IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE FIRST SOLAR, INC. DERIVATIVE LITIGATION	)	C.A. No. 12-417-GMS-CJB

ORDER

WHEREAS, on May 15, 2012, the defendants in the above-captioned matter filed a Motion to Dismiss for Improper Venue or, in the Alternative, to Transfer this action to the District of Arizona (D.I. 7), accompanied by an Opening Brief in support (D.I. 8);

WHEREAS, on June 4, 2012, the plaintiffs filed an Answering Brief in Opposition to the defendants' Motion (D.I. 11) and, on June 18, 2012, the defendants' filed their Reply (D.I. 13);

WHEREAS, on March 4, 2013, Magistrate Judge Christopher Burke issued a Report and Recommendation in connection with that motion, wherein he recommended that the court transfer this action to the District of Arizona (D.I. 21);

WHEREAS, on March 21, 2013, the plaintiffs filed a timely Objection to this Report and Recommendation (D.I. 22) and, on April 8, 2013, the defendants' filed their Response to that Objection (D.I. 23);

WHEREAS, having reviewed Magistrate Judge Burke's Report and Recommendation, the plaintiffs' objections and the parties' submissions in connection therewith;

IT IS HEREBY ORDERED that:

1. Plaintiffs' Objections to the Magistrate Judge's Report and Recommendation (D.I. 22) are OVERRULED;
2. The Report and Recommendation (D.I. 21) is ADOPTED[1];

3. The defendants' Motion to Dismiss for Improper Venue or to Transfer (D.I. 7) is GRANTED IN PART and DENIED IN PART[1]; and

4. The Clerk of Court is directed to transfer this action to the District of Arizona.[2]

Dated: July 12, 2013

CHIEF, UNITED STATES DISTRICT JUDGE

[1] The court conducts a *de novo* review when determining whether to adopt a magistrate judge's decision on a dispositive matter. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(3). It is well established that a motion to transfer is a dispositive matter. *Id.* Upon review, the court may accept, reject, or modify the recommendations of the magistrate judge. *Id.* The court may also choose to receive further evidence or to return the matter to the magistrate judge with instructions. *Id.*

Venue may be proper in one of two ways. Specifically, it may be proper if: (1) a party has consented to suit in a particular district, thus having waived any right to challenge venue; or (2) it is provided for by a relevant venue statute. (D.I. 21 at 5.) Here, the plaintiffs argue that venue is proper under either option. (*See* D.I. 11 at 5–7.) First, plaintiffs maintain that the defendants intended to waive their federal venue privilege by voluntarily serving as directors of First Solar. (D.I. 20 at 5.) The plaintiffs cite the Delaware Nonresident Director Consent Statute, Del. Code Ann. Tit. 10, § 3114 ("Section 3114" or "Director Consent Statute") to support their argument.

The court, however, finds plaintiffs' first argument unpersuasive, particularly in light of the Supreme Court's decisions in *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), and *Olberding v. Illinois Cent. R. Co.*, 346 U.S. 338 (1953). In *Neirbo*, the Court concluded that a foreign corporation's designation of an agent for summons purposes, in accordance with state law, constitutes "actual consent." (D.I. 21 at 7.) The Court later distinguished *Neirbo* in *Olberding*, clarifiying that "actual consent" is not present when designation of an agent is not required by state law and, therefore, such designation is not actually made by a defendant. (*Id.* at 9.) Taken together, *Neirbo* and *Olberding* distinguish between: (1) a voluntary act that is not directly related to the acceptance of service of process in a state, but is still equated to such acceptance through a statute; and (2) a voluntary act that rises to "actual consent" to being sued in a state, as evidenced by a person's express designation of an agent for service of process. (*See id.*) Here, implying that the defendants waived their federal venue privilege by serving as directors of First Solar is inconsistent with *Olberding*. In fact, *Olberding* requires something more—a manifestation of "actual consent"—in addition to a voluntary act and a relevant statute deeming such act as the designation of an agent for service of process. (*See* D.I. 21 at 11.) The plaintiffs do not assert in their Complaint, or otherwise, that the defendants expressly appointed such an agent through written designation or by taking similar action. Furthermore, and as noted in Magistrate Judge Burke's Report, other courts have agreed that a Director Consent Statute does not serve as the sole basis for finding an express waiver of the federal venue privilege. *See Gatz v. Ponsoldt*, 271 F. Supp. 2d 1143, 1161 (D. Neb. 2003); *Bernstein v. IDT Corp.*, 582 F. Supp. 1079, 1088 (D. Del. 1984); *In re Mid-Atl. Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1271–73, 1278–79 (D. Md. 1981). Thus, the court finds that the defendants have not waived their federal venue privilege.

