IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CLOUDOFCHANGE, LLC, Plaintiff, v. CLOVER NETWORK, INC., Defendant.	Civil Action No. 6:22-CV-00634-ADA-DTG **JURY TRIAL DEMANDED**

CLOVER NETWORK, LLC'S OPPOSED MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

Defendant Clover Network, LLC ("Clover")[1] moves for a protective order precluding Plaintiff CloudofChange, LLC from seeking venue discovery, including but not limited to two recently-noticed depositions, related to Clover products that were not accused or otherwise identified by Plaintiff until *after* Clover's Motion to Transfer was filed. Plaintiff thus accused the new products only after Clover adduced overwhelming evidence showing that the originally accused Clover products and this case have no connection with the Western District of Texas. *See* Dkt. 18 (Motion to Transfer); *see also* Ex. 1-A and 1-B (Deposition Notices).

After conducting a thorough investigation of the Accused Products identified in the original Complaint and Plaintiff's Preliminary Infringement Contentions, Clover determined that all of those products were researched, designed, and developed at Clover's headquarters in Sunnyvale, California. Clover therefore moved to transfer this case to the Northern District of California pursuant to 28 U.S.C. § 1404(a). *See id*. Over a month later, Plaintiff amended its Complaint and Preliminary Infringement Contentions to identify Clover Sport, a product developed and designed in Austin Texas, as an additional accused product. *See* Dkt. 24 (Amended Complaint); Ex. 1-C (12/12/22 Amended Infringement Contentions). But Plaintiff does nothing more than identify Clover Sport in those amendments—it does not allege or otherwise state how the new accused product supposedly infringes the Asserted Patents. The timing of the addition of Clover Sport as an accused product, the absence of new factual allegations in the Amended Complaint or details regarding Clover Sport in the amended contentions, and Plaintiff's recent barrage of discovery focused on Clover Sport reflect a clear strategy "*designed to defeat transfer to a more convenient*

[1] Clover Network, Inc. converted to Clover Network, LLC in 2021, before Plaintiff filed this lawsuit.

venue." *In re Amazon.com, Inc.*, No. 22-157, 2022 WL 17688072, at *4 (Fed. Cir. Dec. 15, 2022) (emphasis added) (citation omitted); *see also Phoji, Inc. v. Atlassian, Inc.*, 6:21-CV-00888-ADA, 2022 WL 2392876, at *3 (W.D. Tex. July 1, 2022) (affording little to no weight to forum contacts tied only to a product accused *after* a motion to transfer was filed).

Plaintiff should not be permitted to conduct a fishing expedition into a previously un-accused product in an attempt to manipulate the evidence on the convenience of this forum. Clover therefore seeks a protective order limiting the scope of transfer discovery to the Clover products that were accused at the time Clover moved to transfer.

II. BACKGROUND

A. The Original Accused Clover Products

Plaintiff filed this lawsuit on June 17, 2022 after filing similar suits against two other entities[2] for allegedly infringing the same three patents at issue in this case ("Asserted Patents"),[3] which are generally directed to a web-based POS-building system. Dkt. 1 at ¶¶ 2, 14. The original Complaint identifies four Clover point-of-sale products as the accused products—the (1) Clover Station Solo, (2) Clover Station Duo, (3) Clover Mini, and (4) Clover Dashboard (collectively, "Original Accused Products"). *Id*. at ¶ 8. Notably absent in the Complaint are factual allegations that, if true, would show that the Original Accused Products or Plaintiff's infringement claims have any particular connection to this District relevant to 28 U.S.C. §1404(a) convenience issues. *See id.*

[2] *See CloudofChange, LLC v. NCR Corp.*, 6:19-cv-00513-ADA (filed Aug. 30, 2019) ("NCR Action"); *CloudofChange, LLC v. Lightspeed POS Inc.*, 6:21-cv-01102-ADA (filed Oct. 22, 2021).

[3] The Asserted Patents are United States Patent Nos. 9,400,640 ("'640 Patent"); 10,083,012 ("'012 Patent"); and 11,226,793 ("'793 Patent") ("Asserted Patents").

On September 30, 2022, Plaintiff served Preliminary Infringement Contentions ("PICs") addressing only the four Original Accused Products Ex. 1-C. Plaintiff's PICs admittedly rely on "publicly available information" and detail material from Clover's website, blog entries, and webinars concerning the Original Accused Products. *Id*. Though information pertaining to Clover Sport was also "publicly available," Clover Sport was not identified in Plaintiff's PICs. *See id*.

