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

B.E. TECHNOLOGY, L.L.C., **PLAINTIFF,** **v.** **MATCH.COM L.L.C.,** **DEFENDANT.**	**Case No. 2:12-cv-02834-JPM-tmp**

DEFENDANT MATCH.COM L.L.C.'S
REPLY IN SUPPORT OF MOTION TO TRANSFER VENUE

I. INTRODUCTION.

Despite the fact that B.E. is a seventy-four (74) person company, its opposition to Match.com's Motion to Transfer focuses solely on a single individual – Mr. Hoyle. B.E.'s Response disregards its other members, its history of operations in Michigan, and the stronger ties it has to multiple other jurisdictions, and remarkably argues that its supposed single and recent tie to this District – Mr. Hoyle – sufficiently outweighs all other conveniences obtained by transfer to justify denial of Match.com's Motion.

Because most of the witnesses and evidence pertaining to this case are closer to the transferee venue, with few or no convenience factors favoring B.E.'s chosen forum, Match.com respectfully requests that the Court grant its Motion and transfer this case to the Northern District of California, or alternatively, to the Northern District of Texas. *In re Biosearch Techs. Inc.*, No. 995, 2011 WL 6445102, at *3 (Fed. Cir. Dec.22, 2011) (granting writ and ordering transfer).

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II. ARGUMENT & AUTHORITIES.

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

1. B.E. Inappropriately Applies the Wrong Legal Standard.

B.E. improperly argues that its choice of forum is entitled to "substantial weight," and that Match.com cannot satisfy its burden of making a strong showing that transfer is required. (Dkt. No. 37 at 5, 8). As Magistrate Judge Claxton recently found, however, "courts in this circuit do not assign plaintiff's choice [of forum] paramount importance." *Esperson v. Truegreen Ltd. P'ship*, No. 2:10-cv-02130, 2010 WL 4362794, at * 6 (W.D. Tenn. Oct. 5, 2010), *adopted* 2010 WL 4337823 (W.D. Tenn. Oct. 27, 2010) (granting motion to transfer). Instead, they "simply treat it as one factor to be weighed equally with other factors." *Id.* Furthermore, movants seeking transfer must establish only that "the balance of the transfer factors preponderate in favor of transfer." *Id.* at * 4. Accordingly, B.E.'s arguments that Match.com must satisfy some heightened standard and that B.E.'s choice of forum is entitled to substantial deference applies the wrong legal standard.

2. Contrary to B.E.'s Self-Serving Arguments, 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. Although Mr. Hoyle recently decided to reside permanently in this district, B.E. is the plaintiff, not Mr. Hoyle. Seventy-three of B.E's other members, which B.E. conveniently failed to identify or discuss, reside outside this District. The Western District of Tennessee is "convenient" for exactly one person – Mr. Hoyle. (Dkt. 32-1 at 4-5.)

Furthermore, despite B.E.'s claims that it is an established Tennessee company, the evidence shows that it is a loosely-organized company that has been managed from Michigan,

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where it has maintained a registered office for more than a decade, and where its accountant, Randall Rupp, former managing member, Mark McKinley, and patent attorney, James D. Stevens, all reside. (Dkt. 32-1 at 4-5). Mr. Hoyle's claims that B.E's failure to switch its principal place business from Michigan to Tennessee in the six years since Mr. Hoyle "relocated" to Tennessee amounted to a mere oversight lacks credibility. The only reasonable inference that can be drawn from B.E's activities is that it moved its principal place of business to this District in anticipation of opposing motions to transfer pursuant to Section 1404(a). Accordingly, B.E.'s contacts with this District are entitled to no weight in the transfer analysis. *In re Microsoft Corp.*, 630 F.3d 1361, 1364–65 (Fed. Cir. 2011) (actions to establish contacts in Texas were venue manipulation and entitled to no weight).

a. Mr. Hoyle's Personal Contacts are Not Attributable to B.E.

