

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

WIRELESSWERX IP, LLC,

Plaintiff,

v.

GOOGLE, LLC,

Defendant.

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6:22-CV-1056-RP

ORDER

Before the Court is a motion to transfer filed by Defendant Google, LLC (“Google”). (Dkt. 31). Plaintiff WirelessWerx IP, LLC (“Plaintiff”) filed a response, (Dkt. 46), and Google filed a reply, (Dkt. 48).¹ Having considered the parties’ briefs, the record, and the relevant law, the Court finds that the motion should be granted.

I. BACKGROUND

Plaintiff filed its complaint on October 7, 2022, in the Waco Division of the Western District of Texas. (Compl., Dkt. 1). Plaintiff alleges that various technologies related to Google Maps infringe U.S. Patent No. 8,314,203. (*Id.*). Google filed a motion to dismiss on December 19, 2022. (Mot. Dismiss, Dkt. 16). Two months later, on February 23, 2023, Google filed an opposed motion to transfer, arguing that this Court should transfer the case to the Northern District of California. (Mot. Transfer, Dkt. 31). Google argues that key witnesses related to the allegedly infringing technologies are located in the Northern District of California. (*Id.* at 1). Google further argues the relevant documents and third-party witnesses are also primarily located in California, while only one third-party witness is located in Texas. (*Id.* at 1–5). Finally, Google contends that the

¹ Google also filed a sealed unredacted motion to transfer, (Dkt. 34), with minor identifying details about witnesses. Google has also filed a motion to file a sealed reply, (Dkt. 47-2).

public interest factors weigh in favor of transfer, because there is a local interest in having Google's technology adjudicated in the place where it is developed and maintained. (*Id.* at 14).

II. LEGAL STANDARD

Section 1404 provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a). As such, “[t]he threshold question in applying the provisions of § 1404(a) is whether the suit could have been brought in the proposed transferee district.” *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (“*Volkswagen P*”). If so, the Court turns to consideration of “all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.” *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) (quoting 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3847, at 370 (1986)).

The relevant factors include matters of both private and public interest. *Volkswagen AG*, 371 F.3d at 203; *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004). The private-interest factors include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure witnesses’ attendance; (3) the willing witnesses’ cost of attendance; and (4) all other practical problems that make the case’s trial easy, expeditious, and inexpensive. *Volkswagen I*, 371 F.3d at 203 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)). The public-interest factors include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having local issues decided at home; (3) the forum’s familiarity with the governing law; and (4) the avoidance of unnecessary conflict-of-law problems involving the application of foreign law. *Id.* No single factor is dispositive. *Id.*

The Court must also “give some weight to the plaintiffs’ choice of forum.” *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 63 n.6 (2013). However, the plaintiffs

venue choice “is neither conclusive nor determinative. *In Re: Horseshoe Entertainment*, 337 F. 3d 429, 434 (5th Cir. 2003). Rather, the party seeking transfer must show “good cause”: a moving party, in order to support its claim for a transfer, must satisfy the statutory requirements and clearly demonstrate that a transfer is “[f]or the convenience of parties and witnesses, in the interest of justice.” *Humble Oil & Refining Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir. 1963). Thus, when the transferee venue is “not clearly more convenient than the venue chosen by the plaintiff, the plaintiff’s choice should be respected.” *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (“*Volkswagen IP*”). But when the movant demonstrates that the transferee venue is clearly more convenient, “it has shown good cause and the district court should therefore grant the transfer.” *Id.*

III. DISCUSSION

A. Whether the Case Could Have Been Brought in the Northern District of California

“The preliminary question under 1404(a) is whether a civil action ‘might have been brought’ in the destination venue.” *Volkswagen II*, 545 F.3d at 312. In other words, a movant must show that venue and jurisdiction would have been proper in the transferee forum when the plaintiff filed suit. *XR Commc’ns, LLC v. Google LLC*, No. 6:21-CV-00625-ADA, 2022 WL 3702271, at *2 (W.D. Tex. Aug. 26, 2022). Plaintiff does not dispute that venue and jurisdiction would have been proper in the Northern District of California. (Pl.’s Resp., Dkt. 46, at 4). Google is subject to jurisdiction in California for the purposes of this suit, (Mot. Dismiss, Dkt. 31, at 12), and for the reasons discussed below, venue is appropriate in the district. Therefore, the preliminary question is satisfied.

B. Private Interest Factors

The private-interest factors include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure witnesses’ attendance; (3) the willing witnesses’ cost of attendance; and (4) all other practical problems that make the case’s trial easy, expeditious, and inexpensive. *Volkswagen I*, 371 F.3d at 203. The Court will address each in turn.

