 (S.D.N.Y.1995)). Importantly, “[n]o one factor is dispositive and the relative weight of each factor depends on the particular circumstances of the case.” *SmartSkins LLC v. Microsoft Corp.*, No. 14-civ-10149, 2015 WL 1499843 at \*4 (S.D.N.Y. Mar. 27, 2015).

On balance, the above factors clearly tip in favor of a California forum.

**A. The Convenience of Witnesses Favors Transfer.**

“Courts typically regard the convenience of witnesses as the most important factor in considering a § 1404 motion to transfer.” *Herbert Ltd. P’Ship v. Electronics Arts Inc.*, 325 F.Supp.2d 282, 286 (S.D.N.Y. 2004). When assessing the convenience of witnesses, the Court should assess the materiality, nature, and quality of the testimony that the witnesses are likely to provide. *Capitol Records, LLC v. VideoEgg, Inc.*, 611 F.Supp.2d 349 (S.D.N.Y. 2009).

**1. The Key Party Witnesses Reside in the Central District of California.**

The key party witnesses in this case will be Forever 21’s employees who are knowledgeable about the design (and/or selection of the design), production, and distribution of the accused garments. *See AEC One Stop Group, Inc. v. CD Listening Bar, Inc.*, 326 F.Supp.2d

525, 529 (S.D.N.Y. 2004) (“key witnesses” in copyright infringement cases are “officers and employees who were involved in the design, production, and sale” of the allegedly infringing products.)

While Plaintiff may call some of its witnesses that reside in New York to testify about the ownership and validity of their copyrights, their investigations of Forever 21’s alleged infringement, and the resulting damages, this type of testimony is less likely to be material to the outcome of a copyright infringement case:

Testimony about the ownership or validity of the registered copyrights at issue . . . will hardly be lengthy or nuanced. Furthermore, whereas testimony about the design and creation of the technology at issue and Defendants’ conduct during the period [at issue] can only come from persons who were “in the right place at the right time,” the same cannot be said for testimony about Plaintiff’s ownership of the allegedly infringed copyrights which is relatively easily established and may very well be the subject of a stipulation by the time of trial.

*VideoEgg, Inc.*, 611 F.Supp.2d at 367. Furthermore, insofar as Forever 21 does raise an issue of copyright validity, this will implicate witnesses that reside in China, not in New York, since (i) the claimed designs were all first published in China, (ii) Tianhai’s co-authors, TLC and TLG, reside in China, and (iii) the majority of the third-party vendors that provided the accused designs to Forever 21, whose employees may testify about the designs’ lack of originality, reside in China. In other words, Tianhai’s witnesses will, at most, purport to affirm the validity of their asserted copyrights, but will not be able to shed light on issues raised by Forever 21’s attacks on those copyrights’ validity (e.g., that the claimed designs lack originality, that their dates of publication do not pre-date the publication of the designs reflected in the accused garments, etc.).

Conversely, Defendant Forever 21’s witnesses will be critical in deciding issues that are actually material to this case. For instance, Forever 21’s witnesses will testify about the acquisition of the accused designs, the production of the clothing bearing those accused designs,

and the distribution of that clothing. These witnesses will also be relevant to determining whether Forever 21's alleged infringement was willful, as Tianhai has alleged. Those individuals, as well as the anticipated subjects of their testimony, are as follows:

| <b>Witness</b>                        | <b>Topic of Testimony</b>  |
|---------------------------------------|--|
| Rebecca Rudd, Buyer                   | Topics relating to the acquisition of the accused designs.   |
| Vonnie Tandra, Buyer                  | Topics relating to the acquisition of the accused designs.   |
| Winnie Lo, Buyer                      | Topics relating to the acquisition of the accused designs.   |
| Anthony Chinn, Buyer                  | Topics relating to the acquisition of the accused designs.   |
| Elizabeth Beery, Buyer                | Topics relating to the acquisition of the accused designs.   |
| Jennifer Wen, Buyer/Coordinator       | Topics relating to the acquisition of the accused designs, the production of the accused garments bearing those designs, and the distribution of those garments. |
| Anna Cordon, Buyer/Coordinator        | Topics relating to the acquisition of the accused designs, the production of the accused garments bearing those designs, and the distribution of those garments. |
| Michael Roberts, Assistant Controller | Topics relating to the financial benefits Forever 21 received from each accused design, and the corresponding allocations of those benefits.                     |

(Roberts Decl. ¶ 6.)

