UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

DIGITAL BROADCASTING SOLUTIONS LLC,	§	Case No. 2:22-cv-00335-JRG
Plaintiff,	§	
	§	
v.	§	
	§	
	§	JURY TRIAL DEMANDED
DISH NETWORK L.L.C.,	§	
Defendants.	§	

DEFENDANT DISH NETWORK L.L.C.'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION PURSUANT TO 28 U.S.C. § 1404(a) TO TRANSFER TO THE DISTRICT OF COLORADO

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I. INTRODUCTION

The parties' targeted venue discovery only strengthens DISH's motion to transfer this case to the District of Colorado (Dkt. 20). Without exception, the discovery has corroborated DISH's contention that Colorado is a clearly more convenient forum. DBS's assertions regarding potential documents and witnesses in this District have been affirmatively disproven. Moreover, discovery confirmed that no third-party witnesses identified by DBS have relevant information. Thus, nearly all of the relevant factors still weigh in favor of transfer.

II. ARGUMENT: VENUE DISCOVERY CONFIRMED THIS CASE SHOULD BE TRANSFERRED TO COLORADO

A. The Relevant Sources of Proof Are In Colorado

The parties' venue discovery has confirmed that this factor favors transfer, as the relevant sources of proof are in Colorado.[1] Despite extensive venue discovery, DBS still has nothing more than unsupported attorney argument to counter DISH's showing.

1. Discovery Confirmed the Relevant Evidence Is Overwhelmingly Found in Colorado

The discovery record disproves DBS's assertion that DISH's evidence "is dispersed across multiple venues." Dkt. 27 at 3. DISH admits that it does business across the nation and, thus, may have employees and documents dispersed throughout the United States. The parties' venue discovery, however, demonstrates that the *relevant* evidence in this case is located in Colorado.

[1] DISH's Venue Interrogatory No. 1 requested DBS to provide the "complete factual basis for [its] assertion that venue for this lawsuit would not be more convenient in the District of Colorado as compared to the Eastern District of Texas." Ex. A, DISH's Venue Interrogatories at 4. DBS's answer merely referred back to its transfer motion briefing and exhibits, and DBS never supplemented its answer, despite its obligation to supplement any interrogatory answer if it is incomplete. Ex. B, DBS's Rog Responses at 7; *see* Fed. R. Civ. Pro. 26. As such, DISH has attempted to anticipate other potential arguments that DBS might make in its responsive supplemental brief, but DISH reserves the right to seek leave to file a reply should DBS make any argument that DISH could not reasonably anticipate.

See In re DISH Network L.L.C. ("*In re DISH*"), No. 2021-182, 2021 WL 4911981, at *2 (Fed. Cir. Oct. 21, 2021) (finding Colorado is "the center of gravity" where the key witnesses who developed the accused products, the relevant documents, and the headquarters of DISH are all located in Colorado).

(i) DISH's Corporate Representative Confirmed the Relevant Witnesses, Documents, and Source Code Are in Colorado

DBS deposed DISH's corporate representative, Dan Minnick, DISH's Senior Vice President of Software Engineering, a 26-year DISH employee who oversees software development for all of DISH's set-top boxes, including for the accused AutoHop feature. Ex. C, Minnick Dep. Tr. at 12:14-20, 12:24-13:8. Mr. Minnick testified that his team in Colorado manages the functionality related to the AutoHop system. *Id.* at 131:4-10. He further testified that the Hopper set-top boxes were designed in Colorado and the relevant design schematics are stored in Colorado. *Id.* at 131:11-132:8. Mr. Minnick also confirmed that the AutoHop source code—for both the set-top boxes and related uplink tools—was written and is maintained in Colorado. *Id.* at 132:9-133:3. Thus, the pertinent evidence regarding questions of infringement is in Colorado.

