IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PRAGMATUS AV, LLC, Plaintiff v. FACEBOOK, INC., YOUTUBE, LLC, LINKEDIN CORPORATION, and PHOTOBUCKET.COM, INC., Defendants.	)	Civil Action No. 1:10-cv-1288 (LMB/JFA)

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

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I. INTRODUCTION

Pragmatus's Opposition confirms that this case should be heard in the Northern District of California. Pragmatus's purported connections to this district are simply an artifice to manufacture a basis to file suit here. *See In re Microsoft Corp.*, ___ F.3d ____, 2011 WL 30771, at *2-3 (Fed. Cir. Jan. 5, 2011) ("The Supreme Court has long urged courts to ensure that the purposes of jurisdictional and venue laws are not frustrated by a party's attempt at manipulation."). Pragmatus has no loyalty to Virginia, as it has filed suit in courts throughout the country—including Delaware just last week.[1] Pragmatus admits that its sole connections to the Eastern District of Virginia are: (a) its newly-created Alexandria office, and (b) the current residence of one of its two owners. Pragmatus's choice of forum should be given no weight.

In stark contrast, Defendants and the patents have strong connections with the Northern District of California. Three of the defendants are headquartered, and the fourth operates a substantial facility, there. The vast majority of employee witnesses and documents are located in the Northern District of California. The alleged inventions of the patents-in-suit were conceived, developed, and commercialized there. A substantial number of non-party witnesses also continue to reside there. Pragmatus's attempt to minimize these facts through bare declarations of only a few individuals must be ignored, as none have categorically agreed to the jurisdiction of this Court and to appear for trial.

Finally, arguments regarding docket congestion between this Court and the Northern District have been rejected as a basis to deny transfer and should be similarly rejected here. In sum, the Court should transfer this action to the Northern District of California.

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[1] The Delaware case is *Pragmatus VOD LLC v. Bright House Networks, LLC, et al.*, Case No. 1:11-cv-00070-UNA (D. Del. filed Jan. 20, 2011). That action involves a different Pragmatus entity that shares the same office space and registered agent as the plaintiff herein.

II. THE CONVENIENCE OF THE PARTIES AND WITNESSES OVERWHELMINGLY FAVORS TRANSFER

The Federal Circuit has recognized that "[i]n patent infringement cases, the bulk of relevant evidence usually comes from the accused infringer." *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009). Defendants Facebook, YouTube, and LinkedIn are headquartered in the Northern District of California, and the vast majority of their employees with knowledge of the development, implementation, and operation of the systems and services accused of infringement are located there. Facebook Decl. ¶ 3; YouTube Decl. ¶ 9; LinkedIn Decl. ¶ 3.[2] The vast majority of likely sources of proof, including the accused systems and services are also located in the Northern District of California. Facebook Decl. ¶ 3; YouTube Decl. ¶ 6; LinkedIn Decl. ¶ 4.[3] Litigating this case in the Northern District of California would save all parties countless hours resulting from travel to the East Coast and needless subpoena fights.

Pragmatus's claim that a transfer to the Northern District "would impose harsh burdens on Pragmatus' witnesses" is meritless. Opp'n at 10. Pragmatus has not identified a single individual that resides in Virginia who is likely to serve as a witness in this case. Its opposition identifies Mr. Marino as responsible for its operations, but does not identify any knowledge he

[2] Pragmatus claims that the Court should disregard Defendants' arguments regarding the convenience of party witnesses because "Defendants fail to specify with sufficient particularity the testimony these so-called 'witnesses' would present." Opp'n at 13. As explained in Defendants' opening brief and its pending motion to dismiss, Plaintiff has failed to specifically identify the accused infringing products. Mot. at 2-3. Nevertheless, it is undisputed that the vast majority of knowledgeable employees and documents describing the Defendants' systems are located in the Northern District of California. *Id.* In any event, Pragmatus should be held to its own standard: Pragmatus failed to identify any relevant documents stored at its Virginia office or any particular relevant knowledge possessed by Mr. Marino.

