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

PRAGMATUS AV, LLC, **Plaintiff,** **v.** **FACEBOOK, INC.,** **Defendant.**	**CASE NO. 2:10-cv-00560 (HCM/FBS)**

PRAGMATUS' MEMORANDUM IN OPPOSITION TO FACEBOOK'S MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

Plaintiff, Pragmatus AV, LLC ("Pragmatus"), by counsel, submits the following Opposition to Defendant Facebook, Inc.'s ("Facebook" or "Defendant") Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a):

INTRODUCTION

Multibillion dollar Facebook asks this Court to transfer this patent infringement case because it is "inconvenient" for it to litigate in this Court even though Pragmatus, a small ***Virginia company*** with its ***only office in Virginia***, and which is ***50% owned by a Virginia resident***, alleges that Facebook is infringing its patents by operating servers ***here in Virginia***.

As explained below, a strong nexus exists among Pragmatus, its patent infringement claims and this District. In addition, ***non-party witnesses, including inventors of the patents-in-suit, have agreed to come to Virginia to testify***, if necessary. Moreover, Facebook has failed to carry its burden to show that the "inconvenience" to its few employees who might come to this District to testify strongly weighs in favor of transfer. Nor has Facebook shown that such employees would provide anything more than cumulative testimony.

Facebook's real aim, of course, is to delay this action by transferring it to a much slower court in California where it will be more difficult for its smaller opponent, Pragmatus, to litigate. Facebook, however, falls far short of satisfying its heavy burden of proving that any factors ***considerably outweigh*** Pragmatus' choice of forum here. Facebook's motion would merely shift any "inconvenience" from itself to Pragmatus.

Facebook will no doubt argue that this case should be transferred in light of U.S. District Judge Leonie M. Brinkema's recent ruling in Pragmatus, AV, LLC v. Facebook, Inc., et al., Civil Action No. 1:10-cv-1288 (Alexandria Division) transferring that patent infringement case against Facebook and various other California-based defendants. However, for the reasons stated below, that decision should not be given much weight by this Court. Facebook's motion to transfer should be denied.

STATEMENT OF FACTS

A. Pragmatus' Presence in Virginia.

Pragmatus is a limited liability company organized and existing under the laws of Virginia with its principal place of business located at 601 North King Street, Alexandria, Virginia 22314. Compl., ¶ 1. This is Pragmatus' only office and all of its documents and records are located at its Alexandria office. See William A. Marino Declaration ("Marino Decl.") at ¶ 5, attached as Exhibit 1.

Pragmatus is engaged in the business of owning and managing intellectual property. Id. at ¶ 6. Pragmatus owns more than 100 patents. Id. Pragmatus holds all right, title and interest in several patents that are the subject of this litigation. Pragmatus' patents include United States Patent No. 7,421,470 ("'470 Patent") entitled "Method for Real-Time Communication Between

Plural Users" and No. 7,433,921 ("'921 Patent") entitled "System for Real-Time Communication Between Plural Users." Id. at ¶ 7; Compl., ¶¶ 5 and 6.

At its Alexandria office, Pragmatus, among other things, manages its intellectual property portfolio, including the patents-in-suit, acquires patent rights, and licenses its patents. Id. at ¶ 8. Pragmatus has only two members, William A. Marino and Anthony Grillo, who are responsible for all of Pragmatus' day-to-day operations. Id. at ¶ 3. Mr. Marino works from the Pragmatus Alexandria office four days a week. Id. at ¶ 5.

Mr. Marino has been a tax-paying resident of Virginia since 2005. He owns a home in Alexandria, Virginia that he and his wife purchased in 2007, many years before Pragmatus was formed. Id. at ¶ 4.

B. Facebook's Infringement in Virginia.

The claims of both patents-in-suit are directed to allowing users to communicate over a wide area network. Compl., Exs. A and B. Computer servers, for example, maintain associations between users and addressing information for the communication devices used by those users when they log in. Thus, logged-in users can be found no matter where they are physically located. A user initiates communication by selecting another user's icon from a list and, once selected, the selected user's address is looked up at the server, for example, to establish communication between the users.

Facebook has committed, and continues to commit, acts of infringement ***in Virginia*** by maintaining multiple data centers containing servers in this District where Facebook's infringing activity is occurring. Compl., ¶ 3,4. Pragmatus believes that Facebook currently maintains three large data center facilities in Ashburn, Virginia. Marino Decl. ¶ 12. In fact, Facebook has admitted that it has these servers in Virginia. See Facebook Decl., ¶ 4, attached as Exhibit 2.

