IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DDC TECHNOLOGY, LLC, Plaintiff, v. EMERGE TECHNOLOGIES, INC. (dba UTOPIA 360); STRUCTURAL GRAPHICS, LLC (dba RED PAPER PLANE); PYRITE VR LTD (dba MAXBOX VR); HMD TECH SARL (dba HOMIDO); LANDSBERG ORORA; and GOOGLE LLC, Defendants.	§ § § § § § § § § § § § § § §	CIVIL ACTION NO. 3:22-cv-01263-B

DEFENDANT GOOGLE LLC'S MOTION TO TRANSFER VENUE TO THE NORTHERN DISTRICT OF CALIFORNIA UNDER 28 U.S.C. § 1404(a) AND TO SEVER ITS CASE, TOGETHER WITH SUPPORTING BRIEF

Pursuant to 28 U.S.C. § 1404(a), Defendant Google LLC ("Google") moves the Court to transfer venue to the Northern District of California, and to sever Plaintiff's claims against Google.

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I. INTRODUCTION

Defendant Google LLC ("Google") respectfully moves to transfer DDC Technology, LLC's ("DDC") claims against Google to the Northern District of California ("NDCA") pursuant to 28 U.S.C. § 1404(a) and to sever those claims.

DDC's claims against Google have multiple ties to the NDCA, but none to this District. Witnesses for *both* Google and DDC are located in California, mostly in the NDCA. These witnesses include all of the Google employees knowledgeable about the accused product, Google's Cardboard Version 2 viewer, including the three employees specifically identified in DDC's Complaint and six others identified in this motion. Similarly, based on public information, it appears that DDC's own likely witnesses—employees of DODOcase VR (the prior owner of the asserted patents) including Patrick Buckley, the sole named inventor of all five patents—are located in the NDCA. That these witnesses are all located in the NDCA is not surprising because all of the events relevant to this case took place in the NDCA, including: the conception of the asserted patents; development and manufacture of DODOcase VR's practicing products; development of Google's accused Cardboard viewers; and alleged pre-suit communications between Mr. Buckley and Google employees that underlie DDC's willfulness allegations. By comparison, DDC's claims against Google have no connection to the Northern District of Texas ("NDTX"). Compared to the many relevant witnesses in the NDCA, ***zero*** are in the NDTX.

The locations of the five other co-defendants in this action—Emerge Technologies, Inc., Structural Graphics, LLC, Pyrite Vr Ltd, HMD TECH SARL, and Landsberg Orora—even if considered, do not favor keeping Google in this District. Only one, Emerge, is located in the NDTX, and DDC's allegations against Emerge are based on Emerge's own products, which are unrelated to Google's Cardboard viewers. The other four are all outside of Texas and have no relevant connection to the state. Notably, Landsberg is based out of California and has moved to

dismiss for lack of personal jurisdiction and improper venue precisely because it lacks any personnel, operations, offices, or property in Texas.

Indeed, DDC's joinder of all six named defendants in this single lawsuit is improper under the patent joinder statute, 35 U.S.C. § 299, and is nothing more than an effort to manipulate venue. There is virtually no connection between Google and the other defendants beyond their alleged infringement of the commonly-asserted patents. Among other things, each of the other defendants is being sued based on different products that each defendant designs, makes, and sells on its own, and for which infringement and damages will be decided separately. Accordingly, pursuant to § 299 and to facilitate transfer to the clearly more convenient forum of the NDCA, DDC's claims against Google should be severed from its claims against the other five defendants.

I. FACTUAL BACKGROUND

A. DDC's Allegations Against Google Cardboard Viewers

On June 10, 2022, DDC filed its Complaint alleging infringement of five related patents: U.S. Patent Nos. 9,420,075 ("the '075 Patent"); 9,811,184 ("the '184 Patent"); 10,528,199 ("the '199 Patent"); 11,093,000 ("the '000 Patent"); and 11,093,001 ("the '001 Patent") (collectively "Patents-in-Suit"). Dkt. 1. DDC alleges that Google infringes each patent (1) directly by making, using, and selling Google's Cardboard Version 2 virtual reality viewers ("Cardboard V2 Viewer"), and (2) indirectly by inducing infringement through the dissemination to third parties of guidelines for making virtual reality ("VR") viewers as part of Google's Works with Google Cardboard ("WWGC") program. *Id.* at ¶¶ 137, 251-52, 260, 329-30, 339, 438-39, 503-04, 598-99.

While the WWGC program was operational,[1] under the program, third-party companies could make and sell their own cardboard VR viewers following Google's WWGC design

[1] As alleged in the Complaint, Google ended the WWGC program and the sales of its own Cardboard viewers by no later than March 2021. Dkt. 1 at ¶ 66.

guidelines, and those third parties could apply to become certified members of the WWGC program. *See, e.g.*, Dkt. 1-15 at 7 (Applying to WWGC Program). Certified program members were given permission to market their viewers' compatibility with VR applications. *See, e.g.*, Dkt. 1-15 at 2 ("'Works with Google Cardboard' Program has been designed to indicate to users that a given virtual reality viewer . . . works well with thousands of applications.").