(ii) Florida, Kentucky, and Pennsylvania Are Not Relevant

There are no systems or witnesses with relevant knowledge in Florida, Kentucky, or Pennsylvania.

for certain Florida, Pennsylvania, and Kentucky markets. Ex. D, DISH00007934 at 7956-7957; Ex. E, DISH's Rog Responses at 7-8. These set-top boxes were used to confirm that the markings of the show segment starts and stops were accurate and that the AutoHop feature was functioning properly, but DISH discontinued this Q/A process in 2012. *Id.* Thus, DBS's conjecture regarding witnesses or documents in Florida, Kentucky, and Pennsylvania was

unfounded and should be ignored as irrelevant.

(iii) Mr. Fitzsimmons Has No Meaningful Ties to Texas

DBS argues that Mr. Fitzsimmons' alleged business relationships in Texas weigh against transfer. Dkt. 27 at 3-4. Not so. Mr. Fitzsimmons has never lived in Texas (Ex. F, Fitzsimmons Dep. Tr. at 95:23-96:3), owns no real property in Texas (*id.* at 122:5-9), has never attempted to license the Asserted Patents to anyone in Texas (*id.* at 117:16-118:3), and has never sold a product or performed a service covered by the Asserted Patents in Texas (*id.* at 120:18-121:5). The Asserted Patents were conceived and reduced to practice outside of Texas, and any notes regarding the conception, reduction to practice, or prosecution of the Asserted Patents would only have been transferred to Texas in connection with filing this litigation. *Id.* at 98:2-13, 94:5-95:2. Thus, DBS's arguments that Mr. Fitzsimmons' ties to Texas weigh against transfer are meritless.

2. Any Relevant Evidence in Wyoming Is Equally Available in Colorado

DBS argues that DISH's facilities in Cheyenne, Wyoming have relevant evidence, but such evidence is of limited relevance and, in any event, equally accessible in Colorado.

Ex. E, DISH's Rog Responses at 7. is available in DISH's facilities in Colorado, along with witnesses with knowledge about that process. For example, . Ex. C, Minnick Dep. Tr. at 65:21-66:7. Other individuals in Colorado, too, like Ex. D, DISH00007934 at 7953-7956.

3. DISH's Facilities, Employees, and Retailers in This District Are Not Relevant

Venue discovery demonstrated that DISH's facilities in this District do not have relevant evidence. First, DISH's Local Receive Facilities ("LRFs") have no relevance to the accused AutoHop functionality. LRFs

See Ex. C, Minnick Dep. Tr. at 63:2-6; 65:15-20

. The claims of the Asserted Patents cover the operation of end-user devices, not the process by which content is collected and transmitted to those devices. Further, there are over nearly identical LRFs throughout the country, including in Colorado, so even if DBS were correct that the LRFs are relevant, there is nothing unique about LRFs in Texas that would weigh against transfer. *Id*. at 65:1-14; 133:4-13.

Further, DISH's Authorized Retailers handle only approximately [redacted] of DISH's total sales and installations. *Id*. at 28:24-29:4. They have no relationship to, or special knowledge of, the accused AutoHop functionality. Indeed, DBS subpoenaed a retailer in this District, whose testimony and document production confirmed it only has [redacted], none of which discuss AutoHop. Ex. G, Baughman Dep. Tr. at 48:21-51:2. Authorized retailers in this District have access to the same information and do the same work as all other authorized retailers across the country, including those in Colorado.

Based on questions directed to Mr. Minnick regarding potential DISH employees listed on LinkedIn.com, DISH expects that DBS will attempt to cast doubt on DISH's identification of relevant witnesses. None of the DISH employees whose LinkedIn profiles were shown to Mr. Minnick have any relevance to the present case. Ex. C, Minnick Dep. Tr. at 26:22-28-23, 32:2-34-19, 40:13-46-14; Ex. H, LinkedIn Exhibits to Minnick Dep. Where DISH has identified several

relevant employee witnesses, DBS is in no position to substitute its own judgment as to whether employees it has located on LinkedIn have relevant knowledge. *See Jawbone Innovations, LLC v. Amazon.com, Inc.*, C.A. 2:21-cv-00435-JRG, Dkt. 60 at 14 (E.D. Tex. Sept. 21, 2022) (finding plaintiff's identification of defendant's employees on LinkedIn to be unpersuasive).