Each data center contains numerous computer servers that receive user identification and other information and distribute it to Facebook users. Marino Decl., ¶ 12. Facebook's infringement is occurring on these servers. Id.

A. Pragmatus' Choice To Litigate In Virginia Is Entitled To ***Substantial*** Deference.

The U.S. Court of Appeals for the Fourth Circuit has held that "[u]nless the balance weighs heavily in favor of transfer, the plaintiff's choice of forum should rarely be disturbed." Collins v. Straight, Inc., 748 F.2d 916, 921-22 (4th Cir. 1984).

The burden on a motion to transfer rests with the moving party. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988) (quoting Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)). The movant only can satisfy this burden if it shows that "the balance of convenience among the parties and witnesses is ***strongly*** in favor of the forum to which transfer is sought." Nationwide Mut. Ins. Co. v. Overlook, LLC, 2010 WL 2520973, at *3 (E.D. Va., June 17, 2010); see also Heinz Kettler GMBH & Co. v. Razor USA, LLC, 2010 WL 4608714, at *8 (E.D. Va., Nov. 5, 2010); WIAV Solutions, LLC v. Motorola, Inc., 2009 WL 3414612, at *2 (E.D. Va., Oct. 20, 2009); JTH Tax, Inc. v. Lee, 482 F. Supp.2d 731, 736 (E.D. Va. 2007).

In addition, this Court has recognized that a plaintiff's choice of forum is given ***even more deference*** when its suit is brought in its home forum. Heinz, 2010 WL 4608714, at *8 (substantial weight given to the plaintiff's choice of forum because it was a Virginia corporation with its principal place of business in Virginia); WIAV Solutions, 2009 WL 3414612, at *3 (plaintiff's choice of forum is entitled to substantial weight because the Eastern District of Virginia was plaintiff's home forum); Intranexus, 227 F. Supp.2d at 583 (court denied motion to transfer due, in part, to plaintiff having brought suit in same forum as its principal place of business which the court held "strongly favors retaining venue in this court").

This Court has also established that transfer should be denied if it "simply [shifts] the balance of inconvenience" from one party to another. JHT Tax, 482 F. Supp.2d at 737; General Foam Plastics Corp. v. Kraemer Export Corp., 806 F. Supp. 88, 90 (E.D. Va. 1992); see also Board of Trustees, Sheet Metal Workers Nat'l Fund v. Baylor Heating & Air Conditioning, Inc., 702 F. Supp. 1253, 1258-60 (E.D. Va. 1988).

In deciding whether to grant transfer pursuant to § 1404(a), this Court must consider the following factors: (1) the plaintiff's initial choice of venue; (2) witness and party convenience; and (3) the interests of justice. Nationwide, 2010 WL 252097, at *3; see also Baylor Heating & Air Conditioning, Inc., 702 F. Supp. at 1253.

1. Pragmatus' Choice to Sue In Its "Home" Forum In Virginia is Entitled to Substantial Deference.

Pragmatus has filed this action in the Eastern District of Virginia where it has its principal place of business, headquarters, and only office. Marino Decl. at ¶ 5; Compl. at ¶ 1. At its Alexandria, Virginia office, Pragmatus, among other things, manages its intellectual property portfolio, including the patents-in-suit, acquires patent rights and licenses its patents. Marino Decl. at ¶ 8. In addition, Pragmatus is owned and managed by William A. Marino and Anthony Grillo who are responsible for all of Pragmatus' day-to-day operations. Id. at ¶ 3. Mr. Marino works from the Pragmatus Alexandria office four days a week and he has been a resident of Alexandria, Virginia since 2005, many years prior to Pragmatus' formation and its purchase of the patents-in-suit. Id. at ¶¶ 4, 5. Mr. Marino is a tax-paying resident of Virginia who currently owns a home that he and his wife purchased in 2007. Id. at ¶ 4. He certainly did not move to Alexandria in 2005 for the purpose of bringing this lawsuit, or any lawsuits, in this Court. Id. at ¶ 10. Furthermore, Pragmatus did not open an office in Alexandria for the sole purpose of having access to this Court. Id. at ¶ 11.