Because B.E. has no history of operations in this District, B.E.'s Response focuses on Mr. Hoyle's personal and family contacts. These contacts, however, are not attributable to B.E. and are not relevant to the transfer analysis. There is no evidence that B.E. and Mr. Hoyle are alter egos. Before B.E. moved its principal place of business to Mr. Hoyle's residence (one day prior to initiating litigation in this District), B.E. and Mr. Hoyle always maintained separate addresses. (Dkt. 32-4 at 2, (Ex. A-2)). Therefore, Mr. Hoyle's personal contacts should be given only minimal consideration in the transfer analysis.

b. B.E.'s Statements Regarding its Contacts are Not Credible.

B.E.'s misleading statements regarding its purported contacts with this forum are entitled to little or no weight. The overwhelming majority of its statements are inconsistent with pre-suit statements it made to the State of Michigan and the United States Patent and Trademark Office.

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Misleading Claim 1: "Mr. Hoyle has been physically present in this District since 2006, and B.E. since at least 2008."

The assertion regarding Mr. Hoyle's presence in this District is contradicted by a document B.E. filed with the United States Patent Office in 2011, which states that Mr. Hoyle was a resident of New Orleans, Louisiana. (Dkt. 32-1 at 13, Ex. A-3). The assertion is further contradicted by Mr. Hoyle's declaration, which states that he "took steps to establish residence [in Louisiana] while my non-B.E. work required my presence in the Memphis area." (Dkt. 37-1 at ¶ 4).

B.E.'s assertions regarding its presence in this District are also contradicted in numerous other ways. First, B.E. offered no documentary evidence showing that it has ever done business in Tennessee. Second, Michigan is the only state in which B.E. filed annual statements between 2008 and 2012. Third, in 2011, B.E. filed a document with the United States Patent Office that identified Michigan as the location of its principal office. Fourth, Mr. Hoyle filed a Power of Attorney with the Patent Office in 2011 that – again – identified Michigan as B.E.'s principal office. Fifth, when B.E. registered to do business in Tennessee in September 2012, it answered the question regarding prior business operations in the State by marking "N/A." (Dkt. 32-6 at 2 (Ex. A-4)). Finally, B.E. held itself out as a ***Michigan based corporation*** with a ***Michigan based managing member*** in public filings it made with the Michigan Secretary of State ***as recently as February 10, 2013***.[1]

B.E. either submitted incorrect statements to the Michigan Secretary of State, the Tennessee Secretary of State, and the United States Patent and Trademark Office or it

[1] This filing occurred after Match.com filed its Motion to Transfer, but before B.E. filed its Response. B.E.'s Response fails to address this filing. (See Exhibit A-1 attached hereto).

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mischaracterized the strength of its ties to Tennessee in opposing Match.com's Motion to Transfer.

Misleading Claim 2: "B.E.'s documents, including those relating to the conception and reduction to practice of the inventions disclosed in those patents are physically located in Cordova, Tennessee, and have been located in the Western District of Tennessee since I moved here in 2006."

The assertion that B.E.'s documents are located in this District is only partially true. Mr. Hoyle's declaration confirms that B.E. maintains a registered office in Michigan, and that B.E.'s accountant, Randall Rupp, resides there. (Dkt. 37-1 at ¶ 5). Furthermore, B.E. does not dispute that its patent prosecution attorney, James D. Stevens, lives in Michigan. (Dkt. 32-1 at 5, Ex. A-9). The only reasonable inference based on these facts is that B.E.'s financial records, tax records, and patent prosecution files all reside in Michigan or were located in Michigan until B.E. decided to initiate its litigation strategy.

In similar circumstances, where patent owners have colored the facts in an attempt to make their contacts with a forum seem more substantial, the Federal Circuit has not hesitated to compel transfer. For example, in *In re Zimmer Holdings, Inc.*, MedIdea's business was centered in Michigan, yet it established its principal place of business in Texas shortly before filing suit. *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010). When Zimmer moved to transfer, MedIdea argued that transfer was inappropriate because it filed suit in its home jurisdiction. *Id.* The Federal Circuit ordered transfer, concluding that MedIdea was "attempting to game the system by artificially seeking to establish venue by sharing office space with another of the trial counsel's clients." *Id.* Like MedIdea, B.E. has no history of operations in this District and its principal office in Mr. Hoyle's residence is as recent and ephemeral as MedIdea's shared office space in the Eastern District of Texas. *Id.*

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