B. Clover's Venue Investigation and Motion to Transfer[4]

Because Plaintiff "fail[ed] to allege a single fact in support of" venue in this District, Clover sought an extension to respond to Plaintiff's Complaint so that it had sufficient time to investigate venue. *See* Dkt. 8 (Clover's 7/11/22 Opposed Motion for Extension of Time to Respond to the Complaint). But Plaintiff would only agree to such an extension if Clover bartered away its right to seek transfer under 28 U.S.C. § 1404(a), which Clover was unwilling to do. *Id.* at 2. Thus, Clover filed an opposed motion for an extension, and this Court granted Clover an additional thirty days to respond to the Complaint. *See* July 12, 2022 Text Order.

After filing a Rule 12 motion in response to the Complaint, Clover continued its venue investigation and confirmed that the development and design of all of the Original Accused Products was based at its Sunnyvale, California headquarters, and no Clover personnel in Texas worked on any accused feature of those products. Clover therefore moved to transfer this case to the Northern District of California under 28 U.S.C. § 1404(a) on October 28, 2022. Dkt. 18. Clover supported its Motion with ample evidence, including the following declarations of senior-level Clover personnel based at Clover's Sunnyvale, California headquarters, demonstrating that the

[4] In the interim, Clover also filed a Motion to Dismiss the Original Complaint that has been fully briefed. Dkt. 9; Dkt. 11; Dkt. 12. Notably, Plaintiff did not amend its Complaint in response to that Motion; it amended its Complaint only after Clover filed its Motion to Transfer.

witness with relevant knowledge and sources of proof related to the Original Accused Products are in NDCA rather than this District:

1. Clover's Sr. Vice President, Product and Design, Ellen Linardi;
2. Clover's Sr. Vice President, Head of Engineering, Vinayak Kagalkar; and
3. Clover's Sr. Director of Software Engineering, Hunter Novak.

Specifically, these declarations establish that "Clover researched, designed, developed, and launched the Accused Products exclusively at its Sunnyvale headquarters, where most of that work continues to take place today" and no witnesses, evidence, or other activities relevant to the transfer analysis are in this District. Dkt. 18 at 2.

C. The Post-Transfer Motion Amendments Accusing Clover Sport For The First Time

Faced with the overwhelming evidence relating to the Original Accused Products supporting Clover's transfer motion, Plaintiff amended both its Complaint and PICs to identify "(v) Clover Sport (formerly Bypass)"[5] as an accused product for the first time. Dkt. 24, ¶ 7; *see also id*. at ¶ 8.

Unlike the Original Accused Products, Clover Sport was and continues to be designed and developed in Austin, Texas—a fact that makes clear the purpose of Plaintiff's amendments. *See* Ex. 2 (Declaration of Kevin Albert). And Plaintiff made no attempt to disguise the fact that accusing Clover Sport was a strategy designed to support venue in this District because it even supplemented its venue allegations in the Amended Complaint to include allegations regarding the "Clover Sport business unit" in Austin. Dkt. 24 at ¶¶ 17-18.[6] However, aside from accusing Clover

[5] The Amended Complaint also adds "(vi) Clover Web Dashboard, Clover Dashboard, and other back office–type applications or software that operate with one or more of these products" as an accused product, but Web Dashboard was referenced in the original Complaint. Dkt. 24 at ¶ 7.

[6] Although not the subject of this Motion, transfer remains appropriate to the NDCA even after the addition of Clover Sport to this case.

Sport and attempting to bolster its venue allegations, Plaintiff did not amend the allegations supporting its claims to address Clover Sport in the Amended Complaint. *See id*. In fact, Plaintiff's Amended Complaint contains no allegations pertaining to how Clover Sport works or why that product purportedly infringes the Asserted Patents. *See id.* Plaintiff's Amended Preliminary Infringement Contentions ("Amended PICs") likewise do nothing more than identify Clover Sport by adding it to the list of Accused Products, Ex. 1-D (Amended PICs), and they do not come close to identifying how Clover Sport allegedly infringes. *See id.*

Though Plaintiff's Amended PICs claim that Plaintiff amended now because it only recently learned of "Clover Sport in discovery," that claim is belied by citations throughout the Amended PICs to publicly-available information related to Clover Sport—the same information that was available to Plaintiff since the inception of this litigation. *Id*. at 1.

D. Discovery Targeting The Clover Product Accused *After* Clover Moved to Transfer

The same day Plaintiff served the Amended Complaint and Amended PICs, it also served second sets of venue discovery that include requests focused on Clover Sport. Ex. 1-E (Plaintiff's Second Set of Requests for Production of Documents) and 1-F (Plaintiff's Second Set of Interrogatories). Plaintiff then noticed the 30(b)(1) depositions of Adam Deane and Stephen Harker for December 28, 2022 "for the purpose of venue and jurisdictional discovery." *See* Exs. 1-A and 1-B.