Facebook is also infringing in this District as stated above. Facebook maintains data centers containing servers in this District where its infringing activity is occurring. Compl., ¶¶ 3-4. Facebook has admitted that it maintains data center facilities in Virginia. Facebook Declaration, ¶ 4, attached as Exhibit 2. Each of these data centers contain computer servers that receive information and distribute it to users of Facebook. Id. As discussed above, the claims of the two patents-in-suit are directed to one or more storage systems/servers or to the methods practiced at, or on, such storage systems/servers. Facebook's infringement is occurring on its Virginia servers. Id. Given that Facebook's infringement is occurring, and has occurred, here in Virginia, Pragmatus' choice of venue should be given even more weight. See Samsung Electronics Co, Ltd. v. Rambus Inc., 386 F. Supp.2d 708, 716 (E.D. Va. 2005) ("the plaintiff's choice of forum is certainly a relevant consideration so long as there is a connection between the forum and the plaintiff's claim that reasonably and logically supports the plaintiff's decision to bring the case in the chosen forum").

Accordingly, Pragmatus brought this action in its home forum, and under Collins, a strong presumption exists in favor of denying Facebook's motion to transfer unless it shows that other factors ***considerably outweigh*** Pragmatus' right to choose the forum for its lawsuit and clearly favor transferring the case elsewhere.

The facts in this case are strikingly similar to the facts in WIAV Solutions, LLC v. Motorola, Inc., 2009 WL 3414612 (E.D. Va. Oct. 20, 2009). In WIAV Solutions, the plaintiff's business activities, like those of Pragmatus here, consisted of managing intellectual property assets, acquiring patent rights and licensing patents. In addition, the plaintiff in WIAV Solutions, like Pragmatus, had only one office and that office was located in Virginia. Like Facebook, the defendants in WIAV Solutions moved to transfer to California. The United States

District Court for the Eastern District of Virginia (Richmond Division) recognized that the plaintiff's choice of forum was entitled to substantial weight because the plaintiff was incorporated in Virginia, had its principal place of business in Virginia, and ran its business activities out of its Vienna, Virginia office. Id. at *3-4. The Court denied the motion to transfer.

Given the similarities between Pragmatus' connection to this forum and those of the plaintiff in WIAV Solutions, this Court should find that Pragmatus' choice of venue is entitled to substantial weight.

Facebook incorrectly claims that its infringement "could have occurred in any district in the nation" and that therefore Virginia need not be the forum for this action. See Facebook's Memorandum at p. 1. This contention is misleading. Facebook's data centers are in Virginia, California and possibly Oregon -- not in every state. See Exhibit 3. Furthermore, even if Facebook's infringement is considered to be universal as Facebook suggests, Pragmatus' choice of forum should still stand. If there is no center of infringing activity in a particular case, then as long as the plaintiff brings its action in a forum where the alleged infringement is occurring, that choice should not be undermined by allegations that infringing activity is occurring throughout the country. Beam Laser Sys., Inc. v. Cox Commc'ns., Inc., 117 F. Supp.2d 515, 519 (E.D. Va. 2000).

2. Judge Brinkema's Decision Was Wrong, And Is Not Controlling Here.

It is true that Judge Brinkema granted a motion to transfer in Pragmatus AV, LLC v. Facebook, Inc., et al., Civil No. 1:10-cv-1288. That decision does not govern the outcome here for several reasons.

First, with all due respect to Judge Brinkema, she applied the wrong law, and reached the wrong result. Judge Brinkema gave minimal weight to Pragmatus' choice to sue in its "home"

forum based on In re Microsoft Corp., 2011 WL 30771 (Fed. Cir. 2011). The In re Microsoft case is a Federal Circuit case that applied Fifth Circuit law to the transfer analysis, not Fourth Circuit law. Second, In re Microsoft Corp. is distinguishable on its facts. In that case, the Federal Circuit determined that the plaintiff had no individuals employed in its Texas office and ***no presence*** in Texas, but rather was operated out of the United Kingdom. Id. at *1 (emphasis added).

In contrast, Pragmatus has a genuine presence in this District. Pragmatus' only office is in Alexandria, and one of its two members works there regularly. Marino Dec., ¶ 5. In addition, Mr. Marino, one of Pragmatus' two members, has lived in Virginia since 2005, five years before he formed Pragmatus. Marino Dec., ¶ 4.