DDC accuses four of the five defendants—Structural Graphics, Pyrite, HMD (dba Homido), and Landsberg—of infringing the Patents-in-Suit by allegedly making and selling their own VR viewers in compliance with the WWGC guidelines. Dkt. 1 at ¶¶ 76, 81, 87, 94, 100.

B. Google And Its Accused Activities Relating To Cardboard Are In California

Google is based in California with its principal place of business in Mountain View, California. APPX003. Google's Mountain View headquarters is the strategic center of Google's business. As of the filing of the Complaint in June 2022, Mountain View housed thousands of employees making up over 37% of Google's total U.S. employees. *Id*. Google has additional offices in San Francisco and other locations in the NDCA, such that approximately 48% of Google's U.S. employees are employed out of offices within the NDCA. *Id*.

The vast majority of the Google employees with relevant technical, business, and marketing knowledge about Google Cardboard and the WWGC program, including those witnesses specifically identified in the Complaint, are based in California. *Id*. The employees with the most relevant knowledge are identified in the table below. *See also* APPX004-006.

Witness	Relevant Knowledge	Location At Time Of Complaint Filing
Alex Kauffmann	Identified by DDC in the Complaint. Development and technical knowledge of Google Cardboard; pre-suit communications between Google and DODOcase.	San Francisco, CA

Clay Bavor	Identified by DDC in the Complaint. Development and technical knowledge of Google Cardboard; pre-suit communications between Google and DODOcase.	Mountain View, CA
Andrew Nartker	Identified by DDC in the Complaint. Development and technical knowledge of Google Cardboard; pre-suit communications between Google and DODOcase.	Mountain View, CA and working remotely from Colorado
Erik Goossens	Development and technical knowledge of Google Cardboard.	San Francisco, CA
Kinnari Jhaveri	Pre-suit communications between Google and DODOcase; WWGC program and business and marketing aspects of Google Cardboard	San Francisco, CA
Nina Hoang	WWGC program and business and marketing aspects of Google Cardboard.	San Francisco, CA
Sarah Steele	WWGC program and business and manufacturing aspects of Google Cardboard	Working remotely from California
Roy Pak	WWGC program and business and marketing aspects of Google Cardboard	Los Angeles, CA
Trevor Claiborne	Business and marketing aspects of Google Cardboard	Mountain View, CA and working remotely from California

All technical, financial, and marketing documents related to Google Cardboard and the WWGC Program are created and maintained in California. APPX007. Technical documents regarding Cardboard viewers will be relevant not only to Google's non-infringement defenses, but also to invalidity. In particular, Google expects to use technical documentation associated with the development of Version 1 (V1) of the Cardboard viewer (the predecessor to the accused Cardboard V2 Viewer) as prior art to support Google's invalidity defenses, as that development predated the July 16, 2014 claimed priority date of the Patents-in-Suit.

Although Google has an office in Addison, Texas, and other offices in Texas, Google is not aware of any employees in Texas who have any relevant knowledge about Google Cardboard or the WWGC Program. *Id*.

C. Plaintiff DDC And Its Interested Parties Have No Ties To The NDTX

DDC is a Delaware company with a principal place of business in Austin, Texas, outside of this District. Dkt. 1 at ¶ 2. DDC was assigned the '075, '184, and '199 Patents from DODOcase VR in 2018. APPX015-017. DDC subsequently filed the applications that led to the '000 and '001 Patents. APPX025, APPX036. Apart from holding and attempting to monetize DODOcase VR's patents, DDC does not appear to have any operations.

DDC has identified DODOcase VR and DDC's counsel, Haller Law PLLC and Noble IP LLC, as holding financial interests in the outcome of this litigation. Dkt. 2. None of those parties is located in Texas. Rather, based on public sources, DODOcase VR is based in San Francisco, while Haller and Noble are both in Chicago. APPX091, APPX094; Dkt. 1 at p. 116.

DODOcase VR's current and former employees are also in California. Public sources show that Patrick Buckley, co-founder of DODOcase VR and the only inventor named on all five Patents-in-Suit, is located in San Francisco (in the NDCA), and Craig Dalton, the former CEO of DODOcase VR, is located in Mill Valley, California (also in the NDCA). APPX041, APPX046, APPX050. Additionally, Gene Daly, an employee of DODOcase VR and one of three inventors (along with Mr. Buckley and Mr. Dalton) on a provisional application to which the Patents-in-Suit claim priority, is located in Alamo, California (in the NDCA). APPX060-064; APPX068.

D. Co-Defendant Landsberg And Relevant Third Parties Are In California

Co-defendant Landsberg is based in Buena Park, California, and has no employees, operations, offices, or any real or personal property in Texas. Dkt. 68 at 1-2. Although DDC

accuses Landsberg of infringement based on its manufacture of Google Cardboard V2 Viewers, Landsberg has filed a Rule 12 motion to dismiss, explaining that it does not manufacture any products, let alone the accused Google Cardboard V2 Viewers. *Id*.

Former Google employee Dontae Rayford, who is named in the Complaint and was involved in the WWGC program, is presently located in Los Angeles, California based on public sources. Dkt. 1 at ¶¶ 40, 46; APPX076.