Neither Stephen Harker nor Adam Deane work on any Original Accused Product; rather they are both Senior Managers of Software Engineering for the Clover Sport product in Austin. *See* Ex. 2 at ¶ 4; *see also* Dkt. 18 (explaining that no Clover personnel who work on any accused feature of the Original Accused Products are based in WDTX). Thus, the purpose of the depositions of Mr. Harker and Mr. Deane seems either to establish that Clover Sport is developed

in Austin (which Mr. Albert's declaration states) or to obtain merits discovery on how Clover Sport operates.

Clover now seeks a protective order to preclude the noticed depositions of Mr. Harker and Mr. Deane and other discovery related to Clover Sport. As set forth below, that evidence is unduly burdensome and disproportionate to the venue issues at stake given this Court's duty to guard against efforts to manipulate venue.

III. LAW AND ARGUMENT

A. This Court Has Discretion To Grant A Protective Order Precluding Discovery Related To Clover Sport.

This Court has broad discretion to quash discovery and issue a protective order where, as here, (1) a party seeks information not relevant or disproportionate to the "issues at stake"; (2) the "burden or expense of the proposed discovery outweighs its likely benefit"; or (4) the discovery subjects "a person to undue burden." Fed. R. Civ. P. 26(b)(1) and (c)(1)(D); *see Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004); *Landry v. Air Line Pilots Ass'n Intern. AFL-CIO*, 901 F.2d 404, 435-36 (5th Cir. 1990). To determine whether a protective order is warranted, the Fifth Circuit has explained that courts should consider "(1) the relevance of the information requested; (2) the need of the party for the documents [or discovery]; (3) the breadth of the [discovery] request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (5) "the burden imposed." *Wiwa*, 392 F.3d at 818. If discovery is irrelevant, unnecessary, or disproportionate to the issues in dispute, the discovery is necessarily "unduly expensive and burdensome" and should be quashed. *Landry*, 901 F.2d at 435-36.

B. Because This Court Must "Guard Against Manipulative Measures Designed To Defeat Transfer," Evidence Relating to Clover Sport Should Not Be Considered To Assess §1404(a) Convenience.

Though neither the merits of Plaintiff's infringement claims relating to Clover Sport nor the merits of Clover's Motion to Transfer are before this Court at this point, the scope of the limited transfer discovery that is permissible hinges on the transfer analysis that this Court will soon conduct to decide Clover's Motion to Transfer. Thus, whether transfer discovery related to Clover Sport is relevant, overbroad, and unduly burdensome depends on the extent to which this Court will consider evidence regarding Clover Sport to assess the §1404(a) convenience issues.

This Court and the Federal Circuit have repeatedly held that venue is determined "at the date of filing" and when a motion to transfer is filed. In fact, just last week the Federal Circuit refused to consider "the propriety of venue as to … late-added [post-motion-to-transfer-added] parties" because "venue is determined at the date of filing." *In re Amazon*, 2022 WL 176688072, at *3; *In re NetScout Sys., Inc.*, No. 2021-173, 2021 WL 4771756, at *5 (Fed. Cir. Oct. 13, 2021); *Hoover Grp., Inc. v. Custom Metalcraft, Inc.*, 84 F.3d 1408, 1409 (Fed. Cir. 1996); *Phoji*, 2022 WL 2392876, at *3 (Albright, J.); *Nitride Semiconductors Co. v. Lite-On Tech. Corp.*, No. W-21-CV-183-ADA, 2022 WL 358164, at *2 (W.D. Tex. Feb. 7, 2022) (Albright, J.). Accordingly, Clover's Motion to Transfer demonstrated that the Original Accused Products identified in Plaintiff's Complaint and PICs were all designed and developed in the NDCA. Plaintiff added Clover Sport as an Accused Product only *after* the "date of filing" and only *after* Clover Sport filed its Motion to Transfer. For this reason alone, Plaintiff's pursuit of discovery associated only with allegations advanced *after* the "date of filing" is improper because that discovery is overbroad and unduly burdensome given the transfer analysis this Court ultimately will conduct.

Moreover, "[t]o the extent that post-motion events may ever be considered in a section 1404(a) analysis, [courts] *must guard against manipulative measures designed to defeat transfer*

to a more convenient venue." *In re Amazon*, 2022 WL 176688072, at *3 (emphasis added) (citation omitted). In *Phoji*, a case with materially similar facts, the defendant moved to transfer based on the pleadings and infringement contentions as of the time the motion was filed—and, as this Court ultimately ruled, that motion to transfer established that the witness, evidence, and local interest factors "heavily favor[ed]" or "favor[ed] transfer." *Phoji*, 2022 WL 2392876, at *3. But the plaintiff then amended its infringement contentions, like here, to accuse a new product "with roots in Austin." *Id.* at *3. Doubtful that the new product was "properly accused," this Court was "sympathetic" to the defendants' position that the plaintiff accused the new product "to manipulate the § 1404(a) analysis." *Id.* Thus, the Court found that any witnesses associated with the newly accused product did not support transfer, even if credited, "the number of witnesses in the NDCA far outweigh[ed]" those in Austin. *Id.*

