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

BROADBAND iTV, INC., ***Plaintiff,***	§	
v.	§	**6-19-CV-00716-ADA**
DISH NETWORK L.L.C., ***Defendant.***	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant DISH Network L.L.C.'s ("DISH") motion to transfer venue to the District of Colorado pursuant to 28 U.S.C. § 1404(a) or alternatively to the Austin Division of the Western District of Texas ("Motion to Transfer"). ECF No. 37. After careful consideration of the parties' briefs and the applicable law, the Court **DENIES** DISH's Motion to Transfer.

I. BACKGROUND

Plaintiff Broadband iTV, Inc. ("BBiTV") filed this lawsuit on December 19, 2019, alleging that DISH's video on-demand ("VOD") services using set-top-boxes and mobile apps infringe U.S. Patent Nos. 9,648,388, 9,998,791, 10,028,026, and 10,506,269 (the "Asserted Patents"). Pl.'s Compl., ECF No. 1. On May 7, 2020, DISH filed this motion to transfer venue under 28 U.S.C. § 1404(a) requesting that this case be transferred to the District of Colorado or, in the alternative, to the Austin Division of the Western District of Texas ("WDTX"). Def.'s Mot., ECF No. 37. BBiTV filed a response opposing to DISH's motion (ECF No. 42) and DISH filed a reply (ECF No. 43).

BBiTV is a Delaware corporation headquartered in Honolulu, Hawaii. ECF No. 1 at 2. DISH is established under the laws of the State of Colorado, with a principal place of business in Englewood, Colorado. Pl.'s Compl., ECF No. 1 at 5 and Def.'s Answer, ECF No. 52, at 5.

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. *In re TS Tech USA Corp*., 551 F.3d 1315, 1319 (Fed. Cir. 2008). 28 U.S.C. § 1404(a) provides that, "[f]or the convenience of parties and witnesses, . . . a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." *Id*. "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)).

The preliminary question under Section 1404(a) is whether a civil action "might have been brought" in the transfer destination venue." *In re Volkswagen, Inc.*, 545 F.3d 304, 312 (5th Cir. 2008) (hereinafter "*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) (hereinafter "*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." *Id.* Courts evaluate these factors based on the situation which existed at the time of filing, rather than relying on hindsight knowledge of the defendant's forum preference. *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960).

The burden to prove that a case should be transferred for convenience falls squarely on the moving party. *In re Vistaprint Ltd.*, 628 F.3d 1342, 1346 (Fed. Cir. 2010). The burden that a movant must carry is not that the alternative venue is more convenient, but that it is clearly more convenient. *Volkswagen II*, 545 F.3d at 314 n.10. Although the plaintiff's choice of forum is not a separate factor entitled to special weight, respect for the plaintiff's choice of forum is encompassed in the movant's elevated burden to "clearly demonstrate" that the proposed transferee forum is "clearly more convenient" than the forum in which the case was filed. *In re Vistaprint Ltd.*, 628 F.3d at 314–15. While "clearly more convenient" is not necessarily equivalent to "clear and convincing," the moving party "must show materially more than a mere preponderance of convenience, lest the standard have no real or practical meaning." *Quest NetTech Corp. v. Apple, Inc.*, No. 2:19-cv-118, 2019 WL 6344267, at *7 (E.D. Tex. Nov. 27, 2019).

III. ANALYSIS

The threshold determination in the Section 1404 analysis is whether this case could initially have been brought in the destination venue—the District of Colorado. Neither party contests that venue is proper in the District of Colorado and that this case could have been

brought there. Thus, the Court proceeds with its analysis of the private and public interest factors.

A. The Private Interest Factors Weigh Against Transfer.

i. The Relative Ease of Access to Sources of 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." *Fintiv Inc. v. Apple Inc.*, No. 6:18-cv-00372, 2019 WL 4743678, at *2 (W.D. Tex. Sept. 10, 2019). "[T]he question is *relative* ease of access, not *absolute* ease of access." *In re Radmax*, 720 F.3d 285, 288 (5th Cir. 2013) (emphases in original). "In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. 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).

1. Witnesses Are Not Sources of Proof

BBiTV argues in its response that DISH employs over 1,000 employees in its remanufacturing and call center facilities in this District, and numerous of them can be sources of proof. Pl.'s Resp., ECF No. 42 at 6. BBiTV also identifies several DISH employees and contractors that are allegedly located in this District and "likely have pertinent knowledge." *Id.* at 6–7. Additionally, BBiTV argues that a third-party company, Broadcom's Systems on a Chip ("SoCs"), "employs over 100 engineers at its Austin campus, and thus likely has relevant information in this District." *Id.* at 7.

This Court, in following Federal Circuit precedent, has made clear that witnesses are not sources of proof to be analyzed under this factor; rather, the Court considers only documents and physical evidence. *Netlist, Inc. v. SK hynix Inc. et al*, No. 6:20-cv-00194-ADA (W.D. Tex. Feb.

2, 2021) ("The first private factor, ease of access to sources of proof, considers 'documents and physical evidence' *as opposed to witnesses*.") (emphasis added); *In re Apple Inc.*, 979 F.3d at 1339 ("[t]his factor relates to the ease of access to non-witness evidence, such as documents and other physical evidence"); *Volkswagen II*, 545 F.3d at 315 ("All of the documents and physical evidence relating to the accident are located in the Dallas Division"). Thus, any analysis pertaining to witnesses is more appropriately assessed under the second or third private factor.

2. Electronic Documents Are Accessible with Relative Ease

DISH argues that bulk of its relevant source code, potentially relevant documentary evidence concerning design and development, and non-technical documents, such as marketing documents and financial records, are kept in the District of Colorado, and little if any relevant documents are likely to be found in the Western District of Texas. Def.'s Mot., ECF No. 37 at 4.

Although the physical location of electronic documents does affect the outcome of this factor under current Fifth Circuit precedent (*see Volkswagen II*, 545 F.3d at 316), this Court has stressed that the focus on physical location of electronic documents is out of touch with modern patent litigation. *Fintiv*, 2019 WL 4743678, at *8; *Uniloc 2017 LLC v. Apple Inc.*, 6-19-CV-00532-ADA, 2020 WL 3415880, at *9 (W.D. Tex. June 22, 2020) ("[A]ll (or nearly all) produced documents exist as electronic documents on a party's server. Then, with a click of a mouse or a few keystrokes, the party [can] produce[] these documents" and make them available at almost any location). Other courts in the Fifth Circuit similarly found that access to documents that are available electronically provides little benefit in determining whether a particular venue is more convenient than another. *See Uniloc USA Inc. v. Samsung Elecs. Am.*, No. 2:16-cv-642-JRG, 2017 U.S. Dist. LEXIS 229560, at *17 (E.D. Tex. Apr. 19, 2017) ("Despite the absence of newer cases acknowledging that in today's digital world computer stored documents are readily

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