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

DATASCAPE, LTD., *Plaintiff,*	§	
	§	
v.	§	**Case No. 6:19-CV-00129-ADA**
	§	
DELL TECHNOLOGIES, INC., DELL, INC., and EMC CORPORATION, *Defendants.*	§	

ORDER GRANTING INTRA-DISTRICT TRANSFER OF VENUE

Came on for consideration this date the Motion of Defendants Dell Technologies, Inc., Dell, Inc., and EMC Corporation (collectively, "Dell" or "Dell Defendants") for intra-district transfer from the Waco, Texas Division to the Austin, Texas Division. Defendants filed their Motion (Dkt. 36) on May 1, 2019. Plaintiff filed a Response (Dkt. 37) on May 8, 2019. Defendants filed a Reply (Dkt. 40) on May 15, 2019. The Court has carefully considered the Motion, all responsive pleadings, and the case record, and is of the opinion that the Motion is meritorious and should be **GRANTED**.

Defendants contend that this case should have been filed in Austin, Texas, rather than in Waco, and have moved to transfer it pursuant to 28 U.S.C. § 1404(a). *See* 28 U.S.C. § 1404(a) ("For 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 . . . ."). Analyzing an analogous motion seeking intra-

district transfer from Marshall to Tyler—two cities even closer to each other than Austin is to Waco—the Fifth Circuit stated:

> A motion to transfer venue pursuant to § 1404(a) should be granted if "the movant demonstrates that the transferee venue is clearly more convenient," taking into consideration (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"; (4) "all other practical problems that make trial of a case easy, expeditious and inexpensive"; (5) "the administrative difficulties flowing from court congestion"; (6) "the local interest in having localized interests decided at home"; (7) "the familiarity of the forum with the law that will govern the case"; and (8) "the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law".

In re Radmax, Ltd., 720 F.3d 285, 288–90 (5th Cir. 2013) (quoting *In re Volkswagen of Am., Inc. ("Volkswagen II")*, 545 F.3d 304, 311 (5th Cir. 2008) (*en banc*)). The Court finds that factors (1), (3), (4), and (6) favor transfer; factors (2), (5), (7), and (8) are neutral; and no factor favors the retention of this case in Waco. *See id.* at 290 (holding that the district court clearly abused its discretion by denying transfer where three factors favored transfer, five were neutral, and no factor favored the plaintiff's chosen venue).

The Court has considered Plaintiff's argument that the case should remain in Waco because Austin, Texas, is the hometown of the Dell Defendants. The Court agrees with Defendants that this "hometown" factor is not to be given much, if any, weight in determining whether a transfer would be appropriate. Of much greater importance is whether Plaintiff has articulated a reason or reasons under the § 1404(a) factors that demonstrate Defendants' failure to meet their burden. But in response to the evidence offered by Defendants, Plaintiff proffers neither facts nor arguments sufficient to demonstrate why this case should remain in Waco. Most—if not all—of the relevant connections in this case are to Austin rather than to Waco.

The Court agrees with Defendants that, overall, the relevant convenience weighs heavily in favor of transfer. As in *Radmax*, the § 1404(a) factor-analysis here indicates that that "movant [has] demonstrate[d] that the transferee venue is *clearly more convenient*." *Radmax*, 720 F.3d at 288 (emphasis added). The Court considers below the disputed factors.

Relative ease of access to sources of proof. Dell has presented uncontroverted evidence of relevant sources of proof in Austin, including sales, marketing, and financial information related to the accused products. Defs.' Mot. Ex. 1 ¶¶ 5, 7 (Dkt. 36-1) (Decl. of Julia England). Plaintiff failed to proffer or identify any such sources in Waco. Moreover, Plaintiff's argument that this factor "only favors transfer when the bulk or majority of the evidence is located in the transferee district," Pl.'s Resp. 3 (internal quotations omitted), is insupportable under the controlling law. As confirmed in *Radmax* and *Volkswagen II*, "the question is *relative* ease of access, not *absolute* ease of access." *Radmax*, 720 F.3d at 288 (citing *Volkswagen II*, 545 F.3d at 316). As Dell demonstrates, access to sources of proof is *relatively* easier in Austin than it is in Waco. This factor thus supports transfer.

