IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

AGIS SOFTWARE DEVELOPMENT, LLC,	§	Case No. 2:17-cv-516-JRG
	§	
Plaintiff,	§	
	§	**JURY TRIAL DEMANDED**
v.	§	
	§	
APPLE, INC.,	§	
	§	
Defendant.	§	
	§	

PLAINTIFF AGIS SOFTWARE DEVELOPMENT, LLC'S SUR-REPLY IN OPPOSITION TO DEFENDANT APPLE, INC.'S MOTION (DKT. 53) TO TRANSFER VENUE TO THE NORTHERN DISTRICT OF CALIFORNIA

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Apple, Inc.'s ("Apple") Reply continues to focus on a prior case in a different court involving different parties and different patents. In view of the factors of ***this*** case, Apple has failed to show that the Northern District of California is clearly more convenient or that transfer would serve the interest of justice. First, relevant documents are maintained in this District. Second, this District is more convenient for AGIS and relevant third party witnesses. Third, Apple provides no support for its baseless contention that transfer would promote judicial economy or how any local interest of the Northern District of California should weigh in favor of transfer, let alone demonstrate that the Northern District of California is clearly more convenient.

I. THE LOCATION OF DOCUMENTARY EVIDENCE DOES NOT JUSTIFY TRANSFER

Apple's statement that "no relevant sources of proof exist in this District" is factually incorrect. As AGIS explained in its opposition brief, an AGIS Inc. software developer lives and works in this District under the direct supervision of Mr. Blackwell. While Apple is correct that AGIS has not alleged that any AGIS products practice the asserted claims, Apple conflates AGIS with its sister company, licensee, and practicing entity AGIS Inc. Mr. Armstrong maintains, in this District, documents related to the design, development, and marketing of AGIS Inc. software licensed under the Patents-in-Suit.[1] This is not a case where the only relevant documents in the District are those moved "just before the lawsuit," as Apple contended in *Optimum Power Solutions;* Mr. Armstrong has had access to AGIS Inc.'s documents for many years and his residence in this District was unrelated to this lawsuit. Dkt. 57-1 ¶¶ 15-16. *C.F. Optimum Power Solutions LLC v. Apple, Inc.*, 794 F. Supp. 2d 696, 701 (E.D. Tex. 2011). Because AGIS's proof will come from, *inter alia*, records maintained in offices in this District, as well as from its technical expert located in this District, this factor weighs against transfer. Dkt. 57-1

[1] AGIS has not represented that it will not rely on AGIS Inc.'s practicing of the asserted patents in this case.

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¶ 12. *Media LLC v. Adobe Sys. Inc.,* No. 6:07-cv-355, 2008 WL 819956, at *4 (E.D. Tex. Mar. 25, 2008); *see also Odom v. Microsoft Corp.*, 596 F. Supp. 2d 995, 1000 (E.D. Tex. 2009).[2]

Regarding its own documents, Apple merely contends that documents "exist at Apple's headquarters in Northern California," yet Apple does not contend that those very same documents are inaccessible from this District. Dkt.59 at 1.[3] Apple ignores the location of its own source code which was produced at the offices of outside counsel in New York. Dkt 57 at 8.

II. CONVENIENCE OF THE PARTIES AND WITNESSES AND COST OF ATTENDANCE FOR WILLING WITNESSES WEIGH AGAINST TRANSFER

First, this District is more convenient than the Northern District of California for all AGIS and AGIS Inc. witnesses including Mr. Beyer, Mrs. Beyer, Mr. Blackwell, as well as Mr. Sietsema, Mr. Armstrong, and Mr. Rice.[4] Apple does not contest that this District is more convenient for Mr. Sietsema and Mr. Armstrong. Dkt. 59 at 3-4. AGIS detailed Messrs. Sietsema's and Armstrong's relevant knowledge and anticipated testimony, including their knowledge relating to contracts and licenses involving AGIS's intellectual property and AGIS's software development and quality assurance which relates to, *inter alia*, AGIS's damages. Dkt. 57 at 4, 5; Dkt. 57-1 ¶¶ 15-17.[5] Further, Apple does not dispute that this District is the most convenient for AGIS's technical expert, who is located in this District (Dkt. 59-3) and whose

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[2] Apple's reliance on *Optimum Power Sols.*, 794 F. Supp. 2d at 702 and *Oyster Optics, LLC v. Coriant Am. Inc.*, 2017 WL 4225202, at *5 (E.D. Tex. Sept. 22, 2017) are misplaced because in those cases, there were no witnesses or documents located in the transferor district.

[3] *See Aloft Media LLC v. Adobe Sys. Inc.*, No. 6:17-cv-355, 2008 WL 819956, at *4 (E. D. Tex. Mar. 25, 2008) ("[P]atent litigation usually involves sources of proof that are readily convertible to an electronic medium" and "it is presumed that the parties will exchange discovery electronically.").

