IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

B.E. TECHNOLOGY, L.L.C., Plaintiff, v. SAMSUNG TELECOMMUNICATIONS AMERICA L.L.C., Defendants.	CIVIL ACTION NO. 2:12-CV-02824-JPM-tmp

B.E. TECHNOLOGY, L.L.C., Plaintiff, v. SAMSUNG ELECTRONICS AMERICA, INC., Defendants.	CIVIL ACTION NO. 2:12-CV-02825-JPM-tmp

REPLY MEMORANDUM IN SUPPORT OF THE SAMSUNG DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

I. INTRODUCTION

Plaintiff B.E. Technology, L.L.C. ("B.E.") does not dispute that the District of New Jersey is the location of the vast majority of defendant Samsung Electronics America, Inc.'s ("SEA's") relevant documents and witnesses; a location where SEA's subsidiary, defendant Samsung Telecommunications America L.L.C. ("STA") (SEA and STA are referred to collectively as "Samsung" or "Defendants"), maintains documents and a place of business; and the more convenient location for non-party witnesses. B.E., therefore, cannot reasonably dispute that the District of New Jersey is the most appropriate venue for this case.

Instead, B.E. relies almost exclusively on the personal residence of a single individual (the inventor of the asserted patent and B.E.'s part-time CEO), the fact that it recently registered to do business here in Tennessee, and the existence of a small number of documents in the district, as purportedly showing that this case has strong ties to the district. But B.E. admits that it registered to do business in Tennessee only because it decided to file lawsuits in the district, and that it does not otherwise have offices or regularly conduct business operations in the State. B.E. also admits that its CEO works out of his "home office," which cannot constitute B.E.'s "nerve center" despite its contentions to the contrary. Under these circumstances, it would be unfair to subject Samsung, its witnesses, and numerous third party witnesses to the significant inconvenience of litigating a case with *de minimus* ties to this District.

II. ARGUMENT

A. B.E.'s Choice of Forum Is Not Entitled to Deference

B.E. is incorrect that Samsung has the burden to show "that the balance of convenience strongly favors transfer." (D.E. 34 ("Opp.") at 4.) [1] As the Supreme Court found in *Norwood v.*

[1] All citations to the docket herein refer to the entries in Case No. 2:12-cv-2824, captioned *B.E. Technology, L.L.C. v. Samsung Telecommunications America LLC.* Identical documents are filed in Case

Kirkpatrick, 349 U.S. 29, 39-40 (1955), movants under Section 1404(a) cannot be held to the higher "strongly in favor" standard applicable to the forum non conveniens doctrine. Rather, the appropriate inquiry is whether the movant's proposed forum is "more convenient *vis a vis* the plaintiff's initial choice." *See, e.g., Esperson v. Trugeen Ltd. P'ship*, No. 2:10-cv-02130, 2010 WL 4362794, at *2-6 (W.D. Tenn. Oct. 5, 2010) (discussing the history of "strongly favors" standard, rejecting it, and following *Norwood*); *Riley v. Cochrane Furniture Co.*, No. 94-cv-71016, No. 1994 U.S. Dist. LEXIS 12059, at *5 (E.D. Mich. July 7, 1994) (following *Norwood*). Insofar as the plaintiff's choice of forum may still be considered in assessing the convenience of transfer, it is neither paramount nor determinative. *See, e.g., Union Planters Bank N.A. v. EMC Mort. Corp.*, 67 F. Supp. 2d 915, 921 (W.D. Tenn. 1999) ("the Sixth Circuit has affirmed that, when balancing the interests of a plaintiff's choice of forum against convenience, the plaintiff's choice is only one factor to be considered and is not to be determinative"). Indeed, a plaintiff's choice of forum is routinely rejected where, as here, the plaintiff relocated to the forum shortly before initiating suit so as to create a false impression of strong ties to its chosen forum. *See, e.g., In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010) (holding that where a plaintiff's presence is "recent, ephemeral, and an artifact of litigation," the plaintiff's presence should not be given weight in the transfer analysis).

B.E.'s claim that its choice of venue is entitled to deference simply because it is the plaintiff in this litigation is without basis. As this Court explained in *Hunter Fan Co. v. Minka Lighting, Inc.*, No. 06-2108, 2006 WL 1627746 (W.D. Tenn. June 12, 2006), "Plaintiff's choice of forum is not entitled to the ordinary degree of deference [where] Plaintiff maintains little

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No. 2:12-cv-2825, captioned *B.E. Technology, L.L.C. v. Samsung Electronics America, Inc.*, with a docket number four entries later than that in Case No. 2:13-cv-2824. Thus, the Hoyle Declaration referenced here is at D.E. 34-1 in Case No. 2:12-cv-2824 and D.E. 38-1 in 2:12-cv-2825.

