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

VOIP-PAL.COM, INC.,

        Plaintiff

v.

AMAZON.COM, INC.,
AMAZON.COM SERVICES LLC, and
AMAZON WEB SERVICES, INC.,

        Defendants.

CASE NO. 6:20-cv-00272-ADA

**AMAZON'S OPPOSITION TO VOIP-PAL'S MOTION TO STRIKE OR
CONDUCT VENUE DISCOVERY AND FILE A SUR-REPLY TO AMAZON'S
<u>REPLY IN SUPPORT OF ITS MOTION TO TRANSFER VENUE</u>**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I.   INTRODUCTION

Despite VoIP-Pal's repeated assertions that Amazon raised "new arguments" and submit-

ted "new evidence" in its Reply in support of its Motion to Transfer ("Reply" (Dkt. No. 41)),

nothing in Amazon's Reply was new. Amazon's position is, and has always been, that it has no

relevant witnesses in this District because none of its employees in the District worked on the

accused calling and messaging functionality. In response, VoIP-Pal injected two Austin-based

Amazon employees into the case, Tim Thompson and Bala Kumar, by misrepresenting the sub-

stance of a declaration signed by Mr. Thompson and submitted in a different case. VoIP-Pal's

opposition to Amazon's Motion to Transfer also made misleading arguments about the size of

Amazon's presence in Austin, claimed a need for discovery on a "contact list" feature that VoIP-

Pal speculated was developed in Austin, and asserted that Amazon provided insufficient evidence

about its employees within the Northern District of California who worked on the accused func-

tionality. Amazon responded to all of these arguments in its Reply and included declarations that

addressed each issue raised by VoIP-Pal. Accordingly, VoIP-Pal's motion to strike Amazon's

Reply arguments and declarations should be denied because they all properly respond to VoIP-

Pal's arguments.

VoIP-Pal's alternative request for venue discovery and a sur-reply should also be denied.

VoIP-Pal represented to this Court and Amazon that it did not need venue discovery from Amazon,

that briefing on Amazon's Motion to Transfer would be closed with the filing of Amazon's Reply,

and that the Motion should be decided without delay. (Aug. 7, 2020 Hearing Tr. at 38:22-39:10.)

VoIP-Pal was well-aware of Amazon's positions when it made these representations because

VoIP-Pal was already in possession of Amazon's Motion to Transfer and Mr. Thompson's prior

declaration. Because Amazon's Reply arguments and declarations added nothing new, VoIP-Pal

should be held to its decision to waive venue discovery from Amazon and the Court should decide

Amazon's Motion to Transfer without delay.

II.   AMAZON'S REPLY ARGUMENTS AND DECLARATIONS DIRECTLY RESPOND TO VOIP-PAL'S OPPOSITION ARGUMENTS.

Although courts in this Circuit generally "decline to consider arguments made for the first

time in a reply brief," arguments "made in response to an argument in the [opposing party's] brief"

are properly within the scope of reply. *Avery v. Colvin*, 605 F. App'x 278, 283-84 (5th Cir. 2015)

(concluding that "an appellant's rebuttal in its reply brief of an argument made by an appellee in

its brief" was proper where the appellee "is the one who injected the matter"). *See also Horak v.*

Glazer's Wholesale Drug Co., No. 06-10854, 2007 WL 713154, at *4 n.3 (5th Cir. Mar. 6, 2007)

("theory was properly before the district court" where the appellant "asserted the … theory in his

response brief" and the appellee "addressed the theory in its reply brief"). Declarations in support

of arguments made in reply briefs that respond to the opposing party's arguments are likewise

proper reply evidence. *C&M Oilfield Rentals, LLC v. Location Illuminator Techs., LLC*, No.

PE:18-CV-00039-DC-DF, 2020 WL 4708714, at *2 (W.D. Tex. July 13, 2020) ("As the 'new

arguments' that [defendant] seeks to strike are simply rebuttals to evidence that [defendant] *itself*

introduced, the Court finds that [plaintiff] properly included the [witness] declarations. Accord-

ingly, the declarations shall not be stricken on this ground.").

Here, the arguments and declarations that VoIP-Pal seeks to strike are well within the scope

of reply because they directly respond to arguments made in VoIP-Pal's Opposition to Amazon's

Motion to Transfer ("Opp." (Dkt. No. 33)).

A.   Amazon Properly Responded to VoIP-Pal's Misrepresentations of Tim Thompson's Prior Declaration Testimony.

In its Motion to Transfer, Amazon specifically explained that there are no Amazon em-

ployees within the Western District of Texas who designed, developed, managed, or otherwise

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