Another relevant third party, MerchSource, LLC, is located in Irvine, California. APPX088. MerchSource is a licensee of the Patents-in-Suit who DDC/DODOCase VR previously sued in the NDCA, seeking an injunction to prevent breach of a license agreement and infringement and a declaratory judgment of validity and enforceability of two Patents-in-Suit, the ’075 and ’184 Patents. That litigation lasted for three years, and the NDCA was the venue specifically selected by DODOcase VR in the forum selection clause of its license agreement with MerchSource. APPX143-145. During that litigation, MerchSource raised several patent defenses and counterclaims, including invalidity and non-infringement. APPX134-139. While DODOcase VR initiated suit, DDC was later added as a co-plaintiff. APPX125 (see docket entry 98).

E. Alleged And Relevant Pre-Suit Events All Took Place In California

The Complaint makes several allegations regarding pre-suit interactions between Google and the original assignee DODOcase VR and about the historical development of the accused Google Cardboard products, the WWGC program, and DODOcase VR’s own cardboard viewer. Dkt. 1 at ¶¶ 25-62. Each and every one of those events took place in the NDCA. In particular:

(1) Google’s June 2014 I/O Conference, where Cardboard was allegedly first launched, took place in San Francisco, Dkt. 1 at ¶¶ 25-26; APPX071;

(2) Current and former Google employees, Messrs. Nartker, Bavor, Kauffmann, and Rayford, allegedly communicated or met with Mr. Buckley or other DODOCase employees in San Francisco, Dkt. 1 at ¶¶ 27-33, 40, 46; APPX004, APPX006;

(3) DODOcase VR and Mr. Buckley allegedly developed and manufactured their own "DODO" VR viewer in San Francisco, Dkt. 1 at ¶¶ 6, 35-36; APPX041, APPX046, APPX091, APPX094;

(4) Google employees developed Google Cardboard (both the accused V2 and predecessor V1) and guidelines and best practices for the WWGC program from Google's offices in the NDCA, Dkt. 1 at ¶¶ 37-39, 43-45, 48, 50-65; APPX007; and

(5) Google administered the WWGC program, including accepting DODOcase VR into the program, from its offices in the NDCA, Dkt. 1 at ¶¶ 40-42; APPX006-007.

Further, in response to *inter partes* review proceedings filed by MerchSource challenging the validity of the '075 and '184 Patents, DODOcase VR attempted to antedate the prior art by pointing to its own DODO viewer that was developed in the NDCA, as discussed above. Among other things, DODOcase VR identified a presentation of the DODO viewer given by Mr. Buckley at an industry meeting in Silicon Valley (in the NDCA) in August 2014. APPX099.

II. LEGAL STANDARD

In patent cases, motions to transfer under 28 U.S.C. § 1404(a) are governed by the law of the regional circuit, here the Fifth Circuit. *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008). The first question under Section 1404(a) is whether a civil action "might have been brought" in the proposed transferee district. *In re Volkswagen, Inc.*, 545 F.3d 304, 312 (5th Cir. 2008) ("*Volkswagen II*").

If the destination venue would have been a proper venue, then "[t]he determination of 'convenience' turns on a number of public and private interest factors, none of which can be said to be of dispositive weight." *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004). The private factors include: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious

and inexpensive." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*Volkswagen I*") (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1982)). The public factors include: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law." *Volkswagen I*, 371 F.3d at 203.

Plaintiff's choice of forum is not a separate factor entitled to special weight. Rather, respect for the plaintiff's choice of forum is encompassed in the movant's burden to demonstrate that the proposed transferee forum is "clearly more convenient." *Volkswagen II*, 545 F.3d at 314-15.

III. THE NDCA IS CLEARLY MORE CONVENIENT

A. This Case Could Have Been Brought In The NDCA

A patent infringement case may be brought in "the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b); *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1519 (2017). Google is headquartered in Mountain View, California, in the NDCA. APPX003. Thus, the claims against Google could have been brought in the NDCA.

B. The Private Interest Factors Favor Transfer To The NDCA

1. Cost Of Attendance For Willing Witnesses Heavily Favors Transfer

"The convenience of witnesses is oft-considered the most important factor in the transfer analysis." *Salinas v. O'Reilly Auto., Inc.*, 358 F. Supp. 2d 569, 572 (N.D. Tex. 2005). The Fifth Circuit has established the "100 mile rule" that requires "[w]hen the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be

traveled." *Volkswagen II*, 545 F.3d at 317. This factor includes consideration of additional travel time, meal, lodging expenses, and time away from regular employment. *Volkswagen I*, 371 F.3d at 205. The personal costs associated with being away from family and community should also be considered. *In re Acer Am. Corp.*, 626 F.3d 1252, 1255 (Fed. Cir. 2010).

Google is not aware of—and the Complaint does not identify—any potential witnesses residing in the NDTX or for whom proceedings would be more convenient if a trial was held here.

In contrast, at least ten relevant, willing witnesses for both Google and DDC are located in California. Specifically, three Google employees who developed the Cardboard viewers (both V1 and the accused V2) and are identified in the Complaint as having allegedly interacted with DODOcase VR—Alex Kauffman, Andrew Nartker, and Clay Bavor—all were and are located in the NDCA. APPX004; Dkt. 1 at ¶¶ 27-34. Other relevant Google employees—including engineer Erik Goossens, who worked on accused features of the Cardboard V2 Viewer, and Kinnari Jhaveri, Nina Hoang, Sarah Steele, Roy Pak, and Trevor Claiborne, who worked on business development, marketing and administration for Cardboard and the WWGC program—are also in the NDCA or other locations in California. APPX004-006.