1. Relative Ease of Access to Proof

“In considering the relative ease of access to proof, a court looks to where documentary evidence, such as documents and physical evidence, is stored.” *WAG Acquisition, L.L.C. v. Google LLC*, No. W-21-CV-00816-ADA, 2022 WL 9569437, at *3 (W.D. Tex. Oct. 5, 2022). In “patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer.” *In re Nintendo*, 589 F.3d 1194, 1199 (Fed. Cir. 2009) (citing *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009)). “Consequently, the place where the defendant’s documents are kept weighs in favor of transfer to that location.” *In re Apple Inc.*, 979 F.3d 1332, 1340 (Fed. Cir. 2020) (citing *In re Genentech*, 566 F.3d at 1345). Google alleges that “[m]ost of the relevant documents about the accused features of Google Indoor Maps and Geolocation . . . were primarily created and/or maintained in” the Northern District of California. (Mot. Transfer, Dkt. 31, at 7). Three employees signed declarations that their documents are in the Northern District of California. (*Id.*). The remaining documents are neither in California nor Texas. (*Id.*). Accordingly, the ease of access weighs in Google’s favor.

Plaintiff makes three arguments in response: (1) that Google maintains servers in Texas, (2) that the evidence is electronic and therefore can be readily accessed remotely, and (3) that Google failed to argue it would be easier to retrieve documents in California. (Pl.’s Resp., Dkt. 46, at 4–5). These arguments are unavailing. First, the Federal Circuit has cautioned against the notion that the location of data storage centers should render this factor less important. *See In re Google LLC*, 2021 WL 4427899, at *6 (Fed. Cir. Sept. 27, 2021) (“Nor does the fact that Google stores documents in electronic form at data centers around the country weigh in favor of holding trial in Texas.”); *see also In re Google LLC*, 949 F.3d 1338, 1340, 1346 (Fed. Cir. 2020) (maintaining physical equipment of Google servers is “meaningfully different from” producing, storing, and furnishing information on those servers).

Second, the fact that evidence is electronic does not mean that access is uniform in each district. See *WAG Acquisition, L.L.C. v. Google LLC*, 2022 WL 9569437, at *4 (W.D. Tex. Oct. 5, 2022) (citing *In re Apple Inc.*, 2022 WL 1196768, at * 4 (Fed. Cir. Apr. 22, 2022)); *In re Juniper Networks, Inc.*, 14 F.4th 1313, 1321 (Fed. Cir. 2021) (“electronic storage of documents . . . does not make the sources-of-proof factor irrelevant”). While ease of access may not weigh as heavily in favor of transfer as with physical data, the factor overall still weighs in favor of transfer.

Third, Google did state that access would be more readily available in the Northern District of California because the custodians of the relevant data and evidence are located there. As this Court has previously stated, “the Federal Circuit has held that it is an error not to also consider ‘the location of document custodians and location where documents are created and maintained, which may bear on the ease of retrieval.’” *WAG Acquisition*, 2022 WL 9569437, at *4 (quoting *In re Google*, 2021 WL 5292267, at *2 (Fed. Cir. Nov. 15, 2021)). Google presented strong evidence that physical access is easier in the Northern District of California, while Plaintiff provided evidence only of a single data center located in Midlothian, Texas. (Pl.’s Resp., Dkt. 46, at 5). Because both the data and its custodians are located in the Northern District of Texas, the factor weighs strongly in favor of transfer.

2. Availability of Compulsory Process to Secure Attendance

This factor focuses on “non-party witnesses whose attendance may need to be secured by a court order.” *Fintiv, Inc. v. Apple Inc.*, No. 6:18-CV-00372-ADA, 2019 WL 4743678, at *5 (W.D. Tex. Sept. 13, 2019) (citing *Volkswagen II*, 545 F.3d at 316). “When there is no indication that a non-party witness is willing, the witness is presumed to be unwilling and considered under the compulsory process factor.” *In re HP Inc.*, No. 2018-149, 2018 WL 4692486, at *3 n.1 (Fed. Cir. Sept. 25, 2018). A court may subpoena a witness to attend trial only (A) “within 100 miles of where the person resides, is employed, or regularly transacts business in person” or (B) “within the state where the

person resides, is employed, or regularly transacts business in person, if the person . . . is commanded to attend a trial and would not incur substantial expense.” Fed. R. Civ. P. 45(c)(1)(A), (B)(ii).

