

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

Concurrent Ventures, LLC and
XtreamEdge, Inc.,

Plaintiffs,

v.

Advanced Micro Devices, Inc. and
Pensando Systems, Inc.,

Defendants.

Civil Action No. 1:24-cv-335-DII

JURY TRIAL DEMANDED

**PLAINTIFFS' OBJECTION TO THE REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

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Plaintiffs Concurrent Ventures, LLC and XstreamEdge, Inc. (“Plaintiffs”) object to Magistrate Judge Lane’s Report and Recommendation (Dkt. 58) (“R&R”) recommending that Defendants Advanced Micro Devices, Inc. and Pensando Systems, Inc.’s (“Defendants”) Motion to Transfer Under 28 U.S.C. § 1404(a) (Dkt. 33) (“Motion” or “Mot.”) be granted.

The R&R’s conclusion that five of the transfer factors weigh in favor of Defendants is contrary to law and clearly erroneous. Most notably, the R&R is fatally flawed because it inverts the burden of proof. Its methodology is contrary to law because it finds that the ten witnesses for whom WDTX is more convenient have knowledge that is “cumulative” of six NDCA witnesses—and then concludes that this favors transfer to NDCA. That reasoning effectively credits the knowledge of six NDCA witnesses first and then discounts the ten other witnesses because they have similar knowledge. There is no legal basis or authority for the R&R’s conclusion. If anything, the burden of proof mandates that the Court must start with the local witnesses. In applying this backwards analysis, the R&R proceeds to draw several clearly erroneous factual conclusions by again inverting the burden of proof and drawing a series of speculative inferences in favor of transfer, when the law mandates the opposite. Worse yet, there are six more witnesses for whom WDTX is more convenient that have *unique knowledge*—none of the NDCA witnesses do.

Plaintiffs respectfully object to the R&R and request the Court deny Defendants’ Motion.

I. THE “WILLING WITNESS” FACTOR.

The parties did not dispute that WDTX would be convenient for a greater number of relevant witnesses than NDCA. The R&R nonetheless concluded that “it appears that the greater number of actually relevant witnesses are in NDCA.” R&R at 10. As detailed below, that finding is clearly erroneous and contrary to law for three reasons. First, this finding relies on an improper and speculative inference that there “surely” exist many relevant NDCA witnesses in addition to the six specified by Defendants. Second, the R&R discounts the relevance of ten of the fifteen

WDTX Witnesses based on a finding that they have cumulative knowledge to the six NDCA witnesses. Third, the R&R failed to consider the undisputed evidence of five key witnesses for whom WDTX is more convenient who have unique knowledge that no NDCA witnesses have.

A. The R&R’s Conjecture That There Are “Surely” Other Unidentified Relevant Witnesses in NDCA Is Clearly Erroneous And Contrary to Law.

The R&R erroneously finds that there “surely” exist many relevant NDCA witnesses in addition to the six specifically identified by Defendants, based solely on the bare fact that there are “219 [Pensando] employees in NDCA, 203 of which are engineers.” R&R at 9. But there is not a shred of record evidence that any employee *besides* the six specifically identified by Defendants has any knowledge relevant to this case. Defendants confirmed this, stating that “in providing the number of Pensando’s California employees,” it did not intend “*to establish that any particular one of those employees has specific knowledge.*” Dkt. 49 at 1 (emphasis added).

The R&R ignores that the *movant* has the burden to “adduce evidence and arguments that clearly establish good cause for transfer.” *In re Clarke*, 94 F.4th 502, 508 (5th Cir. 2024). “[V]aguely pointing to people without establishing if they are likely witnesses [is] inconsistent with the movant’s burden of proof . . . and obligation to come forward with evidence.” *Webroot, Inc. v. AO Kaspersky Lab*, 2024 WL 171705, at *8 (W.D. Tex. Jan. 16, 2024) (citing *In re Volkswagen of Am.*, 545 F.3d 304, 314 n.10 (5th Cir. 2008) (en banc)). This Court “draw[s] all reasonable inferences and resolve[s] all factual conflicts in favor of *the non-moving party* when assessing a § 1404(a) motion.” *Solas OLED Ltd. v. Apple Inc.*, 2020 WL 3440956, at *5 (W.D. Tex. June 23, 2020) (emphasis added). The R&R upended this law, drawing *unreasonable* inferences in Defendants’ favor. Defendants had ample opportunity to identify relevant witnesses in NDCA, yet only named six—failing to establish that any others have relevant knowledge.