Even DDC's three likely witnesses appear to be located in the NDCA. DODOcase VR—who is the prior assignee of the patents and predecessor to DDC, and who retains an interest in the outcome of this litigation (Dkt. 2, and Dkt. 1 at ¶8)—is located in San Francisco, and Google expects DODOcase VR's current and former employees to be willing witnesses on DDC's behalf.[2] APPX091; APPX094. Among those employees, Mr. Buckley, the named inventor of the Patents-in-Suit, is located in the NDCA based on public sources. APPX041, APPX046. As are Mr. Daly

[2] To the extent that DODOcase VR's current or former employees are unwilling witnesses, they would be counted under the compulsory process factor discussed in Section III.B.3, *infra*, where their locations within the NDCA would similarly favor transfer.

and Mr. Dalton (DODOcase's co-founder and longtime CEO), both of whom are listed, along with Mr. Buckley, as inventors on the provisional applications to which the Patents-in-Suit claim priority. APPX050, APPX068. These witnesses are knowledgeable about the patents, DODOcase VR's own VR viewer products, and alleged pre-suit interactions with Google.

Co-defendant Landsberg is also based in California, and its Rule 12 motion explains that it has no employees, operations, offices, or property in Texas. Dkt. 68 at 1-2.

The convenience of these potential trial witnesses favors transfer to the NDCA, as it is well established that "it is more convenient [] to testify at home." *See Volkswagen II*, 545 F.3d at 317. Traveling to Dallas from the Bay Area would require almost four hours of flight time, not including time spent traveling to and from the airport. APPX101-103. The long trips and overnight stays in Dallas would lead to lost productivity and disruption to the witnesses' lives while "being away from work, family, and community." *Volkswagen II*, 545 F.3d at 317. By contrast, if this case is transferred to the NDCA, both Google's and DDC's witnesses could readily travel back and forth between court and their homes—a "thirty minutes [to] an hour" commute—as compared to traveling four hours to Dallas. *See Volkswagen I*, 371 F.3d at 205 ("[T]he task of scheduling fact witnesses so as to minimize the time when they are removed from their regular work or home responsibilities gets increasingly difficult and complicated when the travel time from their home or work site to the court facility is five or six hours one-way as opposed to 30 minutes or an hour.").

Because at least ***ten*** witnesses for both Google and DDC are in the NDCA, while ***zero*** witnesses reside in NDTX, this factor strongly favors transfer. *See, e.g.*, *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) (holding that where "a substantial number of material witnesses reside within the transferee venue . . . and no witnesses reside within the [transferor venue], . . . this factor [] weigh[s] substantially in favor of transfer").

2. Relative Ease Of Access To Sources Of Proof Favors Transfer

Ordinarily, "[i]n patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer." *Genentech*, 566 F.3d at 1345. "Although the technological convenience of e-discovery may diminish concerns associated with the location of evidence, it does not negate the significance of or eliminate consideration of this factor in a section 1404(a) transfer analysis." *Word to Info, Inc. v. Facebook, Inc.*, No. 3:14-CV-4387-K, 2015 WL 13870507, at *3 (N.D. Tex. July 23, 2015). The Federal Circuit has held that electronic sources of proof are relatively more easily accessed from where they were created and stored. *In re Apple Inc.*, No. 2022-128, 2022 WL 1196768 at *4 (Fed. Cir. Apr. 22, 2022).

Here, the relevant sources of proof are created and maintained in California. Google's documents relating to the accused Cardboard products, as well as the WWGC program, were created and are maintained by Google's employees in California, mainly in the NDCA. APPX007. Similarly, prior art documents based on Google's early development of Cardboard V1 viewers before July 2014 were also created and are maintained in the NDCA.

Even DDC's likely relevant documents—those relating to its Complaint's allegations and the Patents-in-Suit—are likely to be in the NDCA with DODOcase VR. Specifically, documents relating to the development of the Patents-in-Suit, DODOcase VR's own practicing VR viewer products, and alleged pre-suit interactions with Google are all expected to be in the NDCA, where DODOcase VR is located and where those events took place. *See* Sections I.D and I.E, *supra*.

DDC has not alleged that it has any physical presence in the NDTX. To the extent that DDC alleges having relevant sources of proof in Austin, where it claims to have its principal place of business (Dkt. 1 at ¶ 2), that is irrelevant to the transfer analysis, as Austin is located in the Western District of Texas, outside this District. *In re Toyota Motor Corp.*, 747 F.3d 1338, 1340

(Fed. Cir. 2014) ("The comparison between the transferor and transferee forums is ***not altered*** by the presence of other witnesses and documents in places ***outside both forums***") (emphasis added); *see also WSOU Investments, LLC v. Microsoft Corp.*, No. 6:20-CV-00454-ADA, 2021 WL 1298935, at *3 (W.D. Tex. Apr. 7, 2021) ("The presence of relevant documentary evidence [outside both forums] is ***irrelevant*** when comparing the relative ease of access between the [forums].") (emphasis added).

