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

**PUBLIC VERSION**

**AUDIOEYE, INC.,**
**Plaintiff,**

***v.***

**ACCESSIBE LTD.,**
**Defendant.**

**6:20-cv-997-ADA**

**ORDER GRANTING ACCESSIBE'S MOTION TO RECONSIDER AMENDED ORDER DENYING MOTION TO TRANSFER VENUE TO THE WESTERN DISTRICT OF NEW YORK [ECF No. 71]**

Came on for consideration this date is Defendant accessiBe Ltd.'s Motion to Reconsider Amended Order Denying Motion to Transfer Venue to the Western District of New York, filed December 13, 2021. ECF No. 71 (the "Reconsideration Motion"). Plaintiff AudioEye, Inc. filed an opposition on December 27, 2021, ECF No. 73, to which accessiBe replied on January 3, 2022, ECF No. 74. After careful consideration of the Reconsideration Motion, the Parties' briefs, and the applicable law, the Court **GRANTS** the Reconsideration Motion.

## I. BACKGROUND

Plaintiff AudioEye first filed suit against accessiBe on September 4, 2020, in the Austin division of the Western District of Texas. No. 1:20-cv-00924, ECF No. 1. On October 26, 2020, it voluntarily dismissed that case, No. 1:20-cv-00924, ECF No. 13, and refiled this case in Waco the same day, ECF No. 1. AudioEye filed its second amended complaint on December 29, 2020. *See* ECF No. 13 ("SAC").

accessiBe is registered and located in Israel. ECF No. 21 at 3. It does not have any locations in the United States or employees located here. *Id.* AudioEye is based in Tucson, Arizona and incorporated in Delaware. ECF No. 13 ¶ 11.

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The SAC alleges that accessiBe infringes nine related patents. The SAC also includes Lanham Act claims for False Advertising and Product Disparagement (collectively the "Lanham Act claims"). It further includes five New York state law claims for Product Disparagement, Slander/Defamation, Tortious Interference with Prospective Economic Advantage, Deceptive Business Practices, and Unjust Enrichment (collectively the "NYSL claims"). The Lanham Act claims and the NYSL claims (collectively the "Non-Patent claims") relate to conduct alleged to have occurred while marketing accessiBe's products, and more specifically, accessiBe's statements regarding accessiBe's or AudioEye's products and/or services that AudioEye alleges to be false, misleading, or disparaging.

Consistent with most of the Non-Patent Claims being brought under New York law, Plaintiff has focused on accessiBe's alleged conduct regarding three entities located in New York: the Marketing Association for the Finger Lakes Wine Country of New York ("Finger Lakes"), Hoselton Auto Mall ("Hoselton"), and an unnamed potential consumer in New York (eventually revealed to be AudioEye personnel). ECF No. 13 ¶¶ 189–191; ECF No. 37 at 4. The Lanham Act and unjust enrichment claims rely at least on the same set of underlying allegations as the NYSL claims, or explicitly reference Finger Lakes or Hoselton.

On March 8, 2021, accessiBe filed a motion to transfer venue under 28 U.S.C. § 1404(a) to the U.S. District Court for the Western District of New York ("WDNY") or, in the alternative, dismiss for lack of personal jurisdiction. ECF No. 21 (the "Transfer Motion"). The Parties conducted venue and jurisdictional discovery and on October 18, 2021, the Court entered an order denying the relief sought in the Transfer Motion. ECF No. 51.

Though satisfied that the WDNY is a clearly more convenient venue, the Court denied transfer because accessiBe failed to show that venue and jurisdiction are proper in the WDNY. *See*

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*generally id.* On November 3, 2021, the Court issued an amended order correcting its erroneous holding as to venue but maintaining that accessiBe failed to show that jurisdiction was proper in the WDNY. ECF No. 60 (the "Amended Transfer Order"). On November 5, 2021, accessiBe filed a petition for a writ of mandamus, seeking to reverse the amended order's denial of transfer. *See* Petition, *In re AccessiBe, Ltd.*, No. 22-113, ECF No. 2 (Fed. Cir. Nov. 5, 2021). On December 6, 2021, the Federal Circuit denied that petition, stating that it would not be futile "for accessiBe to ask the district court to first reconsider its decision in light of its arguments." *In re AccessiBe Ltd.*, No. 2022-113, 2021 U.S. App. LEXIS 35858, at *3 (Fed. Cir. Dec. 6, 2021). On December 13, 2021, accessiBe filed its Reconsideration Motion. That Motion is now ripe for judgment.

## II. LEGAL STANDARD

### A. Reconsideration

Federal Rule of Civil Procedure 54(b) "allows parties to seek reconsideration of interlocutory orders and authorizes the district court to 'revise[ ] at any time' 'any order or other decision . . . [that] does not end the action.'" *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (alterations in original) (quoting Fed. R. Civ. P. 54(b)). "Under Rule 54(b), the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Id.* at 336 (quotation marks omitted). "Although the precise standard for evaluating a motion to reconsider under Rule 54(b) is unclear . . . [s]uch a motion requires the Court to determine whether reconsideration is necessary under the circumstances." *Dallas Cnty., Tex. v. MERSCORP, Inc.*, 2 F. Supp. 3d 938, 950 (N.D. Tex. 2014) (quotation marks omitted).

### B. Transfer Under 28 U.S.C. § 1404(a)

In patent cases, motions to transfer under § 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). Section 1404(a) provides

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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 or to any district or division to which all parties have consented." "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 § 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) ("*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) ("*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.* The weight the Court gives to each of these assorted convenience factors will necessarily vary from case to case. *See Burbank Int'l, Ltd. v. Gulf Consol. Int'l, Inc.*, 441 F. Supp. 819, 821 (N.D. Tex. 1977). A court should not deny transfer where "only the plaintiff's choice weighs in favor of denying transfer and where the case has no connection to the

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transferor forum and virtually all of the events and witnesses regarding the case . . . are in the transferee forum." *In re Radmax, Ltd.*, 720 F.3d 285, 290 (5th Cir. 2013).

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. While "clearly more convenient" is not explicitly 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). Yet, the Federal Circuit has clarified that, for a court to hold that a factor favors transfer, the movant need not show that that factor *clearly* favors transfer. *In re Apple Inc.*, 979 F.3d 1332, 1340 (Fed. Cir. 2020).

## III. ANALYSIS

### A. Reconsideration and Jurisdiction in the WDNY

The Court disagrees with accessiBe that the Amended Transfer Order offended the "party presentation rule," constituting a "drastic[] . . . abuse of discretion." ECF No. 71 at 10. This Court did not adduce new evidence. This Court did not present new arguments. accessiBe had a burden. The Court determined that accessiBe fell short of it. accessiBe recognizes that Parties "are responsible for advancing the facts and arguments entitling them to relief," yet it shirked its responsibility to advance facts and arguments entitling it to its requested relief: transfer under § 1404(a). ECF No. 71 at 9 (quoting *Baude v. United States*, 955 F.3d 1290, 1303–04 (Fed. Cir. 2020)). It then laid blame at this Court's doorstep. The Court would have drawn nearer to offending the party presentation rule had it done as accessiBe suggests and, on the briefing before it at the time of the Amended Transfer Order, made accessiBe's arguments for it—including corralling

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