This Court has already rejected the R&R’s logic: “Reference to an entire workforce lacks

the specificity required for this Court to properly weigh this factor.” *Express Mobile, Inc. v. Expedia, Inc.*, 2021 WL 12300181, at *5 (W.D. Tex. Dec. 15, 2021); *see In re HP Inc.*, 826 F. App’x 899, 903 (Fed. Cir. 2020); *see also Resonant Sys., Inc. v. Apple, Inc.*, at *4 (W.D. Tex. Apr. 18, 2024). The R&R’s conjecture that there are “surely” more potential relevant witnesses in NDCA is thus clearly erroneous and contrary to law.

B. The R&R Improperly Disregarded Ten Relevant WDTX Witnesses.

The R&R erred in its wholesale exclusion of ten relevant WDTX Witnesses based on a determination that their knowledge is cumulative to the six NDCA witnesses and thus not “actually” relevant. At most, there is an evidentiary tie. When there is a tie, the party with the burden of proof loses.

The evidence was as follows. Defendants identified *six* employees with relevant information in NDCA (the “NDCA Witnesses”). As to WDTX, the parties identified eighteen relevant witnesses for whom WDTX would be more convenient (two identified by Defendants (Mot. at 9-10), and sixteen by Plaintiffs (Dkt. 35 “Opp.” at 3-5, 5-6)). Of these eighteen, the R&R arguably found that three lacked relevant knowledge.¹ The remaining *fifteen* (the “WDTX Witnesses”) were seven Defendant employees in WDTX (one identified by Defendants, six by Plaintiffs) and eight others for whom WDTX is more convenient (five in Texas, three in Georgia).

There was no dispute that WDTX is more convenient for the WDTX Witnesses.² R&R at

¹ The R&R is woefully unclear on this point. The R&R recaps Defendants’ argument that Mr. Norrod, Mr. Papermaster, and Ms. Vo do lack relevant knowledge and implies in a footnote that it agrees with Defendants regarding Messrs. Norrod and Papermaster. R&R at 8, n.3. The R&R does not mention Ms. Vo again. In any event, the Court need not piece together what the R&R determined for these witnesses, as this factor weighs against transfer regardless.

² The R&R’s states that “scouring sites like LinkedIn . . . is not considered reliable,” but does not conclude the WDTX Employees lack relevant knowledge. *See* R&R at 9. For good reason. “[T]he Federal Circuit has clarified that the identification of witnesses via LinkedIn is not *per se* problematic . . .” *Lionra Techs. Ltd. v. Fortinet, Inc.*, 2023 WL 7491853, at *4 n.3 (E.D. Tex. Nov. 12, 2023); *In re Apple Inc.*, No. 2023-135, 2023 WL 5274629, at *2 (Fed. Cir. Aug. 16, 2023).

10; Dkt. 44 at 2-6. Defendants did not dispute that the fifteen WDTX witnesses have relevant knowledge, nor did the R&R make any finding that these witnesses lacked relevant knowledge. *See, e.g.*, R&R at 18 (“[S]ome WDTX AMD or AMD Pensando employees will have relevant information . . .”). Yet the R&R concludes that “it appears that the greater number of actually relevant witnesses are in NDCA.” R&R at 10. That illogical conclusion is based on its determination that the NDCA witnesses are “superior” because “[i]n multiple instances, one employee identified by Defendants could testify on the same subjects as multiple employees identified by Plaintiffs.” *Id.* at 9. That determination is contrary to law and clearly erroneous.

First, the R&R’s discounting of the WDTX witnesses that “could testify on the same subjects” as the NDCA witnesses is legally flawed. A court “should assess the relevance and materiality of the information the witness may provide. Requiring a defendant to show that the potential witness has more than relevant and material information at this point in the litigation . . . is unnecessary.” *In re Genentech, Inc.*, 566 F.3d 1338, 1343 (Fed. Cir. 2009); *In re FedEx Corp. Servs., Inc.*, 2022 WL 10887770, at *4 (Fed. Cir. Oct. 19, 2022). This Court has held “the Court should consider **all potential** material and **relevant witnesses**.” *See, e.g., Monterey Rsch., LLC v. Broadcom Corp.*, 2022 WL 526242, at *6 (W.D. Tex. Feb. 21, 2022) (emphasis added).