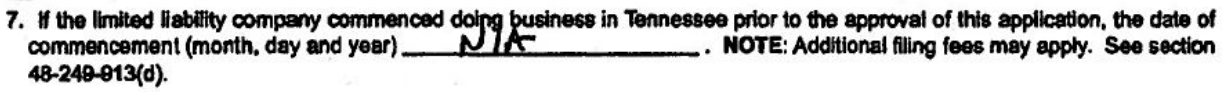
connection to [its] chosen forum." 2006 WL 1627746, at *3 (citing *Tuna Processors, Inc. v. Hawaii Int'l Seafood, Inc.*, 408 F. Supp. 2d 358, 362 (E.D. Mich. 2005)).

In *Hunter Fan*, the plaintiff had its "design, engineering, and manufacturing facilities" in Memphis, and the invention was "conceived of, produced, and marketed" in Memphis. *Id.* at *2. The court expressly distinguished its holding from that in *Tuna Processors*, where the transfer was granted and no deference was accorded to plaintiff because plaintiff had "little connection" to the chosen forum. *Id.* at *1, 4; *see also Civix-DDI, LLC v. Loopnet, Inc.*, No. 2:12cv2, 2012 WL 3776688, at *3 (E.D. Va. Aug. 30, 2012) (NPE's choice of forum "will not be given great weight" where it has "no manufacturing facilities, operations, offices, or employees that are located in this district besides its principal … who owns a home in Alexandria"). Thus, B.E.'s cited precedent supports the requested transfer.

More specifically, B.E. has failed to show meaningful or longstanding ties to this district or otherwise establish that its chosen forum is entitled to deference. Rather, B.E.'s opposition focuses on the residential history of Mr. Hoyle, a single employee. But Mr. Hoyle is not the plaintiff; B.E. is the plaintiff. B.E. does not claim to itself have any independent facilities in Tennessee. In fact, B.E. admits that it first applied to conduct business in the State in September 2012, shortly before initiating suit. (Opp. at 6.) Thus B.E.'s ties to the forum are *de minimus* at best.

B.E.'s attempt to explain away this shortcoming should be rejected. More specifically, B.E. represents that Mr. Hoyle's "[home] office" serves as its "nerve center" in Cordova and that "Mr. Hoyle has controlled and directed B.E. business activities [from Cordova] since at least 2008." (Opp. at 6.) However, these representations are inconsistent with B.E.'s previous, non-litigation-driven representations, including the application submitted by B.E. to conduct business

in Tennessee. For example, Tennessee requires a Certificate of Authority to conduct business in the State in which the applicant must provide the date on which it "commenced doing business in Tennessee [if] prior to the approval of this application." (MacLean Reply Decl. Ex. 1.)[2] Yet, B.E. did not state 2008 as it now claims; rather B.E.'s response was "N/A":


7. If the limited liability company commenced doing business in Tennessee prior to the approval of this application, the date of commencement (month, day and year) N/A . NOTE: Additional filing fees may apply. See section 48-249-913(d).

(*Id.*) Moreover, B.E. held itself out to be a Michigan-based corporation with a Michigan-based managing member in public filings with the Michigan Secretary of State as recently as February 10, 2013, *after* filing its opposition to the Motion. (*Id.* Ex. 2.) Thus, B.E. either submitted incorrect statements to Tennessee and Michigan authorities, or mischaracterized the strength of its ties to Tennessee in opposing the instant motion.

B.E.'s representations regarding Mr. Hoyle's purported residency in Tennessee are similarly problematic. According to documentation filed with the U.S. Patent & Trademark Office, Mr. Hoyle maintained his residency in Louisiana for purposes of his B.E.-related business long after he allegedly moved to Tennessee. (*Id.* Ex. 3.) Mr. Hoyle does not appear to dispute this fact. (D.E. 34-1 ("Hoyle Decl.") ¶ 4.)

Given the above, Samsung respectfully submits that B.E.'s presence in Tennessee is "recent, ephemeral, and an artifact of litigation" and, thus, is entitled to no deference. *In re Zimmer Holdings*, 609 F.3d at 1381.

[2] All citations to "MacLean Reply Decl." refer to the concurrently-submitted Declaration of Justin A. MacLean in Support of Samsung's Reply Memorandum Supporting Its Motion to Transfer Venue and exhibits thereto.

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