

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

B.E. TECHNOLOGY, L.L.C.,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Civil Action No. 2:12cv2769 JPM-tmp

Hon. Jon Phipps McCalla

JURY DEMAND

**FACEBOOK, INC.'S REPLY BRIEF IN SUPPORT OF ITS
MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)**

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I. INTRODUCTION

B.E. Technology is a 74 person company, but its opposition to Facebook's motion to transfer focuses exclusively on B.E.'s Chief Executive, Mr. Hoyle, and the uncorroborated assertion that "Mr. Hoyle has been physically present in this District since 2006, and B.E. since at least 2008." (Dkt. No. 38 at 5.) B.E. disregards its other 73 members because only Mr. Hoyle resides in this District. Once all of B.E.'s members and its history of operations in Michigan and Louisiana are factored into the transfer analysis, it is apparent that B.E. has much stronger ties to other jurisdictions. B.E. is a newcomer with no substantial connections to this District, so its choice of venue is not entitled to any deference.

The balance of private and public interests weighs strongly in favor of transfer because litigating this action in the Northern District of California would be clearly more convenient for all of Facebook's party and third-party witnesses, and no more or less convenient for B.E. and 73 of its 74 members. B.E. offers no evidence to dispute Facebook's evidence that the Northern District of California is a clearly more convenient forum because: (1) Facebook is headquartered there; (2) Facebook's books and records primarily reside in, or are accessible from, that district; (3) Facebook's likely witnesses primarily reside in the Northern District of California; and (4) all known third-party witnesses reside in or near the Northern District of California.

B.E. asserts that a transfer would merely shift inconvenience from Facebook to B.E., but has no factual basis for this assertion. B.E. has no history of operations in this District and its members are dispersed throughout the country. Mr. Hoyle appears to be the only one of B.E.'s 74 members who resides in this District, and by focusing solely on the alleged burdens that Mr. Hoyle would face as a result of a transfer, B.E. tacitly acknowledges that, on an entity-wide basis, B.E. would be largely unaffected by a transfer.

As the Federal Circuit explained in *In re Biosearch Technologies, Inc.*, “in a case featuring most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, the trial court should grant a motion to transfer.” *In re Biosearch Techs., Inc.*, No. 995, 2011 WL 6445102, at *3 (Fed. Cir. Dec. 22, 2011) (non-precedential) (granting writ and ordering transfer). The Northern District of California encompasses the vast majority of witnesses and documentary evidence relevant to this action, so Facebook respectfully requests the Court to transfer this litigation to that district.

II. ARGUMENT

A. B.E.’s Choice Of Forum Is Not Entitled To Deference

1. B.E. Argues The Wrong Legal Standard For Transfer

B.E. argues that transfer is improper because its choice of forum is entitled to “substantial deference,” and that Facebook cannot satisfy its burden of making a “strong showing” that transfer is required. (Dkt. No. 38 at 3-4.) However, B.E. selectively cited outdated and disfavored precedents to support these arguments. As Magistrate Judge Claxton recently found in a well-reasoned and lengthy § 1404(a) transfer analysis, the weight of authority in this Circuit requires that a “movant [must] establish that the balance of the transfer factors preponderate in favor of transfer.” *Esperson v. Truegreen Ltd. P’ship*, No. 2:10-cv-02130, 2010 WL 4362794, at *4 (W.D. Tenn. Oct. 5, 2010), *adopted* 2010 WL 4337823 (W.D. Tenn. Oct. 27, 2010) (granting motion to transfer). Furthermore, Magistrate Judge Claxton concluded that “courts in this circuit do not assign plaintiff’s choice [of forum] paramount importance, but simply treat it as one factor to be weighed equally with other relevant factors.” *Id.* at *6 (internal quotations omitted).

2. This District Is Not B.E.’s Home Forum

B.E.’s choice of forum is also not entitled to deference because this District is not B.E.’s home forum. B.E. has no history of operations in this District. And while Mr. Hoyle resides

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