The plaintiffs also argue that 28 U.S.C. § 1401 expands venue in derivative actions. (*See* D.I. 22 at 9.) Specifically, the plaintiffs contend that a venue analysis under § 1401, operating independently from 28 U.S.C. § 1391, demonstrates that venue is proper in the District of Delaware because § 3114 permits First Solar to sue the defendants here. (*Id.*) Importantly, however, the need to resort to § 1401 in shareholder derivative actions has

[1] For the reasons detailed in Magistrate Judge Burke's Report and Recommendation and in this Order, the court denies the defendants' motion to dismiss for improper venue, but grants its alternative request to transfer this action to the District of Arizona.

diminished because § 1391 currently provides an expanded volume of venue choices that were not previously available. *See, e.g.*, 28 U.S.C. § 1391(b)(2) (stating that venue is appropriate in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred"). Therefore, the court finds that § 1401 is not meant to serve an as independent means of determining venue, but instead is used in conjunction with § 1391 to permit plaintiffs in shareholder derivative actions to expand the number of district courts where federal venue may be found. (*See* D.I. 21 at 20.)

In view of the foregoing and in consideration of §§ 1391(b)(1)-(3), the court realigns First Solar, the nominal corporate defendant, as the plaintiff in this action. Section 1391(b)(1) provides that a civil action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391. This Section is inapplicable to the instant case because none of the defendants are Delaware residents. (D.I. 1 at ¶¶ 14–23.) Second, § 1391(b)(2) provides that a civil action may be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391. Here, a substantial portion of the events or omissions giving rise to the claims at issue occurred in Arizona, not Delaware. (D.I. 11 at 13–14.) Third, § 1391(b)(3) states that "if there is no district in which an action may otherwise be brought as provided by [§ 1391(b)(1) or (2)]" then the action may be brought in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C. § 1391. This Section only applies "if there is no other district which would have both personal jurisdiction and venue as to all defendants." *FS Photo, Inc. v. PictureVision, Inc.*, 48 F. Supp. 2d 442, 448 (D. Del. 1999). Here, § 1391(b)(3) does not apply because the case could have been brought in the United States District Court for the District of Arizona, pursuant to § 1391(b)(2). While the plaintiffs contend that the instant claims arise out of the defendants' actions as directors of First Solar, it is undisputed that the defendants performed these roles primarily in Arizona. (D.I. 1 at ¶¶ 13–23; D.I. 9 at ¶ 6.) In addition, a majority of the relevant disclosures occurred in Arizona and none occurred in Delaware. (D.I. 21 at 23.) Thus, the court finds that the civil action could have been brought under § 1391(b)(2) and, therefore, § 1391(b)(3) does not apply. *See Bockman v. First Am. Mktg. Corp.*, 459 F. App'x 157, 160 (3d Cir. 2012). For these reasons, the court finds that venue is this District is improper under §§ 1401 and 1391.

[2] As noted, Magistrate Judge Burke's Report recommends transferring this action to the District of Arizona. (*See* D.I. 21 at 23–26.) If a case is filed in the wrong court, that court has the discretion to "dismiss, or if it be in the interest of justice, transfer [the] case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a); *see also Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964). A district where the case "could have been brought" requires that the transferee forum have proper venue and personal jurisdiction over the defendant. *FS Photo, Inc.*, 48 F. Supp. 2d at 449. As discussed above, the court concludes that this case could have been brought in the District of Arizona. Moreover, the court finds that a transfer would serve the interests of justice because it would allow for a timely disposition of the case on the merits. *See Minnette v. Time Warner*, 997 F.2d 1023, 1027 (2d Cir. 1993) (stating that the functional purpose of § 1406 is to "eliminate impediments to the timely disposition of cases and controversies on their merits"); *see also Scott Paper Co. v. Nice-Pak Prods., Inc.*, 678 F. Supp. 1086, 1090 & n.4 (D. Del. 1988) (noting that transferring a case is less harsh than dismissing the case and, therefore, aids in resolving the dispute as "conveniently and expeditiously as possible."). For these reasons and those detailed more fully in Magistrate Judge Burke's Report and Recommendation, the court adopts those recommendations and transfers this action to the District of Arizona.