Finally, this case is different from the Pragmatus v. Facebook, et al. case that was pending in Alexandria. The two cases involve different patents.[1] And, in the Alexandria case, Pragmatus sued YouTube, LLC, LinkedIn Corporation and Photobucket.com, Inc. in addition to Facebook. Three of the defendants, (Facebook, YouTube and LinkedIn) claimed their "headquarters" were in California. The fourth defendant (Photobucket) had its headquarters in Colorado, but claimed it was more convenient for it to litigate in California than Virginia. All of the defendants claimed that their employee-witnesses and documents were in California. In this case, Facebook is the only defendant, and although Facebook may find it less convenient to litigate here than in California, merely shifting that inconvenience from Facebook to Pragmatus is improper.

[1] The Alexandria case involved U.S. Patent Nos. 7,730,132; 7,822,813; and 7,831,663. This case involves two different patents, namely Nos. 7,421,470 and 7,433,921.

B. The Convenience Of The Witnesses And Parties Do Not Weigh Heavily in Favor of Transfer.

Even though the convenience of the witnesses and the parties is not the most important factor in the transfer calculus, Facebook's motion essentially rests on this factor alone.

Facebook's contention is that certain of its employees and documents are located at its California office. However, even if a handful of potential employee-witnesses, along with some documents, are located at Facebook's offices in California, this falls far short of Facebook's burden to make the required strong showing that this case should be transferred. Indeed, the convenience of the parties and witnesses weighs in favor of maintaining this action here, because many of the non-Virginia witnesses have agreed to come to trial in Virginia, and transfer would impose harsh burdens on Pragmatus' witnesses, as well as certain other non-party witnesses.

In addition, Facebook totally ignores the sharp inconvenience Pragmatus' witnesses would suffer if the Court transfers this case to California. Pragmatus has two members, Mr. Marino and Mr. Grillo. Marino Decl., ¶ 3. Mr. Marino lives in Alexandria, Virginia. Id. at ¶ 4. Mr. Grillo lives in Pennsylvania, and it would be far more convenient for him to attend a trial in Virginia than in California. Grillo Decl., ¶ 4, attached as Exhibit 4. Moreover, the testimony of Mr. Marino and Mr. Grillo will be important especially if it is true, as Facebook claims, that the "market value of the patents" will be an issue at trial (see Facebook Mem. at p. 8) because Mr. Marino and Mr. Grillo were involved in the negotiations that resulted in Pragmatus' acquisition of the patents in this case. Marino Decl., ¶ 13; Grillo Decl., ¶ 4.

1. Few, If Any, Non-Party Witnesses Will Be Inconvenienced Here In Virginia.

Facebook fails to carry its burden to show that there is good reason to transfer this action to California because of non-party witness availability. "The party asserting witness

inconvenience has the burden to proffer, by affidavit or otherwise, sufficient details respecting the witnesses and their potential testimony to enable the court to assess materiality of evidence and the degree of inconvenience." Heinz, WL 4608714, at *6; WIAV Solutions, 2009 WL 3414612, at *5; Samsung, 386 F. Supp.2d at 718 (citation omitted).

Witness convenience is not merely a battle of numbers favoring the party that can provide the longest list of non-party witnesses it plans to call. Samsung, 386 F. Supp.2d at 718. Moreover, the moving party must demonstrate that the non-party witness is not willing to travel to a foreign jurisdiction. Id. (court denied motion to transfer, in part, because movant failed to show that witnesses would not travel to this district to testify if requested to do so or if certain expenses were paid); see also WIAV Solutions, 2009 WL 3414612, at *6 (court denied motion to transfer, in part, because movants were unable to show that certain non-party witnesses were unwilling to travel to the Eastern District of Virginia). Merely stating that potential witnesses reside beyond a forum's subpoena power does little to assist the court in weighing the convenience of the witness and the necessity of compulsory process. Samsung, 386 F. Supp.2d at 718.

A. Certain Inventors and the Prosecuting Patent Attorney Are Willing to Come to Virginia for Trial.

Facebook has not carried its burden because it has not shown that a single non-party witness has refused or will refuse to come to this forum to testify. Nor is it apparent that any such non-party testimony is necessary. Facebook has only mentioned a few individuals who could possibly be potential third-party witnesses in this case.