The R&R’s analysis flies in the face of this law: the ten overlapping WDTX Witnesses are undisputedly relevant and cannot be disregarded even if the NDCA Witnesses have cumulative, or even superior, knowledge. They must still be weighed. This Court’s decision in *Viasat, Inc. v. Western Digital Technologies, Inc.*, is directly on point. 2022 WL 17815126 (W.D. Tex. Dec. 12, 2022). There, the movant did “not contest that [the WDTX witnesses] are relevant,” but argued “they do not have any ‘unique’ information and that other employees in the NDCA, like their superiors, have ‘at least the same or better knowledge.’” *Id.* at *4. “The Court [wa]s not persuaded

by this argument,” holding that “[g]iven that WDT concedes they have relevant and material knowledge, the Court will weigh their convenience in its analysis.” *Id.*; *see also Lionra*, 2023 WL 7491853, at *4 (“[T]he Court does not discount the potential witnesses identified by Lionra merely because they have knowledge of the same or similar topics as those identified by Fortinet.”).

Just so here. The WDTX Witnesses “have relevant and material knowledge” and their convenience should be weighed. That the overlapping ten WDTX Witnesses and six NDCA Witnesses can “testify on the same subjects” certainly does not *favor* transfer. *See Proxense LLC, v. Apple, Inc.*, Case No. 6:24-CV-00143-ADA, Dkt. 60 (W.D. Tex. Jan. 8, 2025) (attached as Ex. 1) at 8-9. And, as discussed below, Section I.C., there are also five WDTX Witnesses with unique knowledge (not true of any NDCA witnesses), making this factor strongly disfavor transfer.

Second, the R&R’s conclusion as to these ten witnesses relies on Defendants’ conclusory assertions. But the “good-cause requirement prohibits a district court from relying on ‘conclusory assertions’ in considering the transfer factors.” *In re Clarke*, 94 F.4th at 513; *In re TikTok, Inc.*, 85 F.4th 352, 360 (5th Cir. 2023). This Court has thus rejected reliance on “declarations that are too vague and generalized.” *See, e.g., Resonant Sys., Inc.*, 2024 WL 4346391, at *4, *6.

Defendants’ evidence amounts to “conclusory assertions” from two “vague and generalized” declarations. Defendants’ first declaration (“First Ramos Decl.”) fails to identify any specific knowledge—only providing titles and, for some witnesses, a high-level description of their responsibility. *See* Dkt. 33-1 (First Ramos Decl.), ¶¶ 4, 6-8; *see, e.g., id.* ¶¶ 4, 9 (Mr. Doddapaneni was one of “[t]he engineers who worked on researching, designing, and developing Pensando products,” “was Vice President of Software Engineering” and “now Corporate Vice President, Software Development.”). Worse, *it does not mention WDTX at all*—and thus provides *no* evidence comparing the knowledge of any NDCA and WDTX witnesses, let alone

demonstrating cumulative or “superior” knowledge.

After Plaintiffs pointed out Defendants’ silence, they submitted another declaration (“Second Ramos Decl.”), but it provides little more. It avers NDCA Witness Mr. Doddapaneni “ha[s] been with Pensando since its inception in 2017, joined AMD with the Pensando acquisition, and continue[s] to focus on Pensando products to this day.” Dkt. 44-1, ¶ 5; *id.* ¶ 11 (he “led the software team at Pensando, and leads the software team as to Pensando products today”). Ramos further avers that WDTX Witnesses Messrs. Kramer, Whitmill, and Elbrus “report[] up to” Mr. Doddapaneni,” who “know[s] more about the software of Pensando products” than they do. *Id.* ¶¶ 6, 11, and 16; *see also id.* ¶¶ 5, 7 (averring that Mr. Doddapaneni “know[s] more about Pensando products” than WDTX Witnesses Hormuth and Bade). The Second Ramos Decl. makes similarly conclusory assertions of cumulativeness for the other Witnesses. Dkt. 44-1, ¶¶ 5-16.

There is no evidence (1) that any NDCA Witness has any specific relevant knowledge that the WDTX Witnesses do not have, either individually or collectively or (2) that the NDCA Witnesses even have all of the relevant knowledge that the WDTX Witnesses do. The mere fact that some of the WDTX Witnesses “report up” to some of the NDCA Witnesses does not show they all share the same knowledge. And the Second Ramos Declaration’s conclusory assertions that the NDCA Witnesses “know more” cannot be credited without any description of that knowledge. *See Scramoge Tech. Ltd. v. Apple Inc.*, 2022 WL 1667561, at *2-4 (W.D. Tex. May 25, 2022). There is no explanation of whether Ms. Ramos has personal knowledge of each witness’s full scope of knowledge and, if not, what investigations she undertook to reach her conclusions. *See id.*; *Resonant Sys., Inc.*, 2024 WL 4346391, at *4–6. “[R]esolv[ing] all factual conflicts in favor of” Plaintiffs, *Solas OLED Ltd.*, 2020 WL 3440956, at *5, it is clearly erroneous to find that each NDCA Witness is “superior” or can testify on the same topic of multiple WDTX Witnesses.