B. Availability of Compulsory Process Continues to Favor Transfer

DISH identified one former employee with knowledge who resided in Colorado in its Motion, while DBS identified several third-party individuals it alleges to have relevant information. But those individuals' locations either further weigh in favor of transfer to Colorado, or they do not have any relevant knowledge and should be ignored.

Many of the witnesses identified by DBS reside in Colorado, which tips the scales even further towards transfer. For example, DBS identified Mr. David Kummer, who is a former DISH engineering executive and co-inventor of one of DISH's prior art patents. Ex. B, DBS's Rog Responses at 8; Ex. I, U.S. Pat. No. 8,510,771. DISH previously identified the co-inventor, Mr. Casagrande, but not Mr. Kummer because he has been retired from DISH for over eight years and his knowledge regarding AutoHop is largely cumulative of Mr. Casagrande. Ex. E, DISH's Rog Responses at 9. Notably, Mr. Kummer , and because he is an unwilling witness, he would be subject to service of process in Colorado—not Texas.[2] *Id.* at 10.

Next, DBS identified the "prosecuting attorneys for U.S. Patent No. 10,856,038," a patent regarding time-shift buffering that, DBS alleges, is related to DISH's pre-suit knowledge of the

[2] DBS subpoenaed Mr. Kummer (in Colorado) but DISH understands DBS was not able to serve him. Ex. J, Kummer Subpoena. DISH later was in contact with Mr. Kummer, who expressed a strong desire not to be involved in litigation given that he is retired, but ultimately agreed to let DISH's outside counsel accept service on his behalf and sit for a deposition. Ex. K. DISH's counsel proposed this to DBS's counsel but never received a response. *Id.*

Asserted Patents. Ex. B, DBS's Rog Responses at 8, 17; Ex. L, U.S. Pat. No. 10,856,038. But even if true (it is not), this weighs in favor of transfer. DBS's interrogatory response identifies only a subset of the attorneys listed on the Power of Attorney—"Vaibhav Kadaba, Charles Gray, Fei Shen, Cory Myers, and Arush Gadkar"—each of whom (except Charles Gray, who DISH understands is moving to Colorado) appears to reside outside of Colorado and Texas. Ex. B, DBS's Rog Responses at 17; Ex. M, Collection of LinkedIn or law firm website profiles; Ex. N, Power of Attorney for U.S. Pat. No. 10,856,038. First, witnesses outside of the transferor and transferee forums are not relevant. *See Intelligent Automation Design, LLC v. Zimmer Biomet Holdings, Inc.,* No. 5:16-cv-11-CMC, 2016 WL 4424967, at *3, n.2 (E.D. Tex. Jul. 21, 2016) (finding that the presence of a witness and documents outside the transferor district did not alter the analysis) (citing *In re Toyota Motor Corp.,* 747 F.3d 1338, 1340 (Fed. Cir. 2014)). Moreover, several of the other individuals listed on the Power of Attorney for the '038 Patent (which DBS conspicuously omitted) appear to reside in Colorado. Ex. N (listing Daniel Sherwinter, Max Gratton, Jeffrey Lassen, Adam Gianola, Karam Saab, and Aaron Swehla); Ex. M, Collection of LinkedIn or law firm website profiles. Thus, if DBS believes the prosecuting attorneys for the '038 Patent will have relevant testimony to present at trial, seven such individuals would be subject to the subpoena power in Colorado, but none is subject to this Court's subpoena power.

The other individuals identified by DBS are irrelevant to the present case, and do not affect the transfer analysis. DBS identified several individuals who worked for Sling Media, a company acquired by DISH in 2007 for its "place shifting" technology, but discovery further confirmed that these individuals have no relevant knowledge and do not reside in Texas. Ex. B, DBS's Rog Responses at 8. Place shifting allows a user to watch "any live or recorded TV show from your cable TV or your satellite TV service" in another location, *e.g.*, a user could "be in Tokyo" and