[4] Apple's sur-reply brief focuses on the status of Mr. Rice as set forth in AGIS's initial disclosures, however, Mr. Rice's employment status is irrelevant because Mr. Rice is a willing witness in this District.

[5] Apple argues that the convenience of Mr. Sietsema should be discounted because his contacts with Texas are "presumably" recent (Dkt. 59 at 3 fn. 8), but he has worked in Austin Texas office since 2005 (Dkt. 57-1 ¶ 17).

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convenience is, contrary to Apple's contention, relevant to the transfer analysis. *Aloft Media*, 2008 WL 819956, at *3, *5.[6]

Apple's argument that the convenience of Mr. Beyer and Mr. Blackwell is entitled to little weight because they live outside this District (Dkt. 59 at 3) is in contravention of Fifth Circuit law. "When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." *In re Volkswagen AG*, 371 F.3d 201, 204–05 (5th Cir. 2004). The Northern District of California is significantly more inconvenient for both Mr. Beyer and Mr. Blackwell who would be required to travel an additional 1620 miles and 1054 miles, respectively, if this action was transferred. *See* Dkt. 57-4.[7] Apple also ignores that this District is convenient for Mr. Rice who has agreed to travel to this District if called to testify. Dkt 57-1 ¶ 20.

Second, regarding convenience of potential third parties, Apple, for the first time in its Reply, identifies numerous named inventors of alleged prior art patents. Dkt. 59 at 4. Apple does not indicate whether any of these named inventors would be witnesses, nor does it meet its burden to set forth evidence as to the relevance, materiality, and purported inconvenience of these individuals. *Aloft Media,* 2008 WL 819956, at *5 (holding that defendant did not demonstrate how existence of 47 prior art inventors would be important to their case.); *Sanger Ins. Agency, Inc. v. HUB Int'l, Ltd.*, 2014 WL 5389936, at *2 (E.D. Tex. Mar. 2, 2014) (Gilstrap, J.). Similarly, Apple fails to set forth the relevance and materiality of the former AGIS

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[6] *Berry v. Pilgrim's Pride Corp.*, 2016 WL 6092701, at *3 (E.D. Tex. Oct. 19, 2016) cited by Apple, determined that experts are entitled to weight in a transfer analysis.

[7] That Mr. Blackwell testified in an unrelated case in Florida (Dkt 59 at 3) is irrelevant to the transfer analysis.

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prosecuting attorney.[8] *Id.*; *Sanger*, 2014 WL 5389936, at *2.

Additionally, Apple's representations regarding the cellular carriers contravene publicly available information. Apple states that "none of those companies has ever pursued or been involved with any marketing related to the Apple features." Dkt. 59 at 5. However, the carriers explicitly market Apple's "Find My iPhone" application on their websites. *See, e.g.*, Exs. 16-18. Moreover, Apple does not dispute that the cellular carriers may have information regarding the value of the accused features. Dkt 59 at 4-5, Dkt. 57 at 11. These carriers are located in Dallas, Texas, Kansas, and New York (Dkt. 57-2 ¶ 13), may have relevant witnesses in the District, and will likely find Texas more convenient than California (*MHL Tek*, 2009 WL 440627, at *4).[9]

Third, regarding Apple's own witnesses, Apple has failed to provide evidence as to the "relevance and materiality" of the information its seven named individuals might have and has failed to identify "evidence (e.g., a declaration from the [employees]) indicating that travel to Marshall would constitute an inordinate inconvenience or expense." *Sanger*, 2014 WL 5389936, at *2. Apple's statements that it "*may*" call one of these employees as a witness as they "*may* have information relevant to the case" concerning the development, operation, functionality, sales, and marketing of the Accused Products (Dkt. 59 at 2; 53 at 4), without more, is insufficient. *Sanger*, 2014, WL 5389936, at *2.[10] Further, Apple does not dispute that it employs individuals in Texas, responsible for Apple products. *See* Dkt. 59; Dkt. 57-2 ¶¶ 9-10.

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[8] Apple also ignores that other prosecuting attorneys of the patents-in-suit are located in Massachusetts and Florida (Dkt. 59 at 4; Dkt 53 at 7), who, if called to testify, will likely find Texas more convenient than California (*MHL Tek, LLC v. Nissan Motor Co.*, 2009 WL 440627, at *4 (E.D. Tex. Feb. 23, 2009)).

[9] That AGIS has not yet issued subpoenas to the cellular carriers (Dkt. 59 at 4-5) is irrelevant, as the deadline for document production has not yet passed. Dkt. 46 at 3.

[10] *Godo Kaisha IP Bridge 1 v. Xilinx, Inc.*, cited by Apple, is inapposite because in that case the defendant set forth, in detail, the relevant knowledge of its employees *and* the aspects of the case for which the witnesses would be providing testimony. *Godo Kaisha IP Bridge 1 v. Xilinx, Inc.*, 2017 WL 4076052, at *4 (E. D. Tex. Sept. 14, 2017).

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