C. The R&R Ignores The Undisputed Evidence that Five WDTX Witnesses Have Unique Knowledge That NDCA Witnesses Do Not Have.

Third, the R&R ignores the five WDTX Witnesses with unique knowledge. In weighing this factor, courts “qualitatively evaluate the materiality of the testimony that the witnesses may provide,” considering their “numerosity but also uniqueness and materiality.” *Webroot*, 2024 WL 171705 at *7, 8 (cleaned up). While the R&R finds that ten WDTX Witnesses allegedly have cumulative knowledge, that leaves five additional WDTX Witnesses. Despite the undisputed evidence that they have unique, relevant knowledge that no NDCA witness possesses, the R&R fails to address these witnesses in its analysis.

First, Ms. Ramos, Defendants’ declarant, “has knowledge regarding Pensando’s personnel, products, and acquisition by AMD.” Mot. at 10; Dkt. 33-1, ¶ 2 (“I led AMD’s 2022 acquisition of Pensando from an HR perspective”); Dkt. 49 at 2. Ms. Ramos’ knowledge of Pensando’s “acquisition by AMD” is at the core of this case. Dkt. 1, ¶ 5; Opp. at 2, 11. Indeed, it is telling that when Defendants needed someone with knowledge of Pensando and the accused products to submit declarations, they turned to Ms. Ramos. No NDCA Witness shares her knowledge.

Second and third, Plaintiffs’ two witnesses, Mr. Beeson (a named inventor) and Mr. Kenworthy, have unique knowledge regarding the accused technology, its attempted commercialization, and Plaintiffs’ structure, history, and finances. Opp. at 6. Defendants have not contended any NDCA Witness has overlapping knowledge.

Fourth and Fifth, Mr. Matus and Mr. Simmons also have unique knowledge. Mr. Simmons is a “Technical Lead at AMD Pensando.” Opp. at 6. Defendants attempt to discount his testimony by arguing that he is “cumulative to Mr. Matus,” Reply at 4; Dkt. 44-1, ¶ 15, but Mr. Matus himself is in Georgia—WDTX is more convenient for both. If anything, Defendants’ evidence is that Mr. Matus is more senior and has wider knowledge than Defendants’ NDCA technical witnesses. Mot.

at 9-10, Reply at 2-3. Mr. Matus is “head of engineering” with full “technical knowledge . . . of Pensando products,” while NDCA Witness Mr. Galles’s knowledge and title are “particularly as to hardware” and NDCA Witness Mr. Doddapaneni’s are “particularly as to software.” *Id.* Thus, under Defendants’ reasoning, and based on Defendants’ own evidence, Mr. Matus is “superior.”

Plaintiffs do not ask the Court to simply “count[] identified witnesses.” R&R at 9. As this Court has recognized, “[t]he question can be simply framed as ‘what is the cost of attendance for willing witnesses that are likely to appear at trial?’” *Proxense LLC*, Case No. 6:24-CV-00143-ADA, Dkt. 60 at 6. Plaintiffs’ two witnesses will be at trial; Ms. Ramos and Mr. Matus will likely be at trial—WDTX is more convenient for them. That weighs heavily against transfer.

II. THE “EASE OF ACCESS TO SOURCES OF PROOF” FACTOR.

The R&R’s conclusion that this factor favors transfer is clearly erroneous for two reasons. First, it relies on the clearly erroneous conclusion that there are more witnesses with relevant knowledge in NDCA than in WDTX. R&R at 11. *See* Section I. Second, the R&R’s analysis is contrary to law. The R&R “agree[d] that relevant documents and source code could probably be accessed from the WDTX,” but found “the evidence demonstrates that more individuals who will have a better grasp of what documents and source code exist and where those are electronically located are in NDCA.” R&R at 112. But this Court has explained, “[t]he fact that shared documents are accessible from NDCA is irrelevant in this analysis, unless those same electronically shared documents are not accessible in Austin or are stored in NDCA.” *See Proxense LLC*, Case No. 6:24-CV-00143-ADA, Dkt. 60 at 10. There is no evidence that any source of proof is not accessible in Austin. Opp. at 15-16. Who has a “better grasp” of the documents does not weigh into this factor.