"watch the TV content that you would normally be able to see on your DVR at home." Ex. O, Tarra Dep. Tr. at 18:11-19:22. Mr. Tarra, a former Sling Media employee subpoenaed by DBS, confirmed that the accused commercial-skipping features in this case (AutoHop and PrimeTime Anytime) have nothing to do with place-shifting, as they are "completely independent features." *Id*. at 29:15-30:12; *see also* Ex. C, Minnick Dep. Tr. at 135:16-136:15. Mr. Tarra further testified that he did not work on AutoHop or PrimeTime Anytime, and the same is true of each of the other Sling Media employees identified by DBS.[3] Ex. O, Tarra Dep. Tr. at 37:5-21, 40:7-12; Ex. C, Minnick Dep. Tr. at 34:5-38:11; Ex. E, DISH's Rog Responses at 14-15.

Finally, DBS identified "hundreds of DISH Beta Testers," but these individuals are irrelevant. Ex. B, DBS's Rog Responses at 8. DISH's Beta Testers

. Ex. P, DISH00008160; Ex. C, Minnick Dep. Tr. at 90:21-91:5. The Beta Testers

. Ex. C, Minnick Dep. Tr. at 20:10-13. There is no evidence that any Beta Tester has any specific knowledge of the development or operation of AutoHop, especially a non-employee. *Id.* at 22:13-22, 18:5-19:18.

As at least some of the witnesses identified by DBS further weigh towards transfer, and the rest are irrelevant, this factor continues to weigh in favor of transfer.

C. Cost of Attendance for Willing Witnesses Continues to Favor Transfer

Venue discovery did not reveal ***any*** new, willing witnesses for whom attendance at trial in the Eastern District of Texas would be easier. Rather, trial attendance in this District will be more costly for everyone, and the fact that many of DISH's willing witnesses are current employees

[3] The original Slingbox product, which DISH no longer sells or services, was capable of both place shifting and time shifting, but none of the current DISH products utilize both place shifting and AutoHop at the same time. Ex. O, Tarra Dep. Tr. at 30:13-20; Ex. C, Minnick Dep. Tr. at 135:16-136:15.

should not be given any weight in evaluating this factor.

DBS's only witness, Mr. Fitzsimmons, will have to travel for trial no matter what. Mr. Fitzsimmons confirmed he has not traveled to the Eastern District of Texas in over a decade, and he was unable to provide any reason as to why it would be more costly or difficult for him to travel to Colorado for trial. Ex. F, Fitzsimmons Dep. Tr. at 43:17-45:4. Thus, Mr. Fitzsimmons' unexplained Texas preference is not sufficient "to force the overwhelming majority of witnesses . . . to undertake burdensome travel to this District." *Jawbone Innovations, LLC*, C.A. 2:21-cv-00435-JRG, Dkt. 60 at 14.

With respect to DISH's identified witnesses, the Court acknowledged that there are at least five DISH employees for whom it would be more convenient to have trial in Colorado, but found "they will ultimately go wherever DISH instructs them to go, and with no financial impact or personal cost to them."[4] Dkt. 41 at 12. The Federal Circuit rejected "the proposition that the convenience-to-the-witnesses factor is attenuated when the witnesses are employees of the party calling them." *In re Juniper Networks, Inc.*, 14 F.4th 1313, 1319 (Fed. Cir. 2021). For example, in *In re Hulu*, the Federal Circuit found that the district court "erred in entirely discounting Hulu's party witnesses located in the transferee venue because, according to the district court, Hulu could compel their testimony at trial." 2021-142, 2021 WL 3278194, at *5 (Fed. Cir. 2021) (internal quotation omitted). As in that case, discounting the convenience of DISH's witnesses is "fundamentally at odds with the purpose of a transfer for convenience of the witnesses." *Id*.

Even if the Court finds there are relevant witnesses in Wyoming, Colorado will be more

[4] To the extent DBS argues that DISH's recent patent litigation trial in the District of Utah, *Clearplay v. DISH*, is relevant to this factor, it is not. The *Clearplay* case was filed well before the landmark *TC Heartland* decision that altered the venue calculus in patent litigation. *See TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1521 (2017). Further, that DISH is capable of litigating a patent case outside Colorado does not make it convenient to do so.

convenient for those witnesses than this District. It is only about an hour and a half drive from Cheyenne to Denver, and there are daily, direct flights that take less than one hour. Ex. Q; Ex. R. In stark contrast, there are no direct flights from Cheyenne to Houston or Dallas, and DISH employees would still have to drive to Marshall. Ex. S; Ex. T.