Even considering DDC's Austin location, DDC is a non-practicing entity that simply acquired, holds, and attempts to monetize the Patents-in-Suit from DODOcase VR. DDC likely has no documents about the development of the patents, DODOcase VR's products, or any pre-suit interactions with Google. Instead, those documents are likely with DODOcase VR in the NDCA. The limited documents DDC may store in Austin, such as patent-related documents and corporate records, pale in volume compared to the documents that Google and DODOcase VR will need to produce from the NDCA and, thus, should not be given significant weight in the transfer analysis. *See In re Google LLC*, 2022-140, 2022 WL 1613192, at *4 (Fed. Cir. May 23, 2022) (finding that a non-practicing plaintiff's storage of "patent-related documents and corporate records at its office space in Marshall, Texas" only served to "establish a presence for forum selection for patent cases" and should not be "given significant weight" in the transfer analysis). This factor, therefore, weighs strongly in favor of transfer.

3. Availability Of Compulsory Process Favors Transfer

The "availability of compulsory process" factor "weigh[s] heavily in favor of transfer when more third-party witnesses reside within the transferee venue than reside in the transferor venue." *In re Apple, Inc.*, 581 F. App'x 886, 889 (Fed. Cir. 2014). This is because, under Federal Rule of Civil Procedure 45, a court may subpoena a person (a) within 100 miles of where a person resides

or works, or (b) within the state when the witness is a party, an officer of the party, or would not incur substantial expense to attend trial. Fed. R. Civ. P. 45(c)(1)(A)-(B).

Multiple relevant third parties are located in California. These include former Google employee Dontae Rayford, named in the Complaint as an administrator of the WWGC program who allegedly interacted with DODOcase VR, and, MerchSource, who was previously engaged in litigation and licensing with DODOcase VR/DDC and is thus relevant to licensing/damages issues. Dkt. 1 at ¶¶ 40, 46, 121, 123, 128-132; APPX076, APPX088. To the extent that any of DODOcase VR's current or former employees (e.g., Messrs. Buckley, Dalton, and Daly) are unwilling witnesses, such that they would be counted under this factor, they are all located in the NDCA. APPX041, APPX046, APPX050, APPX068. Google is not aware of any relevant third-party witnesses in the NDTX, or Texas more generally. Accordingly, this factor favors transfer.

4. All Other Practical Problems Associated With Trial Favor Transfer

When considering the private interest factors, courts must consider "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Volkswagen II*, 545 F.3d at 314. At the same time "garden-variety delay associated with transfer is not to be taken into consideration when ruling on a § 1404(a) motion to transfer." *In re Radmax*, 720 F.3d 285, 289 (Fed. Cir. 2013).

This case is in its early stages, so transfer would not prejudice DDC. Google only recently filed its Answer on September 13, while co-defendants Pyrite's and HMD's responses to the Complaint are not due until October 13, after the filing of this motion. Dkt. 54, 63, 70. Discovery has not opened and no case schedule has even been set. Accordingly, "any increase in judicial economy from the Court's experience in these early stages of litigation is likely to be limited." *Parus Holdings Inc. v. LG Elecs. Inc.*, No. 6:19-CV-00432-ADA, 2020 WL 4905809, at *7 (W.D.

Tex. Aug. 20, 2020); *see also Camatic Proprietary Ltd. v. Irwin Seating Co.*, No. 3:16-CV-0795-M, 2017 WL 2362029, at *6 (N.D. Tex. May 31, 2017) (finding this factor neutral where "the case is in its early stages, as fact discovery has not begun and claim construction has not occurred").

Meanwhile, the NDCA's prior experience with the asserted '075 and '184 Patents, to which the other three Patents-in-Suit are related, favors transfer. DDC's predecessor (and an interested party here), DODOcase VR, intentionally filed a prior lawsuit against MerchSource in the NDCA, to which DDC was later added as a plaintiff. *See DODOcase VR, Inc. v. MerchSource, LLC*, No. 3:17-cv-07088 (N.D. Cal.). In that case, DODOcase VR sought declaratory judgements of validity and enforceability of both the '075 and '184 Patents. APPX105-117. MerchSource responded with patent defenses, including non-infringement and invalidity. APPX134-139. That case lasted for three years and the docket has over 200 entries, including orders deciding several substantive, disputed motions. APPX120-131. For example, DDC filed motions for temporary restraining orders and other injunctive relief, with one motion noting that its prior licenses had forum selection clauses selecting courts in San Francisco to resolve any disputes. APPX143-145. The NDCA's familiarity with DDC and the patents, combined with DDC's apparent desire to litigate there, weighs in favor of transfer. *See, e.g.*, *In re EMC Corp.*, 501 F. App'x 973, 976 (Fed. Cir. 2013) (identifying "a district court's experience with a patent in prior litigation" as a "permissible consideration[] in ruling on a motion to transfer venue").