[3] Although Defendant Photobucket is headquartered in Denver, Colorado, the Photobucket employees with knowledge of the development, implementation, and operation of the systems and services accused of infringement and likely sources of proof for those systems and services are located either at its office within the Northern District of California or its Denver, Colorado office. None are in Virginia. Photobucket Decl. ¶ 4.

possesses that is relevant to this litigation. *See* Opp'n at 2. Mr. Marino is not an inventor, nor is there any evidence that he was involved in the development or attempted commercialization of the alleged inventions, which occurred nearly two decades before Pragmatus purchased the patents-in-suit in June 2010. It is unclear what evidence, if any, he could provide in this litigation. Moreover, it could hardly be considered an imposition for Mr. Marino to travel to the Northern District of California to enforce Pragmatus's patents given that the patents were conceived, prosecuted, and commercialized in that district and a number of non-party witnesses currently reside there.[4] Maintaining this case in this district, on the other hand, would place an undue imposition and inconvenience on the potentially numerous party witnesses in California who are involved in the day-to-day development and provision of Defendants' accused products and services.

As to non-party witnesses, Pragmatus does not dispute that the vast majority of them also reside in the Northern District of California. Opp'n at 11-12. Pragmatus attempts to downplay the significance of this factor by arguing that "many of the non-Virginia witnesses have agreed to come to trial in Virginia" (Opp'n at 10), but this argument is misleading. Pragmatus has submitted only one declaration from a potential third party who actually resides in California—co-inventor J. Chris Lauwers. Mr. Lauwers's artfully-drafted declaration does not categorically aver that he will submit himself to this Court's jurisdiction, but rather states that "[i]f necessary, [he] [is] willing to travel" here for trial. Lauwers Decl. ¶ 6. Pragmatus has no such declaration from the two other inventors who reside in California. Pragmatus argues self-servingly that their

[4] In addition, Mr. Marino and Mr. Grillo previously maintained litigation in the Eastern District of Texas to enforce the patents of a prior non-practicing entity with which they were involved. *See* http://www.saxoninnovations.com/ManagementTeam.html (listing Mr. Marino as CEO and Mr. Grillo as Senior Vice President of Licensing) (last visited Jan. 25, 2011); *see e.g.*, *Norman IP Holdings, LLC v. Casio Computer Co., Ltd. et al.*, 6:09-cv-00270-LED-JDL (Dkt. 118-2) (April 10, 2010) (Declaration of Anthony Grillo acting on behalf of Saxon).

testimony would likely be "cumulative" (Opp'n at 11), but does not explain why. Pragmatus is also silent on whether Avistar[5] or Vicor—the California companies where the alleged inventions were developed—would agree to produce witnesses for a trial more than 3,000 miles away. The location of potential non-party witnesses clearly favors transfer.

Finally, Pragmatus argues without legal support that "the convenience of the witnesses and the parties is not the most important factor in the transfer calculus." Opp'n at 10. That argument is contradicted by the law acknowledged in the opposition: "Section 1404(a) is designed to … protect litigants, witnesses and the public against unnecessary inconvenience and expense."[6] *Id.* at 4 (internal quotations omitted). Furthermore, the Federal Circuit has recently made clear that the convenience of witnesses and parties should be the primary focus of any transfer analysis under Section 1404(a). *See, e.g.*, *In re Microsoft Corp.*, ___ F.3d ___, 2011 WL 30771, at *2-3 (granting mandamus and transferring to forum where defendant's witnesses and documents were located); *see also In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010) (same). In short, the Court should transfer this action to the Northern District of California.

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[5] Pragmatus misleadingly asserts that "Avistar's Witnesses Are Willing to Come to Virginia" but identifies only Mr. Rodde—who is the President of Collaboration Properties, Inc., a wholly-owned subsidiary of Avistar. Opp'n at 12. Mr. Rodde avers in his declaration that he has knowledge of the sale of the patents to Intellectual Ventures, but that took place many years after the alleged inventions were conceived and commercialized. Mr. Rodde does not state whether he has any other knowledge regarding the patents-in-suit, such as the conception of the inventions or development of commercial technology embodying those inventions. Rodde Decl. ¶ 3.

[6] Pragmatus does not dispute that the cost of obtaining the attendance of witnesses favors transferring this litigation. Instead, Pragmatus implicitly acknowledges that this factor favors Defendants, but argues that Defendants "are able to bear the costs." Opp'n at 15. Even so, the witness costs in this case still clearly favor transfer. Moreover, Pragmatus's analysis fails to consider the significant costs that litigation in this forum would impose on the numerous third parties identified by Defendants.

III. THE SOURCES OF PROOF ARE IN CALIFORNIA

It is also undisputed that the overwhelming majority of potentially relevant documents and other proof regarding the development and operation of the accused services is located in Northern California. Pragmatus has identified no such proof in the Eastern District of Virginia.

Pragmatus's argument that the documents are electronic deserves no consideration. Opp'n at 14. The Federal Circuit has specifically rejected that argument, holding that the convenience of access to sources of proof is not diminished by the electronic nature of the documents. *See In re T.S. Tech USA Corp.*, 551 F.3d 1315, 1320-21 (Fed. Cir. 2008). The Northern District of California, where the proof is, is clearly the more convenient forum.

Pragmatus contends that transfer should be denied because Facebook and YouTube, like many other companies, have "data centers" in Virginia that facilitate faster access to their websites and services. *See* Opp'n at 7-8. Plaintiff does not identify any "data center" operated in Virginia by LinkedIn or Photobucket. With respect to Facebook and YouTube, Pragmatus's argument ignores the practical reality that evidence relating to the alleged infringement will not be found in the data centers, but in the documents describing the accused products and the testimony of engineers who built them—all of which are located within the Northern District of California. Pragmatus's unsubstantiated claim that the data centers are the "center of infringing activity" is precisely the type of generic allegation that is entitled to little weight. *See Lycos, Inc. v. Tivo, Inc.*, 499 F. Supp. 2d 685, 692-93 (E.D. Va. 2007). The rule that Pragmatus advances would subject any technology company that operates or leases a data center in Virginia to patent infringement litigation in this district, even where the accused products were built, maintained, and commercialized elsewhere.

IV. PRAGMATUS'S CHOICE OF FORUM IS ENTITLED TO NO DEFERENCE

Pragmatus's choice of forum is not entitled to substantial deference because there is little

to connect the Eastern District of Virginia with the cause of action in this case. *Bd. of Trustees v. Baylor Heating & Air Conditioning, Inc.*, 702 F. Supp. 1253, 1256 (E.D. Va. 1988); *Koh v. Microtek Int'l, Inc.*, 250 F. Supp. 2d 627, 635 (E.D. Va. 2003) (transferring action and explaining "[I]f there is little connection between the claims and [the chosen forum], that would militate against a plaintiff's chosen forum and weigh in favor of transfer to a venue with more substantial contacts"); *Corry v. CFM Majestic, Inc.*, 16 F. Supp. 2d 660, 666 (E.D.Va. 1998) (acknowledging that "motions to transfer [are] likely to succeed where action originally filed in district where no operative events occurred" and transferring action) (citing 17 James Wm. Moore, et al., Moore's Federal Practice § 111.13[1][d] (3d ed. 1997)).

Pragmatus argues that its recently-created office in Alexandria, where a single person allegedly works on a part-time basis to "manage" Pragmatus's intellectual property portfolio, favors denying Defendants' motion to transfer. Opp'n at 6-7. Pragmatus does not describe in any detail what business activity allegedly takes place in that office, let alone explain how such activity would relate to any of the claims or defenses in this case. There is no indication that Pragmatus possesses any evidence relevant to this case. Pragmatus's purported business activity appears to be nothing more than purchasing the patents-in-suit and seeking to enforce them in this district.[7] *See* Marino Decl. ¶ 8.

The Federal Circuit has recently condemned the practice of setting up a company in a judicial district as a way to manufacture venue there. *See In re Microsoft Corp.*, ___ F.3d ____, 2011 WL 30771, at *2-3 ("The Supreme Court has long urged courts to ensure that the purposes of jurisdictional and venue laws are not frustrated by a party's attempt at manipulation."); *see*

[7] Pragmatus does not have a functional website (http://www.pragmatus.com/ is "Under Construction"), and Defendants were unable to find a listed telephone number for Pragmatus or Mr. Marino at Pragmatus's address—601 N. King Street, Alexandria, Virginia. Nor is Pragmatus listed on the building directory at 601 N. King Street.

also In re Zimmer Holdings, Inc., 609 F.3d at 1381. In *Microsoft*, the Federal Circuit reversed the denial of a motion to transfer and directed the district court to transfer the action to the district in which the defendant was headquartered. The court held that the plaintiff's presence in the forum state (the result of its formation shortly before filing suit) was not relevant to the § 1404(a) analysis. The court observed that the plaintiff's argument "rests on a fallacious assumption: that this court must honor connections to a preferred forum made in anticipation of litigation and for the likely purpose of making that forum appear convenient." *In re Microsoft Corp.*, ___ F.3d ____, 2011 WL 30771, at *2. This is the same "fallacious assumption" on which Pragmatus's opposition relies.[8]

Pragmatus's forum manipulation is evidenced by another patent litigation it recently filed in the District of Delaware. *See Pragmatus VOD, LLC v. Bright House Networks, LLC, et al.*, Case No. 1:11-cv-00070-UNA (D. Del. Jan. 20, 2011). Pragmatus VOD LLC ("Pragmatus VOD") was formed on the same day as the plaintiff herein, shares the same address as plaintiff, and identifies the same person (Mr. Marino) as its registered agent. *Compare* Ex. 1 *with* Ex. 15. Only this time, however, Pragmatus VOD formed itself as a Delaware entity—and filed suit there last week. *See* Ex. 16 at ¶ 1. The fact that these two closely-related Pragmatus entities are formed under the laws of the jurisdiction in which they file suit indicates obvious attempts at forum manipulation that cannot be condoned.

Pragmatus's assertion regarding its "home forum" of Virginia must therefore be viewed

[8] Pragmatus's efforts to factually distinguish *In re Microsoft* miss the point. *In re Microsoft* stands for the proposition that deference will not be extended to a plaintiff's home forum where that home forum is the result of forum manipulation. ___ F.3d ____, 2010 WL 4630219, at *3-4. Because such forum manipulation exists here, the proposition applies in this case, regardless of any factual differences. In any event, the fact that Pragmatus formed under Virginia law and established an office in this District six months before filing suit, as compared to the 16 days in *In re Microsoft*, is of no moment. Pragmatus could not have filed suit any earlier because the last patent-in-suit issued on November 9, 2010—six days before the Complaint was filed.

with skepticism. Pragmatus does not deny that it opened its Alexandria office in large part to influence the venue analysis. All Pragmatus can say is that forum manipulation was not the "sole" reason for opening that office. *See* Opp'n at 7; Marino Decl. ¶ 11.

V. THE INTERESTS OF JUSTICE FAVOR TRANSFER

Pragmatus argues that the relative speed of the dockets between the two competing districts is the only relevant interest of justice consideration and that it favors litigating this case in Virginia.[9] Opp'n at 16-17. But, as Pragmatus's own briefing acknowledges, docket speed is not a significant factor in the balance of interests. Opp'n at 16 (quoting *Heinz Kettler GMBH & Co. v. Razor USA, LLC*, Case No. 1:10cv708, 2010 WL 4608714, at *7 (E.D. Va. Nov. 5, 2010)). That is particularly true when, as here, the plaintiff patent holder is a non-practicing entity that would not suffer any harm to its competitive position in the marketplace as a result of a longer time to trial.

This Court has recognized on several occasions the minimal relevance of the relative docket speeds between this Court and other proposed transferee courts. *See, e.g.*, *Lycos, Inc.*, 499 F. Supp. 2d at 696 ("docket conditions are only 'a minor consideration' where, as here, the other convenience and justice factors weigh in favor of transfer"); *GTE Wireless, Inc. v. Qualcomm, Inc.*, 71 F. Supp. 2d 517, 520 (E.D. Va. 1999) (same); *Cognitronics Imaging Sys., Inc. v. Recognition Research Inc.*, 83 F. Supp. 2d 689, 699 (E.D. Va. 2000) (explaining that docket conditions should not be the primary reason for declining to transfer a case). Indeed, this Court has recently rejected docket speed as a factor weighing against transfer to the Northern District of California:

[9] Likely due to its inability to demonstrate that this forum is convenient for any party or witness, Pragmatus attempts to cast the interests of justice factor as the most critical factor in the transfer analysis. Opp'n at 15-16. This contention is belied by the fact that Pragmatus is unable to cite a single case from either the Eastern District of Virginia or the Fourth Circuit so stating. *See id.*

> Convergence correctly argues that the comparative docket speeds of the transferor (E.D.Va.) and transferee (N.D.Cal.) fora weigh against transfer, the former according to Convergence averaging 10.2 months to trial and the latter 24.5 months to trial. Yet, these figures do not tell the whole story, as they are calculated averages for all types of civil cases. In this district, for example, patent cases, on average, take substantially longer to litigate than most civil cases. Given the Northern District of California's well-earned reputation as an experienced patent district, the averages may well overstate the difference in docket speeds with respect to patent cases. Moreover, although relative docket speeds is a pertinent factor in the transfer calculus, ***it is rarely, if ever, a primary or decisive factor, and it is not so here***.

Convergence Techs. (USA), LLC v. Microloops Corp, et al., 711 F. Supp. 2d 626, 643-44 (E.D. Va. 2010) (transferring action to Northern District of California) (emphasis added). Accordingly, this factor does not weigh against transfer.

Defendants have provided substantial evidence of the judicial economy and practical expedience of litigating in the Northern District of California, a court which has previously presided over two litigations involving related patents and similar issues of inequitable conduct and invalidity that are likely to be raised in this case. *See* Mot. at 13-15. Pragmatus fails to address, let alone rebut, the significance of this evidence. *See* Opp'n at 18. This Court has expressly recognized that such judicial economy outweighs the limited detriment of docket congestion offered by Pragmatus. *See Hunter Eng'g. Co. v. ACCU Indus., Inc.*, 245 F. Supp. 2d 761, 776 (E.D. Va. 2002) ("The docket congestion factor supports a denial of the transfer motion, but only slightly, and does not outweigh the interest in judicial economy."). Furthermore, as explained above, third party discovery would be much more efficient in the Northern District of California because the majority of potentially-relevant third party witnesses reside there. In short, the interests of justice support transfer.[10]

[10] Pragmatus also notes that discovery has commenced in this litigation. Opp'n at 17. Although Pragmatus served discovery the day before its Opposition was filed and certain of Defendants served discovery the next day, Pragmatus offers no reason why such activity should weigh against transfer. Given the brevity of the discovery period in this case, prudence dictates that the

VI. CONCLUSION

For the foregoing reasons, and the arguments set forth in their opening brief, Defendants Facebook, YouTube, LinkedIn, and Photobucket respectfully request that this case be transferred to the Northern District of California pursuant to 28 U.S.C. § 1404(a).

Dated: January 25, 2011

Respectfully submitted,

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parties initiate discovery despite the pending transfer motion. The exercise of such prudence should not be used as a sword against Defendants.

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CERTIFICATE OF SERVICE

I certify that on the 25th day of January 2011, I will electronically file the foregoing DEFENDANTS' REPLY IN SUPPORT OF THEIR JOINT MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a) with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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