D. Other Private Interest Factors Continue to Favor Transfer

While the Federal Circuit has noted it is improper to consider actions taken after a motion to transfer was filed to justify denial of the motion, *see In re Apple*, 979 F.3d 1332, 1343 (Fed. Cir. 2020), even after 75 days of venue discovery, there is no judicial economy served by keeping this case in this District. This case is still at an early stage; DISH has not answered DBS's Complaint, the Court has not ruled on DISH's Motion to Dismiss (Dkt. 18), the parties have not engaged in significant discovery beyond venue issues, and no claim construction has been done. As the infancy of a case favors transfer, this factor weighs in favor of transfer. *See* Dkt. 20 at 11-12.

E. DBS Has Not Shown Comparative Congestion of Courts Favors Denial

While the Court found that this factor "appears to weigh slightly against transfer" (Dkt. 41 at 12), the Federal Circuit has cautioned that this factor has no "particular significance" where the plaintiff could not "point[] to any reason that a more rapid disposition of the case…would be important enough to be assigned significant weight in the transfer analysis." *In re Samsung Elecs. Co., Ltd.*, 2 F.4th 1371, 1380-81 (Fed. Cir. 2021). Here, DBS has not identified ***any*** reason that a few-month delay from filing to final disposition would be important enough to be assigned significant weight—particularly, here, where DBS is a non-practicing entity seeking only monetary damages. *See* Dkt. 1 at 31-32. All of the other factors weigh in favor of transfer, so this factor should not be assigned significant weight, if assigned any weight at all. *See In re Genentech Inc.*, 566 F.3d 1338, 1347 (Fed. Cir. 2009) ("speed of the transferee district court should not alone outweigh" the other factors).

F. Colorado Local Interests Continue to Favor Transfer

No one disputes that DISH is a Colorado company, headquartered in the Denver area, or that the Accused Products were developed in Colorado. Dkt. 20 at 13-14; Dkt. 27 at 12; Dkt. 41 at 13-14. The Court stated that the "[p]resence of DISH in Texas is not unimportant merely because the Accused Products were not developed here," finding "community where suit is filed and where the population is subject to the use and impact of the Accused Products should be taken into account." Dkt. 41 at 14. But the proper inquiry is whether there is any connection between the Eastern District and the events that gave rise to this case, not whether DISH has a general presence in this District or sells its products here. *See In re Apple Inc.*, 979 F.3d at 1344–45 ("This factor most notably regards not merely the parties' significant connections to each forum writ large, but rather the ***significant connections between a particular venue and the events that gave rise to a suit***.") (internal quotation omitted). Here, there are no connections—much less "significant" ones—tying the Eastern District of Texas to the "events that [gave] rise" to this case. This factor weighs in favor of transfer, as the Federal Circuit recently held in granting mandamus in a case that also involved DISH's Hopper set-top boxes. *See In re DISH*, 2021 WL 4911981, at *3 ("[E]ven if these Texas-based operations have some connection to the accused set-top boxes here, that connection is insubstantial compared to Colorado's significant connection to the design and development of the accused features.").

G. Remaining Factors

No venue discovery evidence affects the neutrality of these factors. *See* Dkt. 41 at 14.

III. CONCLUSION

For the foregoing reasons, DISH respectfully requests that the Court grant its motion to transfer this case to the District of Colorado.

Dated: April 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document e-mail per Local Rule CV-5(a)(3) on the 20th day of April 2023.

/s/ Amy E. Bergeron
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CERTIFICATE OF FILING UNDER SEAL

This is to certify that this Supplemental Brief in Support of DISH's Motion to Transfer is filed under seal pursuant to ¶ 16 of the Protective Order (Dkt. 39).

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