In this case, the fact that DDC has sued multiple defendants does not favor keeping the case in this District. In particular, that some defendants may remain in this District even if Google is properly transferred to the NDCA does not weigh against transfer because, "[w]hile judicial economy may be served by having the Court try cases that involve the same patents, cases involving the same patents but different defendants, products, and witnesses will not necessarily

be expedited by being in the same court." *Parkervision, Inc. v. Intel Corp.*, No. 6:20-CV-00108-ADA, 2021 WL 401989, *6 (W.D. Tex. Jan. 26, 2021). Indeed, "[a]llowing a plaintiff to manipulate venue by [suing multiple defendants] in one district would undermine the principals [*sic*] underpinning transfer law." *Kirsch Rsch. & Dev., LLC v. GAF Materials LLC*, No. 3:20-CV-1028-K, 2020 WL 5815911, at *4 (N.D. Tex. Sept. 30, 2020). Applying these principles in another Google case, the Federal Circuit granted mandamus relief, directing the district court to vacate its order denying Google's motion to transfer to the NDCA, finding that the district court "committed clear error by … allowing [] co-pending litigation to dominate" the court's transfer analysis. *In re Google Inc.*, No. 2017-107, 2017 WL 977038, at *2 (Fed. Cir. Feb. 23, 2017).

Even if the Court considers the other defendants in this action, that does not change the conclusion that the NDCA is a far more convenient forum for DDC's claims against Google. Among the six defendants, two—Google and Landsberg—are based in California. Only one is based in this District—Emerge. But Emerge was never a certified member of the WWGC program and makes non-cardboard viewers; thus its alleged infringing activities are wholly unrelated to the claims against Google. APPX007. None of the other defendants are based in Texas or even have any relevant connection to the state. Although DDC alleges that Structural Graphics—a Delaware LLC based in Essex, Connecticut—has a sales office in Dallas and a warehouse in Eagle Pass, Texas (Dkt. 1 at ¶ 10), DDC does not allege that either location has any connection to Structural's accused SleekPeeks products, and Eagle Pass is outside this District. And while DDC alleges that Landsberg has a place of business in Grapevine, Texas (Dkt. 1 at ¶ 13), Landsberg's pending Rule 12 motion to dismiss explains that the Grapevine location is for an unrelated affiliate, Orora Packaging, who does not manufacture any products and who Landsberg does not control. Dkt. 68 at 12; Dkt 68-1 at 4. Landsberg itself is a California company, headquartered in Buena Park,

California, has no employees or presence of any kind in Texas, and does not manufacture any products, let alone Google's accused V2 viewers. Dkt. 68 at 1-2. Thus, the locations of the other five defendants do not favor keeping the claims against Google in this District, and this factor favors transfer to the NDCA.

C. The Public Interest Factors Favor Transfer To The NDCA

1. The NDCA Has A Strong Local Interest

The "local interest" factor evaluates the "relevant factual connection between the events and the venue." *Leblanc v. C.R. England, Inc.*, 961 F. Supp. 2d 819, 832 (N.D. Tex. 2013) (Boyle, J.). In this manner, it takes into consideration the Fifth Circuit's recognition that "jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Volkswagen I*, 371 F.3d at 206.

The NDCA has a strong local interest in this case. Google was founded and maintains its headquarters and largest offices in the NDCA, where it designed the accused Cardboard viewers and managed the WWGC program. These facts weigh in favor of transfer. *See, e.g.*, *In re Samsung Elecs. Co.*, 2 F.4th 1371, 1380 (Fed. Cir. 2021) (finding a strong local interest in the district in which the accused products were "researched, designed, and developed").

Similarly, the Patents-in-Suit and their development originated in the NDCA, where the named inventor, Mr. Buckley, and his company DODOcase VR are located based on public sources. This fact also favors transfer. *See, e.g.*, *Acer Am.*, 626 F.3d at 1256 ("if there are significant connections between a particular venue and the events that gave rise to a suit, this factor should be weighed in that venue's favor"). Further, DDC's allegations of willful infringement are based on alleged interactions between Google and Mr. Buckley that all occurred in the NDCA, where those interactions "call[] into question the work and reputation of several individuals

residing in or near that district," adding to the strong local interest the NDCA already has in this case. *In re Hoffman-La Roche Inc.*, 587 F.3d 1333, 1336 (Fed. Cir. 2008).

By contrast, DDC has no employees or activities in this District. DDC's activities at its place of business in Austin appear limited to attempting to monetize DODOcase VR's patents, which originated from the NDCA. On similar facts in *In re Juniper Networks, Inc*., the Federal Circuit refused to give any weight to a non-practicing plaintiff's office in the transferor forum, where the "activities of the office are largely tied to bringing lawsuits" and the office had only two employees, one of whom was an "attorney responsible for litigation." 14 F.4th 1313, 1320 (Fed. Cir. 2021). Likewise here, DDC's ephemeral, litigation-driven connection to Austin does not give this District a location interest. This factor thus strongly favors transfer.

2. The Remaining Public Interest Factors Are Neutral

The time to final disposition is neutral. Based on statistics from the past 10 years, the median times to jury trial in patents cases in the NDCA and the NDTX are comparable—981 days in the NDTX versus 920 days in the NDCA. APPX147-148. Familiarity with the governing law is neutral, as both the NDCA and the NDTX are well versed in patent law. And because there is no prospect for any conflict of laws, the last public interest factor is also neutral.