While Defendants’ source code is maintained in NDCA, Defendants’ evidence is silent as to what sources of proof are stored in WDTX, Opp. at 14-16, thereby “prohibit[ing] the Court from

meaningfully comparing NDCA’s apples to WDTX’s apples.” *Resonant Sys., Inc.*, 2024 WL 4346391, at *6. Given there are more relevant employees in WDTX—more “custodians for the relevant electronic documents”—this factor disfavors transfer. *Jawbone Innovations, LLC v. Meta Platforms, Inc.*, No. 6:23-cv-00158, Dkt. 93 at 11 (W.D. Tex. Aug. 7, 2024); Opp. at 15-16.

III. THE “AVAILABILITY OF COMPULSORY PROCESS” FACTOR

The R&R ignores three WDTX third-party witnesses: Mr. Elbrus, Mr. Olsen, and Mr. Stauble. The R&R acknowledges that Plaintiffs identified them, and Defendants’ arguments, but the analysis does not mention them further. That is a clear error. The R&R’s error flips this factor. The R&R determined that one of Defendants’ identified third parties, Mr. Jain, weighed in favor of transfer. R&R at 12, 15. Thus, properly considering Messrs. Elbrus, Olsen, and Stauble, the tally stands at **three** relevant third-party witnesses subject to WDTX’s subpoena power to **one** subject to NDCA’s.³ Nor is there any basis to discount these three witnesses. Defendants make the same arguments on cumulativeness as for the “willing witnesses” and fail for the same reasons. *See* Section I.B. Defendants’ arguments make even less sense here. Defendants argue that Mr. Olsen and Mr. Stauble are each cumulative to *two* NDCA witnesses, and that Mr. Elbrus is cumulative to one. R&R at 13-14. There are **no** instances where one NDCA witness could cover multiple WDTX witnesses, but two instances where the reverse is true. This factor weighs against transfer.

IV. THE “COURT CONGESTION” FACTOR.

This factor considers “[t]he speed with which a case can come to trial and be resolved.” *Proxense LLC*, Case No. 6:24-CV-00143-ADA, Dkt. 60 at 15 (quoting *In re Genentech*, 566 F.3d at 1347). The case will come to trial and be resolved faster in WDTX. Opp. at 19. All the more so

³ Defendants also identified two former employees, Mr. Rao and Mr. Mallick, but **did not assert they have relevant knowledge**. Mot. at 15-16; Opp. at 18, n.1. While it is unclear what the R&R decided for these witnesses, it would be legal error to consider them. Defendants cannot meet their burden to demonstrate a witness’s relevant knowledge if they do not even make the assertion.

now that Judge Albright has transferred to the Austin division. Yet the R&R found this factor favored transfer by only looking to WDTX's congestion, without comparison to NDCA's. That is contrary to law: "[T]he defendant's proffered venue is measured against the plaintiff's chosen venue." *In re Clarke*, 94 F.4th at 510. Applying this standard, this factor weighs against transfer.⁴

V. THE "LOCAL INTEREST" FACTOR.

The R&R's conclusion that the "local interest" factor favors transfer is clearly erroneous for three reasons. First, it erroneously concludes that there are more witnesses with relevant knowledge in NDCA than in WDTX. R&R at 16-17. *See* Section I. Second, the R&R failed to address a fundamental argument: AMD's decision to acquire Pensando—and thus to make and sell the infringing Pensando products—and its execution of that acquisition are key "events that gave rise to [this] suit." *In re Apple*, 979 F.3d 1332, 1345 (Fed. Cir. 2020); *see* Dkt. 1, ¶ 5; Opp. at 2, 11. They all undisputedly occurred in WDTX. Opp. at 7, 8-9, 19. Indeed, Defendants' WDTX employee, Ms. Ramos, is the only identified witness with knowledge of those events. *Id.* at 11.

Finally, the R&R only considered the local interest attached to Pensando, not AMD, finding that the "suit's only tie" to WDTX is that "Pensando is one of AMD's 75 subsidiaries." R&R at 17. But AMD is a Defendant in this suit. That is a significant "tie." And AMD is a staple of WDTX. Opp. at 8-9; R&R at 17 (AMD "has a substantial campus" in Austin). This factor favors transfer.

CONCLUSION

Plaintiffs request that the Court deny Defendants' Motion to Transfer under §1404.

⁴ This Court recently recognized that "Federal Circuit precedent appears to contradict Fifth Circuit rulings" on this factor. *Proxense LLC*, Case No. 6:24-CV-00143-ADA, Dkt. 60 at 16. Even under the apparent Federal Circuit rule, this factor is neutral and does not weigh in favor of transfer.

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Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that the forgoing document was served upon all counsel of record via electronic mail.

Dated: February 14, 2025

/s/ Michael Matulewicz-Crowley
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