The Federal Circuit in *In re Amazon* elevated *Phoji*'s "sympathetic" treatment of the apparent venue manipulation to a *requirement* that courts "guard against" such tactics. *In re Amazon*, 2022 WL 17688072, at *3. Emphasizing that venue is "determined at the date of filing," the Court added that, even if post-motion events are relevant, post-motion pleading amendments often constitute "an impermissible attempt at venue manipulation" and are highly "suspect." *Id.* Thus, the Court declined to consider the plaintiff's post-filing, post-motion amendments because they appeared designed to manipulate venue rather than engage with § 1404(a)'s promise of venue in a more convenient forum. The Federal Circuit had done the same in earlier cases. *See In re NetScout*, 2021 WL 4771756, at *5 (disregarding plaintiff's filing of additional actions in this District post-transfer due to the apparent venue manipulation).

Similarly here, it was not until *after* Clover moved to transfer this case to NDCA that Plaintiff attempted to change the factual landscape relevant to the convenience of parties and

witnesses by amending its Complaint and PICs to accuse "technology with roots in Austin" (Clover Sport) for the first time. *Phoji*, 2022 WL 2392876 at *3 (W.D. Tex. July 1, 2022). In other words, Plaintiff accused Clover Sport (1) after Clover sought transfer; (2) after Clover sought a stay; and (3) after Clover (over Plaintiff's objection) expended time and resources to investigate venue based on the facts and claims as then pleaded. And when Clover amended its pleading, it accused Clover Sport with only the barest of factual pleadings.

Plaintiff's post-filing, post-motion amendment targeting Clover Sport implicates the same "venue manipulation" tactics at issue in *Phoji* (products accused post-motion), *In re Amazon* (defendants added post-motion), and *In re NetScout* (similar lawsuits filed post-motion). These facts give rise to more than simply "some suggestion" that Clover Sport was accused "primarily to affect the transfer analysis." *VoIP-Pal.com, Inc. v. Meta Platforms, Inc.*, 6:20-CV-00267-ADA, 2022 WL 3021522, at *1 (W.D. Tex. July 28, 2022). Because the post-motion pleading amendment appears designed to manipulate venue, venue discovery relating Clover Sport need not and should not be considered when analyzing the § 1404(a) factors.

C. Because Clover Sport Should Not Be Considered In The Court's § 1404(a) Analysis, A Protective Order Precluding Transfer Discovery On Clover Sport Is Warranted.

The depositions and discovery relating to Clover Sport that Plaintiff is seeking are well outside of the limited scope of transfer discovery that is permissible at this point in the case. The scope of transfer discovery is necessarily limited to matters fairly tailored to the public and private interest factors considered in a § 1404(a) analysis. Because evidence relating to Clover Sport should not be considered to decide Clover's pending Motion to Transfer, information relating to Clover Sport will not lead to the discovery of admissible evidence regarding the Original Accused Products and is disproportionate and unduly burdensome. *See Landry*, 901 F.2d at 435-36 (5th Cir. 1990).

The burden that transfer discovery related to Clover Sport would impose on Clover cannot be overstated. Plaintiff's Complaint offered little more than threadbare venue allegations. As a result, Clover was left with little more than the references to the Original Accused Products in the Complaint and PICs to undertake its own venue investigation. And based on its thorough internal venue investigation relating to the Original Accused Products, Clover determined that an overwhelming majority of the sources of proof and witnesses with knowledge of the Original Accused Products were in NDCA and then moved to transfer. Since Clover's Motion to Transfer was filed, Clover has responded to Plaintiff's first set of transfer discovery by providing information and records related to the Original Accused Products. Absent a protective order preventing discovery on Clover Sport, Clover will be forced to incur substantial expense and burden imposed by conducting a second internal venue investigation, amending its transfer discovery responses, and possibly supplementing the pending Motion to Transfer—all on matters that, under binding precedent, should not be afforded any weight in the ultimate transfer analysis. A protective order precluding discovery regarding Clover Sport is therefore necessary.

IV. CONCLUSION

For the reasons above, Clover respectfully moves the Court to grant this Motion and enter a Protective Order precluding discovery relating to Clover Sport, including but not limited to the depositions of Mr. Deane and Mr. Harker.

December 23 , 2022

Respectfully Submitted,

/s/ J. Stephen Ravel

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CERTIFICATE OF CONFERENCE

Counsel for Defendant conferred with counsel for Plaintiff who confirmed that Plaintiff is opposed to this Motion.

/s/ Kelly Ransom
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CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure, I hereby certify that the foregoing was filed with the Court and served via the Court's ECF E-Filing Service System on all counsel of record on December 23, 2022.

/s/ Caitlyn E. Hubbard
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