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Because five of the private/public factors favor transfer to the NDCA while no factor disfavors transfer, the NDCA is clearly a more convenient forum than the NDTX.

IV. DDC'S CLAIMS AGAINST GOOGLE SHOULD BE SEVERED

As discussed, the NDCA is a clearly more convenient forum regardless of whether the other five defendants are considered. Indeed, DDC's joinder of the five other defendants in the same case with Google is nothing more than an improper attempt to manipulate venue and prevent

transfer to the NDCA. Such abusive behavior is precisely what the patent joinder statute, 35 U.S.C. § 299, was enacted to prevent. Thus, as detailed below, DDC's claims against Google should be severed under § 299 and to facilitate transfer.

A. The Joinder Requirements Of 35 U.S.C. § 299 Are Not Satisfied

DDC's joinder of the six defendants is improper under § 299, which permits joinder only if: "(1) any right to relief is asserted against the parties jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences relating to the making, using, importing into the United States, offering for sale, or selling of the ***same accused product*** or process; and (2) questions of fact common to all defendants or counterclaim defendants will arise in the action." 35 U.S.C. § 299 (emphasis added). The statute makes clear that "accused infringers may not be joined in one action as defendants or counterclaim defendants, or have their actions consolidated for trial, based solely on allegations that they each have infringed the patent or patents in suit." *Id*. But that is precisely what DDC has done here.

DDC's joinder of the six defendants fails the first element of § 299's joinder requirements because the defendants' accused products are different. DDC accuses each defendant of infringement based on ***its own*** VR viewers, which each defendant designs, makes, and sells on its own. Specifically, Emerge is accused based on its Utopia 360 headset (Dkt. 1 at ¶16); Structural Graphics is accused based on its SleekPeeks Cardboard Viewer (*id*. at ¶17); Pyrite is accused based on its "Maxbox" line of cardboard viewers (*id.* at ¶18); Homido is accused based on its Grab and V2 viewers (*id.* at ¶19); and Landsberg is accused based on its viewers, which the Complaint calls the "Landsberg Cardboard Viewer" (*id.* at ¶20), as well as its manufacture of viewers for Google, which is addressed below. Moreover, the main commonality among all six defendants is the overlap of the Patents-in-Suit, which is *per se* insufficient for joinder under § 299.

DDC may counter that joinder here is permitted because the co-defendants are members of Google's WWGC program and sell allegedly infringing viewers that Google certifies as compliant with Google's guidelines. But as an initial matter, some of the accused viewers are not even part of the WWGC program or certified by Google: Homido's accused "V2" viewer was never certified or part of the WWGC program. APPX007. As DDC itself concedes, the Utopia viewer offered by Emerge (the only Texas-based defendant) was never WWGC-certified, nor was it made from cardboard, and Emerge was never a certified member of the WWGC program. *Id.*; Dkt. 1 at ¶109. As to the other co-defendants, the mere fact that their viewers were certified in the WWGC program does not change the requirement that infringement must be evaluated separately for each defendant, by examining the specific features of those viewers and related evidence (e.g., technical documentation) unique to each defendant. Similarly, damages must be decided for each defendant separately, based on information (e.g., sales, financial data) unique to each defendant.

Multiple courts have found joinder improper and ordered severance in comparable circumstances, where co-defendants followed the same mandatory industry standard, or used the same supplied chip or software that formed the basis for the plaintiff's infringement allegations. In *Network-1 Sec. Sols., Inc. v. Alcatel-Lucent USA Inc.*, the court held that plaintiff's allegation that the accused devices of multiple co-defendants were all compliant with the same standard was not sufficient for joinder. No. 6:11-CV-492-LED-JDL, 2013 WL 12053123, at *2 (E.D. Tex. Jan. 17, 2013). The court in *Wi-Lan Inc. v. Alcatel-Lucent USA Inc.* severed claims against multiple handset manufacturers, despite the fact that each of the accused handsets included the same chips containing software that provided "functionality that is pertinent in establishing infringement." No. 6:10-CV-521, 2013 WL 12153578, at *2 (E.D. Tex. Mar. 18, 2013). And in *Motorola Mobility, Inc. v. Apple Inc.*, the court found that accused devices from HTC and Motorola were

not "the same" as required by § 299, despite allegations that each of them included the same Google software, "including applications such as Maps and Play Store—that is present in the same form on both HTC's and Motorola's accused devices." No. 1:10-CV-23580-RNS, 2012 WL 3113932, at *4 (S.D. Fla. July 31, 2012). The court concluded that "[t]he mere use of the Android platform by these competitors, and the mere allegation that the same or similar patents were infringed, does not satisfy the joinder standards of the AIA." *Id*. Likewise here, co-defendants' compliance with Google's WWGC guidelines and best practices is insufficient to warrant joinder.

Further, WWGC compliance only suggests that the co-defendants' viewers share certain basic features, not that they are the same in all material respects. Google's WWGC guidelines leave significant design choices to each defendant. Dkt. 1-15 (Works with Google Cardboard Guidelines and Best Practices). Indeed, in each count of direct infringement, DDC premises its allegations on the specific features of each defendant's accused products, rather than merely on a defendant's compliance with Google guidelines. *See, e.g.*, Dkt. 1 at ¶¶ 158-248 (counts for direct infringement of the '075 Patent). Thus, defendants' WWGC membership or compliance in no way satisfies § 299's requirements of having the "same accused product[s]" and "questions of fact common to all defendants." Rather, deciding infringement for each defendant will require a completely separate analysis of that defendant's own accused viewers, which are not identical to one another and have substantial differences as DDC's own allegations show. *See, e.g.*, *id*.