As an initial matter, Facebook emphasizes that none of the five inventors live in Virginia, and three of the five live in California. But Facebook fails to explain why all five inventors -- or any of them -- will have to testify at trial. Although Facebook states, in a conclusory way, that

inventor testimony "will be relevant to a number of critical issues in this litigation. . . ." Facebook Mem., p. 8, this falls far short of meeting Facebook's requirement to show the details that are necessary for the Court to assess the relevance of this testimony.

Assuming that some inventor testimony may be necessary, two of the five inventors of the patents-in-suit, Lester Ludwig and Emmett Burns, reside outside of California in Texas and Montana, respectively, and thus could not be compelled to testify in California or Virginia. See Facebook's Memorandum at 3. In any event, Lester Ludwig is willing to travel to this District to provide live testimony if necessary. See Lester Ludwig Declaration at ¶ 5, attached as Exhibit 5.

The third inventor, Chris Lauwers, currently resides in California, but also has stated that he is willing to travel to Virginia to provide live testimony. See Chris Lauwers Declaration at ¶ 6, attached as Exhibit 6.

The remaining two inventors who live in California (Keith Lantz and Gerald Burnett) would likely provide cumulative testimony to that which Ludwig and Lauwers would provide. Moreover, Facebook has not shown that either of these individuals refuse or are unable to travel to Virginia to provide testimony in this action.

Finally, Craig Opperman, the attorney who prosecuted the patents-in-suit, resides in California but is likewise willing to travel to Virginia to provide live testimony in this action. See Craig Opperman Declaration at ¶ 5, attached as Exhibit 7.

B. Avistar's Witnesses Are Willing to Come to Virginia.

Facebook also states that California-based Avistar had some "involvement with the patents-in-suit" that "suggests that it will have knowledge" of various matters relating to the patents. But a mere "suggestion" that some Avistar employees may have unspecified knowledge does not establish that this testimony will be relevant to any real issue in this case.

Moreover, to the extent it is even necessary for Avistar employees to testify in this action – which is not apparent at this time – Tony Rodde, President of Collaboration Properties, Inc. (Avistar's wholly owned intellectual property licensing subsidiary), was the primary person involved in Avistar's sale of the patents to Intellectual Ventures. See Tony Rodde Declaration at ¶ 3, attached as Exhibit 8. Mr. Rodde currently resides in New Mexico and is willing to travel to this District to provide live testimony, if necessary. Id. at ¶ 5. Mr. Rodde provided testimony on behalf of Avistar in both the Tandberg and Polycom cases referenced in Facebook's Memorandum. Id. at ¶ 6; see Facebook's Memorandum at pp. 10-11.

Furthermore, even if Facebook showed that some non-party witnesses are unwilling to travel to this District, it is quite common for non-party trial testimony to be provided by videotape. In Samsung, 386 F. Supp.2d 708, 716, for example, this Court held:

> Although live testimony is the preferred mode of presenting evidence, when non-party witnesses are unavailable to give live testimony, videotaped depositions often are sufficient. Somewhat less weight is given to witness inconvenience when a party is unable to demonstrate with any particularity that videotaped deposition testimony will be inadequate, and that live testimony is critical...This is especially so when the witness is not central to the case. 'Loss of live testimony of less central witnesses is not so great a price for honoring plaintiff's choice [of forum].

386 F. Supp.2d at 719 (citations omitted).

Facebook has failed to show that there are any necessary, central non-party witnesses in this action who reside in California and are unable to provide live or videotaped testimony and who refuse to travel to this jurisdiction. Facebook fails to show significant inconvenience and thus its grounds for transfer with respect to non-party witnesses should not be given much consideration by the Court.

In addition, Facebook claims that there will be inconvenience to Vicor, a former owner of the patents-in-suit, because it is located in California. But Vicor no longer has a presence in

California. In or about 2006, it was sold to Metavante, a company based out of Milwaukee, Wisconsin which has since become a subsidiary of Fidelity National Information Services based out of Jacksonville, Florida. See Rodde Decl. at ¶ 7, attached as Exhibit 8.

2. The Convenience Of Facebook's' Employee-Witnesses Does Not Justify Transfer.

Because the convenience of non-party witnesses weighs against transfer, Facebook argues that the alleged inconvenience of its own employees compels transfer. Facebook's argument should be rejected and further, its likely reliance on the transfer ruling in the Pragmatus AV, LLC case before Judge Brinkema is entitled to little weight. In that case, Pragmatus filed suit against Facebook and several other defendants, each claiming to have their employees located in California. Because Facebook is the only defendant named in this suit, it is clear that to the extent any "inconvenience" exists, it is minimal.

Facebook fails to specify with sufficient particularity the testimony its employee-witnesses would present. Without such a showing, Facebook's argument carries little, if any, weight. See Baylor Heating, 702 F. Supp. at 1258 ("Defendant failed to identify the witnesses and describe their testimony with the requisite particularity.")

Indeed, as Professor Moore has noted:

> To meet the burden of demonstrating that transfer is in the convenience of the witnesses, the party seeking transfer must specifically list the evidence and the witnesses . . . along with a general statement of the topics of each witness' testimony . . . Absent such a showing, the motion should be denied.

17 Georgene M. Vairo, Moore's Federal Practice § 111.13 [1] [f] [v] (3d ed.) (citing Pilates, Inc. v. Pilates Institute, Inc., 891 F. Supp. 175, 183 (S.D.N.Y. 1995)); see also Samsung, 386 F. Supp.2d at 718-719.

Typically, a distinction is drawn between party witnesses and non-party witnesses. Samsung, 386 F. Supp.2d at 718. Party witnesses are the parties themselves and those closely aligned with a party and they are presumed to be more willing to testify in a different forum. Id; see also WIAV Solutions, 2009 WL 3414612, at *5 (defendant's employees can be expected to appear before this court if necessary). Again, Facebook has not (and cannot) provide any reasons why its own employees are unable to provide live testimony in Virginia, to the extent such testimony is even necessary. After all, much of the infringement testimony will be accomplished on the basis of expert testimony. These experts will be retained and can be expected to present live testimony. Id.

Even if Facebook is somewhat inconvenienced by litigating here in Virginia, such inconvenience does not compel a transfer. Travel from Facebook's home district to Virginia by their employee-witnesses would be rare and not terribly difficult given the ease of travel to Virginia by plane. In addition, the fact that Facebook would have to ship documents from its office to Virginia is hardly a compelling factor in the transfer analysis, especially in light of the ease in which documents are produced electronically through cds and other electronic media.

Boiled down to its essentials, Facebook's inconvenience argument really is nothing more than a claim that it may be somewhat more expensive for it to litigate here in Virginia. This Court essentially rejected such an argument in Baylor Heating, a case cited by Facebook in its Memorandum. See Facebook's Memorandum at pp. 4, 12. In Baylor Heating, the defendant claimed that it was a small company and that the case should have been transferred because its costs to litigate in Virginia would have been higher than if the litigation was transferred to its home court. This Court rejected that contention:

> To be sure, defendant's costs will likely increase by having to defend the suit in Virginia. But defendant has not demonstrated that it is so small and so lacking in resources that the interest of justice require transfer . . ..

Baylor Heating, 702 F. Supp. at 1261.

In fact, Facebook is a billion-dollar company that is able to bear the costs of litigation. Its real strategy is to try and delay this action for as long as possible and try to inconvenience Pragmatus, a far smaller litigant.

Facebook also ignores the fact that Pragmatus' witnesses, who live in Virginia and Pennsylvania, will be inconvenienced if this case is transferred to California. See Marino Decl., ¶ 13; Grillo Decl., ¶ 4.

Facebook fails to demonstrate why this case should be transferred based on the convenience of the parties and witnesses. Although Facebook may be somewhat inconvenienced by litigating in this forum, it certainly has not satisfied its burden under the cases cited herein.

C. The Interests Of Justice Decidedly Favor Litigating These Actions Here.

The final "interests of justice" factor is designed to be broad and to encompass all those issues bearing on transfer, while being distinguished from the other transfer factors. Nationwide, 2010 WL 2520973, at *9. The interest of justice factor is to be given much weight. See, e.g., Kaiser Industries Corp. v. Wheeling-Pittsburgh Steel Corp., 328 F. Supp. 365, 370 (D. Del. 1971) ("This Court has long recognized that of the three statutory standards which must be considered on a motion for transfer under § 1404(a), 'the interest of justice' is a factor entitled to the greatest weight.") (citations omitted); see also Coffey v. Van Dom Iron Works, 796 F.2d 217, 220 (7th Cir. 1986) ("The 'interest of justice' is a separate component of a § 1404(a) transfer analysis,...and may be determinative in a particular case, even if the convenience of the parties

and witnesses might call for a different result.") (Citations omitted.); Medi USA, L.P. v. Jobst Institute, Inc., 791 F. Supp. 208, 211 (N.D. Ill. 1992) (same).

In Nationwide, this Court analyzed the "interest of justice" prong of section 1404(a) and determined that the following factors must be analyzed:

> Relevant considerations in evaluating the "interest of justice" are the pendency of a related action; the court's familiarity with the applicable law; docket conditions; access to premises that might have to be viewed; the possibility of an unfair trial; the ability to join other parties and the possibility of harassment.

Nationwide, WL 2520973, at *9. (Citations omitted.)

There is not a single factor under the "interest of justice" test that weighs in favor of transfer.

1. Transfer Would Not Promote The Interests Of Justice Because Docket Conditions In The Transferee District Are Slower.

As an initial matter, the Eastern District of Virginia has recognized that if plaintiff is a local business, "Virginia has an interest in providing a forum for its residents to litigate their disputes." Heinz, 2010 WL 4608714, at *7. Furthermore, the conditions of the relative dockets is a factor a court should consider on a motion to transfer. Id. ("docket conditions, while not a significant factor, favor retaining this case because statistics reflect that [the Eastern District of Virginia], on average, provides a speedier trial"); see also Intranexus, 227 F. Supp.2d at 585 ("[a] more speedy resolution of this case in the Eastern District of Virginia would be in the interest of justice . . . [t]herefore this factor likewise favors retaining venue"); Baylor Heating, 702 F. Supp. at 1260; Zurich Ins. Co. v. Raymark Indus., Inc., 672 F. Supp. 1102, 1104 (N.D. Ill. 1987) ("a comparison of the dockets for [the transferor and transferee courts] indicates that transfer of this case promotes the interest of justice. . .. Measured in terms of docket congestion and prospects for an earlier trial, the [transferee] court is clearly the preferable forum"); Coffey, 796 F.2d at

221 ("Factors traditionally considered in an 'interest of justice' analysis relate to the efficient administration of the court system. For example, the interest of justice may be served by a transfer to a district where the litigants are more likely to receive a speedy trial.") (Citations omitted.)

This Court's docket is much faster than the proposed transferee court. The median time from the filing of a civil action to its final disposition in the Eastern District of Virginia is 10 months. In contrast, the median time in the Northern District of California is 26.2 months. See Administrative Office of the United States Courts. 2009 Annual Report of the Director: Judicial Business of the United States Courts (GPO 2010), relevant pages attached as Exhibit 9.

A transfer of this matter to the Northern District of California would act as a delay in this proceeding and will have a negative impact on Pragmatus' ability to enforce its patents. Accordingly, the relative docket conditions weigh heavily against transfer.

2. Transfer Is Not In The Interests Of Justice Because This Court Is Fully Capable Of Adjudicating All Issues Fairly.

There will be no choice of law issues that will enable the court in California to adjudicate this dispute better than this Court. Most of the legal issues will be governed by federal law. No possibility exists of an "unfair" trial here in Virginia, and there is no threat of "harassment." No premises will have to be viewed and there are no facilities that will have to be inspected.

In addition, Facebook's argument that the District Court in the Northern District of California is better suited to handle this action because of the Tandberg and Polycom cases is without merit. See Facebook's Memorandum at pp. 10-11. There has been no showing by Facebook that those suits have any relation to the claims in this case. Further, those cases were decided three and six years ago, respectively. The patents-in-suit did not even exist during the Tandberg and Polycom litigations. The Northern District of California's familiarity with the

Tandberg and Polycom matters, which involved different patents, after all these years, does not warrant a transfer of venue.

In sum, the interests of justice weigh heavily, if not fully, in favor of maintaining the present action in this forum.

CONCLUSION

Facebook has simply failed to carry its burden of showing that the balance of the appropriate factors is strongly in favor of transferring this case. The interests of justice weigh heavily in Pragmatus' favor, and Facebook has not made any compelling arguments regarding any genuine inconvenience it will suffer if it must litigate in this forum. Finally, Pragmatus' choice of forum should be given significant weight. For the reasons set forth above, as well as those which may be argued before the Court, Pragmatus respectfully requests the Court to deny Facebook's motion and award any further relief the Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2011, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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