Google alleges that at least nine relevant third-party witnesses are subject to compulsory process in California. (Mot. Transfer, Dkt. 31, at 8–9). This includes the two named inventors of the ‘203 patent, as well as the prosecuting attorneys, and two relevant third-party companies. (*Id.*). Plaintiff contends that at least one potential witness resides in Houston, which favors keeping the case in Texas. (Pl.’s Resp., Dkt. 46, at 6). Plaintiff further argues that compulsory processes do not strongly favor the Northern District of California because many witnesses live in Southern California or Washington State. (*Id.*). The availability of one third-party witness in Texas does not negate the fact that nine witnesses are available in California. And while witnesses in Southern California may still incur costs to attend trial in the Northern District, this does not affect the availability of compulsory processes. Rule 45 authorizes the issuance of subpoenas to a person “within the state where the person resides,” so compulsory processes are available for those in California regardless of their location in the state. Therefore, the Northern District of California has subpoena power over those potential “unwilling witnesses” living in Southern California. While Plaintiff argues that “depositions may be conducted near the location of such potential witnesses,” the Fifth Circuit has held that a court should give greater weight to “a proper venue that enjoy[s] absolute subpoena power for both depositions and trial.” *Volkswagen II*, 545 F.3d at 316. Because the Northern District of California has subpoena power over at least eight more third-party witnesses than this Court, the factor weighs in favor of transfer. *In re Hulu, LLC*, 2021 WL 3278194, at *4 (Fed. Cir. Aug. 2, 2021) (citing *In re HP Inc.*, 2018 WL 4692486, at *3 n.1 (Fed. Cir. Sept. 25, 2018)).

3. Cost of Attendance

The cost of attendance focuses on willing witnesses, and the factor considers both party and non-party witnesses. *Vargas v. Seamar Divers Int'l, LLC*, No. 2:10-CV-178-TJW, 2011 WL 1980001, at *7 (E.D. Tex. May 20, 2011) (citing *Volkswagen I*, 371 F.3d at 204). This factor is often considered the most important factor to be considered in deciding whether to transfer venue. *Moss v. Lockheed Martin Corp.*, No. 3:10-CV-1659-M, 2011 WL 197624, at *5 (N.D. Tex. Jan. 18, 2011) (citing *AT&T Intellectual Prop. I L.P. v. Airbiquity Inc.*, No. 3:08-CV-1637-M, 2009 WL 774350, at *5 (N.D. Tex. Mar. 24, 2009)). The Fifth Circuit employs a “100-mile rule” which states that when “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 I*, 371 F.3d at 204–05. The Federal Circuit has stated that courts should not apply the rule rigidly if they will have to travel a significant distance regardless of the venues at stake. *In re Apple*, 979 F.3d at 1342.

The vast majority of witnesses are located in California, especially in the Northern District, while none are located in the Western District of Texas. (Mot. Transfer, Dkt. 31, at 10–11).² Plaintiff contends that Google has “cherry-picked” these witnesses for the purpose of making venue appear more convenient in California. (Pl.’s Resp., Dkt. 46, at 7). But there is simply no factual support suggesting these witnesses were cherry-picked. The far more apparent explanation is that the witnesses all reside in the Northern District of California because—as Google repeatedly emphasizes—that is where its relevant Google Maps products were created and maintained. (Mot. Transfer, Dkt. 31, at 1–3, 7). Google admits that some employees in its Austin office have knowledge of the products, which Plaintiff argues should weigh against transfer. (*Id.* at 12; Pl.’s Resp., Dkt. 46, at 8). But there is no reason to think that these employees will testify about the

² In its sealed motion, Google identifies the exact number of witnesses in each district. (See Mot. Transfer, Dkt. 34).

technology, and indeed, Google mentions them precisely to raise the point that they could offer only duplicative information to the primary witnesses in California. (Mot. Transfer, Dkt. 31, at 12).

Because the relevant witnesses are almost entirely located in California, especially within the Northern District, this “most important factor” weighs strongly in Google’s favor.

4. Other Problems

“When considering the private interest factors, courts must also consider “all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Volkswagen II*, 545 F.3d at 315. Plaintiff argues that this factor should weigh against transfer because Google has 35 pending patent infringement cases in the Western District of Texas, while WirelessWerx concurrently filed two other patent suits in the district with this case. (Pl.’s Resp., Dkt. 46, at 8); *WirelessWerx IP LLC v. Apple Inc.*, Case No. 6:22-cv-01050, Dkt. 17 (W.D. Tex. Jan. 18, 2023); *WirelessWerx IP LLC v. Uber Techs., Inc. d.b.a. Uber*, Case No. 6:22-cv-01060 (W.D. Tex. Jan. 17, 2023). However, these suits do not involve the same patent or products. *In re Apple Inc.*, 2021 WL 5291804, at *4 (Fed. Cir. Nov. 15, 2021). Moreover, Plaintiff’s case against Apple has been dismissed, while its case against Uber was jointly transferred to the Northern District of California. *WirelessWerx IP LLC v. Uber Techs., Inc. d.b.a. Uber*, Case No. 6:22-cv-01060, Dkt. 20 (W.D. Tex. Jan. 17, 2023). Overall, this factor is neutral, as there are no material problems weighing for or against transfer.