B. DDC's "Manufacture" Claims Against Landsberg Do Not Weigh Against Severing Claims Against Google

DDC alleges that because Landsberg manufactures some of Google's accused Cardboard V2 Viewers, Google and Landsberg should be held jointly and severally liable for alleged infringement by Google's V2 Cardboard Viewers. Dkt. 1 at ¶¶ 157, 178, 271, 283, 355, 372.

DDC's allegations regarding Landsberg, however, are wrong on the facts as Landsberg's Rule 12 motion to dismiss explains. Landsberg does not manufacture the Google V2 Cardboard viewer or any products for that matter. Dkt. 68 at 1-2. Beyond manufacture, DDC does not allege any other involvement that the named Landsberg defendant had with the accused Google V2 Cardboard viewers. Rather, DDC alleges only that Landsberg may have been involved with the design of the earlier V1 version of Cardboard—which is not accused. Dkt. 1 at ¶¶ 76, 78; *see also* Dkt. 68 at 20. DDC therefore lacks any basis for joining Landsberg to this lawsuit with Google.

At any rate, Landsberg is a California-incorporated company headquartered in Buena Park, California, with no employees, offices, operations, or property in Texas. *Id*. Thus, even if considered as a properly joined co-defendant in this lawsuit, Landsberg does not justify retaining DDC's claims against Google in this District.

C. The Overwhelming Convenience Of The NDCA Supports Severance

Beyond the requirements of § 299, severance is further warranted to facilitate transfer and safeguard the principles of fundamental fairness and convenience—principles the Federal Circuit has emphasized district courts have an obligation to protect. *In re Nintendo Co.*, 544 F. App'x 934, 942 (Fed. Cir. 2013) (directing district court to "sever[] for purposes of facilitating transfer of venue," reasoning that "the district court had an obligation to exercise its discretion to decide whether the action against the retailer defendants should have been severed . . . for purposes of fairness and convenience"). Here, the court should exercise its discretion to sever and transfer DDC's claims against Google to prevent DDC from thwarting the purpose of Section 1404.

Google is the primary focus of DDC's infringement allegations. DDC's Complaint includes 181 paragraphs of allegations concerning Google, including allegations about Google's original development of Cardboard, the WWGC program, and Google's alleged pre-suit

interactions with DODOcase—all events that occurred in the NDCA. *E.g.*, Dkt. 1 at ¶¶ 25-75, 120-135. The Complaint contains no such allegations against the other five defendants. Instead, the claims against the other five defendants are peripheral to those against Google and appear to have been added merely to try to secure venue in this District and prevent transfer to the far more convenient forum of the NDCA. Such abuse of joinder in an attempt to fabricate venue is exactly why § 299 was enacted as part of the AIA patent reform in 2011. *See, e.g.*, H.R. Rep. No. 112-98, pt. 1, at 54 n.61 (2011) (joinder under the AIA is more stringent than joinder pursuant to Federal Rule 20, as the Act was designed to address "problems occasioned by the joinder of defendants who have tenuous connections"); 157 Cong. Rec. 9,778 (2011) (statement of Rep. Goodlatte) (stating that § 299 was intended to "end[] the abusive practice of treating as codefendants parties who make completely different products").

As demonstrated above, DDC's claims against Google have no connection to the NDTX, and the NDCA is the clearly more convenient venue. That fact alone is sufficient to support severing DDC's claims against Google to facilitate their transfer to the NDCA. *See, e.g.*, *Nintendo*, 544 F. App'x at 940 (holding that courts have "considerable latitude to order severance solely for purposes of facilitating transfer"); *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984), *overruled on other grounds In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987) (recognizing that a district court may sever and transfer claims against one co-defendant to a clearly more convenient venue where those claims may have been brought, while the district court retains claims against another co-defendant).

V. CONCLUSION

Because five transfer factors (including all four private factors) favor transfer to the NDCA and no factor weighs against transfer, this case should be transferred. And both to remedy DDC's

improper joinder and to facilitate transfer, DDC's claims against Google should be severed from DDC's claims against the other five defendants.

Dated: November 10, 2022

/s/ Mark Liang

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CERTIFICATE OF CONFERENCE

On September 16, 2022, counsel Mark Liang for Defendant met and conferred telephonically with counsel Tim Haller and Gabriel Opatken for Plaintiff. During the meet and confer, the parties discussed the merits of the Motion for over thirty minutes and Plaintiff stated that it opposed to the relief sought by this Motion.

November 10, 2022 /s/ *Mark Liang*
Mark Liang

CERTIFICATE OF SERVICE

I hereby certify that, on November 10, 2022, all counsel of record who have appeared in this case are being served with a copy of the foregoing via the Court's CM/ECF system.

Dated: November 10, 2022 /s/ *Mark Liang*
Mark Liang