These individuals all reside in California, specifically within the Central District. Bringing these witnesses to a trial in this district would therefore be inconvenient and unfairly burdensome.

**2. Key Non-Party Witnesses Reside in the Central District of California.**

Key non-party witnesses reside in California, specifically within the Central District. Importantly, “[t]he convenience of non-party witnesses is accorded more weight than that of party witnesses.” *ESPN, Inc. v. Quicksilver, Inc.*, 581 F.Supp.2d 542, 547 (S.D.N.Y. 2008).

As background, Forever 21 frequently acquires the designs of its garments from third-party manufacturers, who in turn owe Forever 21 an indemnity obligation in defending lawsuits pertaining to those designs.

Here, since the design of the accused garments were all acquired from third-party vendors, who either did or did not copy Tianhai’s designs, testimony from those vendors’ employees will be critical to this case. For instance, those vendors should be able to provide testimony about: (i) how they developed the accused designs, and whether it was independently done; (ii) if independently designed, when they developed those designs; and (iii) if they acquired the designs from someone else, whether by a license or transfer, who they got them from and when.

Here, the designs of the accused garments was acquired from the following vendors:

| <b>Vendor</b>                    | <b>Location</b>         |
|----------------------------------|-------------------------|
| Hangzhou Simei Costume Co., Ltd. | Zhejiang, China         |
| Jiangsu Zhongjin                 | Jiangsu, China          |
| United Way International Ltd.    | Causeway, Hong Kong     |
| Rare Fashion                     | Liverpool, UK           |
| New Century Textiles             | Shanghai, China         |
| Fire (Topson)                    | Culver City, California |

|                                      |                         |
|--------------------------------------|-------------------------|
| Dong Suh International               | Seoul, Korea            |
| Farrah 17                            | Los Angeles, California |
| C&C Nantong Cathay Clothing Co. Ltd. | Jiangsu, China          |

(Roberts Decl. ¶ 5.) In sum, 7 of the 9 vendors are located outside of the U.S., which favors neither the Central District of California nor this Court.

Notably, however, the only companies that are located in the U.S. are both in Los Angeles, specifically within the Central District of California: Fire (Topson) and Farrah 17. Because these companies reside in Los Angeles, the Central District of California would be a more convenient forum for their witnesses, who, again, are likely to provide key testimony regarding issues that will actually be in dispute.

Therefore, the convenience of the witnesses weighs heavily in favor of transfer to the Central District of California.

**B. The Convenience of the Parties is Neutral**

Here, Plaintiff purports to reside in New York, New York, while Forever 21 resides in Los Angeles, California. Even if it were more convenient for Plaintiff to remain in the Southern District of New York, the parties' convenience becomes a "neutral factor in the transfer analysis if transferring venue would merely shift the inconvenience to the other party." *See Federman Assocs. V. Paradigm Medical Indus., Inc.*, No. 96 Civ. 8545 (BSJ), 1997 WL 811539,\*2 (S.D.N.Y. April 8, 1997) (finding that, as between New York resident and Utah-based corporation, "the convenience of the parties" factor "weighs neutrally" when "regardless of the forum . . . one party will be obligated to travel").

This factor is therefore neutral.

**C. The Locus of Operative Facts Favors Transfer.**

In a copyright infringement action, the locus of operative facts is commonly the place where the allegedly-infringing products were designed and developed. *See, e.g., Bristol-Myers Squibb Co. v. Andrx Pharm., LLC*, No. 03 CIV. 2503 (SHS), 2003 WL 22888804, at \*3 (S.D.N.Y. Dec. 5, 2003); *cf. AEC*, 326 F.Supp.2d at 530 (explaining, in copyright case, that “[t]he operative facts in infringement cases usually relate to the design, development and production of an infringing product”).

Here, Tianhai’s central allegation is that Forever 21 (or its agents) copied their lace designs. As outlined above, that copying, if it occurred at all, must have occurred in one or more of the following locations: Los Angeles, California; China; Liverpool, United Kingdom; or Seoul, Korea. For instance, the selection/acquisition of the design and production of the accused garments all occurred at Forever 21’s principal place of business in Los Angeles, California. The designs were all acquired from third-party vendors, who either reside in Los Angeles, or overseas in the enumerated locations. Put differently, none of the alleged copying occurred, or could have occurred, in New York State.

A secondary issue is the validity of the underlying copyrights themselves. All of the claimed designs were first published in China, and each of the corresponding registrations lists TLC and TLG, Chinese companies, as co-authors and co-claimants. The acts or omissions pertaining to copyright validity, therefore, occurred in China.

Either way, the locus of operative facts does not lie in this forum. As between the two forums, it is far closer to the Central District of California, since the Defendants’ allegedly infringing conduct either culminated, emanated from, or continued there.

This factor therefore favors transfer.

**D. The Location of Relevant Documents Favors Transfer or is Neutral.**

Here, the relevant documents pertain to Defendant's allegedly infringing activities and communications with third-party vendors relating to the accused designs. Those documents are housed at Forever 21's headquarters in California, which favors transfer.

At worst, this factor is neutral. *See, e.g., Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Lafarge N. Am., Inc.*, 474 F.Supp.2d 474, 484 (S.D.N.Y.2007) ("The location of relevant documents is largely a neutral factor in today's world of faxing, scanning, and emailing documents.").

This factor therefore either favors transfer or is neutral.

**E. The Availability of Process to Compel Attendance Favors Transfer.**

To be sure, there is no evidence at this case's outset that any witness is unwilling to appear at trial or deposition. The mere possibility of unwilling witnesses, and the attendant availability of compulsory process, however, favors transfer to the Central District of California.

As outlined above, key non-party witnesses reside out of this district and within the Central District of California. And while a federal district court generally enjoys nationwide subpoena power, there are two qualifications to that power that are relevant here.

First, under Rule 45, a court cannot compel attendance of a non-party witness at trial or deposition at a place more than 100 miles from where that person resides, unless it is in a state in which that person resides, is employed, or regularly transacts business in person *and* that person will not incur substantial expense. Fed. R. Civ. P. 45(c)(1)(B)(ii). Thus, while it is dubious that this Court could compel unwilling non-party witnesses that reside in Los Angeles to attend trial here, a district court within the Central District of California would face no such issues.



Second, disputes relating to compliance with subpoenas are heard in the district in which compliance is required. *See* Fed. R. Civ. P. 45(d) & (e). Here, compliance with third-party subpoenas would be required in the Central District of California, i.e., the district that lies within 100 miles of where the non-party witnesses reside. Thus, insofar as there are disputes regarding compliance with subpoenas, it would promote judicial economy to have them heard in the district in which the underlying action lies.

This factor therefore favors transfer.

**F. Both Forums Are Familiar With the Governing Law.**

This factor favors neither the Southern District of New York nor the Central District of California. Copyright law is federal law, and thus, any district court will be sufficiently familiar with the governing law. *See, e.g., AEC*, 325 F.Supp.2d at 531.

This factor should therefore be given no weight.

**G. The Relative Financial Means of the Parties.**

Where a disparity of means exists between the parties, the relative means between the parties is a relevant factor in determining venue. *See Aerotel, Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 197 (S.D.N.Y. 2000). But when both parties are corporations, as here, this factor is given little weight. *See Arrow Electronics Inc. v. Ducommun Inc.*, 724 F.Supp. 264, 266 (S.D.N.Y.1989).

Here, while Defendant Forever 21 is a large corporation, Plaintiff is likewise a corporation within a conglomerate of “three sister companies . . . all of whom collaborate on the creation, manufacture, and marketability of lace fabric designs.” (Dkt. No. 1, ¶ 11.) There is no evidence that there is a material disparity in means between the parties.

This factor is therefore neutral and should be given no weight.

**H. The Weight Afforded Plaintiff's Choice of Forum Should Be Minimal.**

While a plaintiff's choice of forum is generally entitled to “substantial consideration,” *In re Warrick*, 70 F.3d 736, 741 (2d Cir. 1995), “[a] plaintiff's choice is accorded less weight where the case's operative facts have little connection with the chosen forum.” *Stein v. Microelectronic Packaging, Inc.*, No. 98 Civ. 8952, 1999 WL 540443, at \*8 (S.D.N.Y. July 26, 1999); *see also Fuji Photo Film Co., Ltd. v. Lexar Media, Inc.*, 415 F.Supp.2d 370, 375 (S.D.N.Y. 2006) (“The court’s emphasis on a plaintiff’s choice of forum diminishes . . . where ‘ . . . the operative facts upon which the litigation is brought bear little material connection to the chosen forum.’”) (citation omitted).

Here, as established above, the loci of operative facts do not lie in this forum. As a threshold matter, as Plaintiff has alleged, it acts “as the U.S. enforcement arm” of a Chinese conglomerate comprising three sister companies, two of which are Chinese—Tianhai Lace Co. Ltd. and Tianhai Lace (Guangdong) Ltd. Again, those two companies are listed as authors and claimants for each of Plaintiff’s asserted copyrights. (*See* Dkt. No. 1, Exhs. B, D, F, H, J.) And while Tianhai is registered in New York, there is no evidence that it has a presence in the state aside from a “corporate office on Madison Avenue” and a “showroom” in New York. (*See* Dkt. No. 1, ¶¶ 11-12.) There is no evidence, for instance, that it has retail stores in the state, or that its activities in the state, particularly as they relate to their current claims, are significant.

Conversely, the loci of the two salient issues—whether Forever 21 or its agents copied Tianhai’s designs and whether those designs are valid copyrights in the first place—are either in Los Angeles, California or outside the U.S.

That is, the focus of the case will be on Forever 21’s allegedly infringing activities. Again, those activities would have emanated, if anywhere, from Forever 21’s corporate

headquarters in Los Angeles, California or where its vendors are located—either Los Angeles or overseas. The case’s operative facts, therefore, have little connection with this forum, and Plaintiff’s choice of forum should therefore be given minimal deference.

**I. Trial Efficiency and the Interests of Justice.**

Transferring this action to the Central District of California would facilitate discovery, and thus, promote efficiency and judicial economy. Transfer of an action facilitates discovery when: (i) the action is in the early stages of litigation; and (ii) the transferee district is the place where the operative events occurred and where many witnesses and documents are located. *Wechsler v. Macke Int'l Trade, Inc.*, No. 99 CIV. 5725 (AGS), 1999 WL 1261251, at \*10 (S.D.N.Y. Dec. 27, 1999).

Here, transfer to the Central District of California would facilitate discovery because: (i) this litigation is in its early stages, and discovery has yet to commence; and (ii) California is the place where most of the operative events occurred, all of the key party witnesses and several key non-party witnesses reside, and most of the relevant documents are located. This factor therefore favors transfer.

Therefore, on balance, the above factors tip clearly in favor of transferring this case to the Central District of California, where all of the key party witnesses and a majority of the key non-party witnesses reside.

**CONCLUSION**

For the convenience of the witnesses, and in the interest of judicial economy, this Court should transfer this action to the Central District of California, where it can be more appropriately heard.

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