C. Public Interest Factors

1. Administrative Difficulties Flowing from Court Congestion

This factor concerns “whether there is an appreciable difference in docket congestion between the two forums.” *In re Adobe Inc.*, 823 F. App’x 929, 932 (Fed. Cir. 2020). The relevant inquiry under this factor is the “speed with which a case can come to trial and be resolved.” *In re Genentech*, 566 F.3d at 1347; *In re Apple*, 979 F.3d at 1343 (citations omitted). This factor is “the most speculative” and is given little weight compared to the other transfer factors. *XR Commc’ns*, 2022 WL

3702271, at *9 (citing *In re Genentech*, 566 F.3d at 1347). The Federal Circuit recently “noted that ‘the Western District of Texas and the Northern District of California show no significant differences in caseload or time-to-trial statistics.’” *In re Apple*, 2021 WL 5291804, at *4 (quoting *In re Juniper Networks*, 14 F.4th at 1322). Plaintiff claims that the Western District of Texas is actually three months faster in time-to-trial, but this is a statically insignificant amount. Moreover, the undersigned has a particularly busy civil caseload, with over 500 pending civil cases. Overall, the factor is neutral.

2. Local Interest

Under this factor, courts evaluate whether there is a local interest in deciding local issues at home. *Volkswagen II*, 545 F.3d at 315. The factor focuses on the “significant connections between a particular venue and the events that gave rise to a suit.” *In re Google*, 2021 WL 4427899, at *5 (internal citations omitted). While Google has an office in Austin, its headquarters is located in the Northern District of California. (Mot. Transfer, Dkt. 31, at 7). Under similar circumstances, courts in this district have found that the Northern District of California has a greater local interest in cases involving Google than the Western District of Texas. *See XR Commc’ns*, 2022 WL 3702271, at *9; *WAG Acquisition*, 2022 WL 9569437, at *8–9. While “Google has a general presence in this District,” a court “would clearly abuse its discretion in according any weight to it.” *XR Commc’ns*, 2022 WL 3702271, at *9 (citing *In re Apple Inc.*, No. 2022-137, 2022 WL 1676400, at *2 (Fed. Cir. May 26, 2022)) (emphasis in original).

As established *infra* Section III.B.1, the products at issue were created and maintained in the Northern District of California. The employees and documents related to their creation and use are located there. Accordingly, the Northern District of California has a cognizable interest in having the allegations brought against its companies decided in that district. Moreover, Plaintiff has little interest in litigating in the Western District of Texas, because it was formed shortly before filing suit by its trial counsel. (Mot. Transfer, Dkt. 31, at 14). The Federal Circuit has cautioned that “little or

no weight should be accorded to a party's 'recent and ephemeral' presence in the transferor forum, such as by establishing an office in order to claim a presence in the district for purposes of litigation." *In re Juniper Networks*, 14 F.4th at 1320 (quoting *In re Microsoft*, 630 F.3d 1361, 1365 (Fed. Cir. 2011)). Overall, this factor weighs in favor of transfer.

3. Familiarity with the Law and Conflict of Laws

Both parties agree that this factor is neutral. Plaintiff alleges violations only of federal patent law, and there are no issues involving conflict of laws. The factor weighs in neither direction.

D. Conclusion

For the reasons discussed above, the factors weigh overwhelmingly in favor of transfer. Four factors—the ease of access to proof, availability of compulsory processes, cost of attendance, and local interests—all weigh strongly in favor of transfer. Four factors—court congestion, familiarity of law, conflict of law, and miscellaneous problems—are neutral. None weigh in favor of keeping venue in the Western District of Texas. Therefore, because venue is clearly more convenient in the Northern District of California, the Court will grant Google's motion to transfer.

V. CONCLUSION

For the reasons given above, **IT IS ORDERED** that Google's Motion to Transfer Venue, (Dkt. 31, 34), is **GRANTED**.

IT IS FURTHER ORDERED that this case is **TRANSFERRED** to the Northern District of California.

IT IS FINALLY ORDERED that Google's motion to file a sealed reply, (Dkt. 47), is **MOOT**.

SIGNED on April 14, 2023.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE