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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AT&T CORP.,
Plaintiff,
v.
TELIAX, INC.,
Defendant.

Case No. [16-cv-01914-WHO](#)

**ORDER DENYING MOTION TO
CHANGE VENUE**

Re: Dkt. No. 10

INTRODUCTION

Plaintiff AT&T Corp. contends in this case that defendant TeliAx, Inc. failed to make payments pursuant to a contract between the parties. TeliAx seeks to transfer the case from this district to the District of Colorado. Because TeliAx waived personal jurisdiction, venue is proper in this district. A discretionary transfer under 28 U.S.C. § 1404(a) is unwarranted. TeliAx’s motion is DENIED.

BACKGROUND

AT&T provides national telecommunication and information services. Compl. ¶ 1 [Dkt. No. 1]. AT&T is a New York corporation with its principal place of business in Bedminster, New Jersey. *Id.* TeliAx is a carrier certified by the California Public Utilities Commission to provide telephone exchange services to users in California. *Id.* ¶ 2. Its principal place of business is in Denver, Colorado and it is incorporated in Colorado. *Id.*

Around July 2011, AT&T and TeliAx entered into a contract in which AT&T agreed to provide Voice Over IP Connect Service (“AVOICS”) to TeliAx under contractually specified terms and conditions. *Id.* ¶¶ 6-7. AVOICS is an internet communication software that TeliAx subscribers used for long-distance calls. *Id.* ¶ 7. In exchange for these services, TeliAx agreed to pay AT&T a monthly fee, plus extra charges associated with late payments. *Id.*

1 AT&T performed its obligations under the contract from October 2011 to September 2015.
2 *Id.* ¶ 8. It asserts that Teliix stopped making many of its payments beginning around May 2014.
3 *Id.* ¶ 9. AT&T issued multiple demands for payment and ultimately terminated its services around
4 September 2015. *Id.* ¶¶ 10-11. As a result, Teliix allegedly owes AT&T at least \$382,497.29
5 including late payment charges. *Id.* ¶ 12.

6 The complaint consists of two claims, a breach of contract claim and a “Common Count -
7 Open Book Account” claim based on liquidated damages stemming from the breach of contract
8 allegation. AT&T contends that venue is proper in the Northern District of California under 28
9 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions under the AVOICS
10 Contract occurred in this district. *Id.* ¶ 5. According to AT&T, Teliix “substantially performed”
11 the Contract in California “based on Teliix’s termination of access services to end users in [this
12 state].” *Id.* ¶ 4. Additionally, about 80% of the AVOICS calls terminated in California and “the
13 largest portion of end users [were] located in Northern California.” *Id.* ¶ 8.

14 LEGAL STANDARD

15 Federal Rule of Civil Procedure 12(b)(3) allows a party to move to dismiss a case for
16 improper venue. The question of whether venue is “wrong” or “improper” is generally governed
17 by 28 U.S.C. § 1391. When venue is challenged, the court must determine whether the case falls
18 within one of the three categories set out in § 1391(b). If it does, venue is proper. If it does not,
19 venue is improper, and the district court “shall dismiss, or if it be in the interests of justice, transfer
20 such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a).

21 Additionally, 28 U.S.C. § 1404(a) provides that “[f]or the convenience of the parties and
22 witnesses, in the interest of justice, a district court may transfer any civil action to any other
23 district or division where the action might have been brought.” The purpose of this section is to
24 “prevent the waste of time, energy, and money and to protect litigants, witnesses and the public
25 against unnecessary inconvenience and expense.” *Van Dusen v. Barrack*, 376 U.S. 612, 616
26 (1964) (internal citations and quotations omitted). The moving party bears the burden of showing
27 that the inconvenience of litigating in this forum favors transfer. *Florens Container v. Cho Yang*
28 *Shipping*, 245 F. Supp. 2d 1086, 1088 (N.D. Cal. 2002). A motion for transfer lies within the

1 broad discretion of the district court, and must be determined on an individualized basis. *Jones v.*
2 *GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000).

3 **DISCUSSION**

4 Teliix moves under Rule 12(b)(3) to have this case transferred to the District of Colorado
5 pursuant to 28 U.S.C. § 1406 or, alternatively, to transfer venue for “convenience” purposes under
6 28 U.S.C. § 1404.

7 **I. 28 U.S.C. § 1406**

8 Under 28 U.S.C. § 1406(a), “[t]he district court of a district in which is filed a case laying
9 venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer
10 such case to any district or division in which it could have been brought.” Venue is proper in “a
11 judicial district in which any defendant resides,” or “a judicial district in which a substantial part
12 of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b). A defendant is
13 deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time
14 the action is commenced. 28 U.S.C. § 1391(c). It is the plaintiff’s burden to demonstrate that
15 venue is proper. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir.
16 1979).

17 AT&T asserts that venue is proper in this district because Teliix failed to argue lack of
18 personal jurisdiction in its motion. *Oppo.* at 6 [Dkt. No. 18]. A party waives a defense based on
19 lack of personal jurisdiction by omitting it from its first Rule 12(b) motion. Fed. R. Civ. P. 12(h).
20 In its reply brief, Teliix concedes that it waived its right to challenge personal jurisdiction but
21 argues that venue is nonetheless improper. Reply at 6 (“AT&T is also correct that Teliix waived
22 its right to challenge personal jurisdiction by not raising it in a 12(b) motion.”). But, because
23 Teliix did not contest personal jurisdiction, it is therefore “subject to personal jurisdiction” in this
24 district for the purposes of establishing venue. 28 U.S.C. § 1391; *see also* Wright & Miller §
25 3811.1 Particular Classes of Parties – Corporations, 14D Fed. Prac. & Proc. Juris. § 3811.1 (4th
26 ed.) (“[I]f an entity defendant waives its right to object to personal jurisdiction, it has ipso facto
27 consented to venue under [28. U.S.C. § 1391]. It is, after all, ‘subject to personal jurisdiction with
28 respect to the civil action in question.’”); *Underberg v. Employers Mut. Cas. Co.*, No. 15-cv-112,

1 2016 WL 1466506, at *5 (D. Mont. Apr. 14, 2016) (holding that because the defendant did not
2 challenge personal jurisdiction, it waived its right to do so under Rule 12(h)(1) and therefore
3 venue was proper under 28 U.S.C. § 1391(1)). Accordingly, no transfer or dismissal is proper
4 pursuant to 28 U.S.C. § 1406.

5 **II. 28 U.S.C. § 1404**

6 Section 1404(a) provides: “For the convenience of parties and witnesses, in the interest of
7 justice, a district court may transfer any civil action to any other district or division where it might
8 have been brought.” 28 USC § 1404(a). “Unlike § 1406(a), § 1404(a) does not condition transfer
9 on the initial forum’s being ‘wrong.’” *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of*
10 *Texas*, 134 S. Ct. 568, 579 (2013). A motion to transfer venue under section 1404 requires a
11 consideration of multiple factors including: “(1) the location where the relevant agreements were
12 negotiated and executed, (2) the state that is most familiar with the governing law, (3) the
13 plaintiff’s choice of forum, (4) the respective parties’ contacts with the forum, (5) the contacts
14 relating to the plaintiff’s cause of action in the chosen forum, (6) the differences in the costs of
15 litigation in the two forums, (7) the availability of compulsory process to compel attendance of
16 unwilling non-party witnesses, and (8) the ease of access to sources of proof.” *Jones*, 211 F.3d at
17 498-99.

18 Teliix has not made the required “strong showing” that this case should be transferred to
19 the District of Colorado. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843
20 (9th Cir. 1986) (“The defendant must make a strong showing of inconvenience to warrant
21 upsetting the plaintiff’s choice of forum.”). Many of the factors, including the governing law, the
22 location where the agreements were executed, and the ease of access to sources of proof, do not
23 weigh in favor of either forum. For example, the parties agree that New York law governs the
24 contract at issue. Both this district and the District of Colorado would be equally positioned to
25 apply New York law. Further, Teliix contends that given that the contract was negotiated and
26 executed in Colorado, “most” of the documents related to AT&T’s breach of contract claim are
27 expected to be in Colorado. Mot. at 8 [Dkt. No. 10]. But AT&T, which is likely more familiar
28 with the evidentiary basis for its complaint, asserts that the relevant documents have been

1 generated and maintained electronically and therefore can be accessed from computers
2 nationwide. *See Lax v. Toyota Motor Corp.*, 65 F. Supp. 3d 772, 780 (N.D. Cal. 2014) (“[W]here
3 electronic discovery is the norm (both for electronic information and digitized paper documents),
4 ease of access is neutral given the portability of the information.”).

5 The factors that weigh in Teliix’s favor do so only slightly. Teliix contends the location
6 of the witnesses dictates that this case should be heard in Colorado. It asserts that “roughly half”
7 of its anticipated witnesses are in Colorado. Mot. at 7. “However, the convenience of a litigant’s
8 employee witnesses are entitled to little weight because litigants are able to compel their
9 employees to testify at trial, regardless of forum.” *Skriver Tech. Sols., LLC v. OCLC Online*
10 *Computer Library Ctr., Inc.*, No. 10-cv-03305-JSW, 2010 WL 4366127, at *3 (N.D. Cal. Oct. 28,
11 2010). More important to me is the convenience of non-party witnesses, and Teliix acknowledges
12 that their identities are not known at this stage of the lawsuit. Mot. at 9. Moreover, AT&T
13 represents that its likely witnesses are scattered throughout the United States including in Florida,
14 Wisconsin, Illinois, and Texas. Oppo. at 8. In addition, AT&T represents that depositions will be
15 taken in a location convenient to the witnesses or via teleconference. Oppo. at 8.

16 Teliix also argues that because it is principally located in Colorado, litigating in this
17 district would be expensive. Mot. at 8. While I recognize that litigating in California may be
18 more burdensome than litigating in Colorado for Teliix, which is dwarfed in size and revenue by
19 AT&T, a plaintiff’s choice of forum is afforded substantial weight. *See Lou v. Belzberg*, 834 F.2d
20 730, 739 (9th Cir. 1987) (recognizing that “great weight is generally accorded plaintiff’s choice of
21 forum”).

22 Lastly, courts also consider the “administrative difficulties flowing from court congestion”
23 as another factor relevant to determining whether to grant a motion to transfer pursuant to section
24 1404(a). *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).
25 Teliix contends that AT&T has chosen to burden the already “busy” Northern District of
26 California when it could have brought its lawsuit as a counterclaim (although not a compulsory
27 one) in other litigation pending between the parties in the District of Colorado. Mot. at 1, Reply at
28 3. While I appreciate the concern for this district’s docket, AT&T is not required to bring its suit

1 in Colorado. The Colorado case is a suit for monetary damages under the Communications Act
2 based on Teliix's allegations that AT&T refused to pay it for the use of its facilities to switch and
3 deliver toll free calls from end users to AT&T's toll free subscribers. Aldworth Decl., Exh. A
4 [Dkt. No. 10-1]. This case, on the other hand, involves an alleged breach of the AVOICS contract
5 under which AT&T performed a long-distance, internet-based service for Teliix's subscribers. As
6 AT&T represents, and Teliix does not dispute, none of the phone calls at issue in the Colorado
7 case are at issue here and different divisions within AT&T are involved in the two lawsuits.
8 Lordo Decl. ¶ 4 [Dkt. No. 18-1]. While the two lawsuits share some overlapping elements, and
9 AT&T likely could have brought the instant suit in Colorado, it was not required to do so.
10 Administrative considerations do not compel a transfer.

11 Ultimately, Teliix has not carried its burden to present a strong show of inconvenience.
12 Transfer pursuant to 28 USC § 1404(a) is unwarranted.

13 **CONCLUSION**

14 Teliix's motion to transfer venue is DENIED.

15 **IT IS SO ORDERED.**

16 Dated: August 11, 2016

17 
18 WILLIAM H. ORRICK
United States District Judge