Cost of attendance for willing witnesses. Data Scape complains that Dell "cherry-pick[ed]" only witnesses in Austin and failed to identify their relevance to the case. Pl.'s Resp. 6 (Dkt. 37). The Court has carefully reviewed the evidence that Dell proffered, including a list of Austin employees who might serve as potential witnesses in this case. According to Defendants, these employees have "knowledge of Dell's marketing and sales of the accused products and their financial performance"—key

issues Data Scape cites in its complaint as a basis for infringement and damages. Defs.' Mot. Ex. 1 ¶ 5 (Dkt. 36-1) (Decl. of Julia England). In contrast, Data Scape has identified *no* such witnesses in Waco. Dell "has no employees located in the Waco Division who have any responsibilities related to its Data Domain or RecoverPoint products." *Id.* ¶ 4. This factor thus supports transfer.

Availability of compulsory process. Data Scape's contention that the Waco Division is more convenient because there is a Dell employee located in Dallas is unavailing. That argument is severely weakened by the fact that Dell proffered evidence that this single witness is in fact in the process of moving to Austin. *Id.* ¶ 4 n.1. To defeat a Motion to Transfer such as this one requires more than an attorney's opinion that there might be other witnesses for whom Waco would be a better forum for compulsory service. *See Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*, No. 309-CV-00488, 2009 WL 2634860, at *6 (N.D. Tex. Aug. 26, 2009) (finding factor neutral where party had "not specifically identified a single *witness* by name and address"). Furthermore, the Court agrees with Defendants that the compulsory process factor focuses on unwilling, non-party witnesses. *See Carruth v. Michot*, No. 15-CA-00189, 2015 WL 6506550, at *9 (W.D. Tex. Oct. 26, 2015) ("Because party witnesses do not typically require compulsory process, the Court focuses on non-party witnesses."). As stated in Dell's Motion, and contrary to Plaintiff's argument, this factor accordingly remains neutral.

Other practical problems. Data Scape argues that the co-pendency of three other actions in this Court involving at least some of the same asserted patents would

raise practical difficulties that urge against transfer, viz., consuming unnecessary additional judicial resources, requiring another court to address overlapping issues, and creating a risk of inconsistent rulings. Pl.'s Resp. 7–8. But Data Scape also acknowledges that, "where the other transfer factors *clearly* favor transfer, the existence of co-pending litigation, *by itself*, should not preclude transfer." *Id.* at 9. That is the exact scenario presented in this case, where all the factors strongly favor litigating in Austin or are neutral. Plaintiff is correct that there are three other cases pending in Waco, two of which have transfer motions pending, and the third of which is stayed. But Plaintiff has filed at least ten other cases in district courts other than Waco as well as in the International Trade Commission. Therefore, Data Scape's concern that transfer would "requir[e] another court to address overlapping issues, and would create a risk of inconsistent rulings" is without merit. *Id.* at 8. Since both Parties have assented to this Court's continued control of the proceedings, there is little if any risk of judicial waste or inefficiency associated with transfer.

Local interest in having localized interests decided at home. The Court turns next to Data Scape's argument that Austin cannot have an interest in this litigation because Dell has asserted in another case that California has an interest in Dell's Data Domain products. *Id.* at 9. The Court finds this argument unpersuasive. The Court accepts that California also has an interest in this case—because, as explained in Dell's declaration, Dell has relevant operations in Austin, California, Massachusetts, and Israel. Defs.' Mot. Ex. 1 ¶¶ 5–7 (Dkt. 36-1) (Decl. of Julia England). There is no rule that only a single forum can have a local interest in

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