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

PRAGMATUS AV, LLC,

Plaintiff,

v. **CIVIL CASE NO. 2:10CV560**

FACEBOOK, INC.

Defendant.

ORDER

This is a patent infringement case. On November 15, 2011, Plaintiff Pragmatus AV, LLC ("Pragmatus") filed its complaint for patent infringement against Defendant Facebook, Inc. ("Facebook"). Doc. 1. In its complaint, Pragmatus alleges that Facebook directly and indirectly infringes two of Pragmatus' patents: U.S. Patent No. 7,421,470[1] and U.S. Patent No. 7,433,921.[2] On January 21, 2011, Facebook moved to dismiss Pragmatus' complaint under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted. Doc. 10. That same day, Facebook moved to transfer venue of this action pursuant to 28 U.S.C. § 1404(a). Doc. 12. On January 25, 2011, Facebook moved in the alternative for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). Doc. 15. Pragmatus filed responses to Facebook's motions on February 4, 2011. Docs. 17–19. On February 10, 2011, Pragmatus requested a hearing, and Facebook filed replies to Pragmatus' responses and its own request for a hearing. Docs. 20–23, 24.

[1] Method for Real-Time Communication Between Plural Users, U.S. Patent No. 7,421,470 (filed Nov. 26, 2003) (issued Sept. 2, 2008).
[2] System for Real-Time Communication Between Plural Users, U.S. Patent No. 7,433,921 (filed Nov. 26, 2003) (issued Oct. 7, 2008).

For the reasons contained herein, the Court **GRANTS** Facebook's motion to transfer venue, Doc. 12, and **DISMISSES AS MOOT** Facebook's motion to dismiss, Doc. 10, and Facebook's motion for a more definite statement, Doc. 15. Additionally, because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the Court's decisional process, the Court dispenses with oral argument and **DENIES** the parties' requests for a hearing. Docs. 20, 24.

I. LEGAL STANDARDS

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The decision of whether to transfer rests within the district court's discretion. "'[I]n considering whether to transfer venue, a district court must make two inquiries: (1) whether the claims might have been brought in the transferee forum, and (2) whether the interest of justice and convenience of the parties and witnesses justify transfer to that forum.'" Pragmatus AV, LLC v. Facebook, Inc., No. 1:10cv1288, 2011 WL 320952 at *2 (E.D. Va. Jan. 27, 2011) (quoting Agilent Tech., Inc. v. Micromuse, Inc., 316 F. Supp. 2d 322, 324–25 (E.D. Va. 2004) (citation omitted)). The party seeking transfer carries the burden of establishing the propriety of the transferee forum. Id.

II. DISCUSSION

Facebook advises that that the Alexandria Division of the Eastern District of Virginia recently "transferred a parallel patent infringement litigation between Pragmatus and four defendants, including Facebook, to the Northern District of California on nearly identical facts to those here." Doc. 23 at 1. Pragmatus contends that the case Facebook brings to the Courts attention—Pragmatus AV, LLC v. Facebook, Inc., et al., No. 1:10cv1288, 2011 WL 320952

(E.D. Va. Jan. 27, 2011) (hereinafter "the Alexandria Pragmatus case")—was "wrong, and is not controlling." Id. at 7. For the reasons that follow, the Court finds no reason to doubt the propriety of or depart from the reasoning in that decision.

In the Alexandria Pragmatus case, Pragmatus filed a patent infringement action against defendants Facebook, LinkedIn Corporation, Photobucket.com, Inc., and YouTube LLC. Pragmatus AV, LLC, 2011 WL 320952 at *1. The defendants moved to transfer venue to the Northern District of California. Id. The District Judge granted that motion. Id. The District Judge recognized that a plaintiff's choice of forum is typically entitled to substantial weight; however, the District Judge found that Pragmatus' choice of the Eastern District of Virginia was entitled to only minimal deference due to Pragmatus' "tenuous" connection to this District:

> [T]he only connection between the Eastern District of Virginia and this plaintiff is that Pragmatus was formed in Alexandria a week before it acquired the patent portfolio and five weeks before it filed this lawsuit. Although plaintiff's choice of forum weighs against transfer, this factor will be given minimal weight in light of the weak connection between plaintiff and the Eastern District of Virginia.

Id. at * 3. Ultimately, the District Judge concluded that the slight weight afforded Pragmatus' choice of the Eastern District of Virginia was outweighed by the convenience of the parties and witnesses and the interest of justice factors, which weighed in favor of transfer. Id. at *3–*5. The District Judge rejected Pragmatus' argument that the convenience of the defendants' employees did not justify transfer because it is easy to travel to Virginia by plane and all the defendants were large companies. The District Judge also opined that "Pragmatus's claim that some California witnesses are willing to travel to Virginia does not negate the simple fact that cross-country trips would be inconvenient, and the litigation would occur 3,000 miles from much of the defendants' sources of evidence and witnesses." Finally, the District Judge dismissed

Pragmatus' argument that a comparison of the docket conditions in the Northern District of California and this District weighed against transfer. Id. at *4–*5.

Pragmatus argues that it was inappropriate for the District Judge in the Alexandria Pragmatus case to rely on In re Microsoft Corp., 630 F.3d 1361 (Fed. Cir. 2011) because in In re Microsoft Corp., the Federal Circuit "applied Fifth Circuit law to the transfer analysis, not Fourth Circuit law." Doc. 19 at 8. This argument is unpersuasive. First, as Facebook points out, in the Alexandria Pragmatus case, the District Judge "cites to In re Microsoft Corp. merely as support for the proposition that a plaintiff's choice of forum is entitled to substantial weight only if plaintiff proves 'a legitimate connection to the district.'" Doc. 23 at 4; see Pragmatus AV, LLC, 2011 WL 320952 at *3 ("For this factor [plaintiff's choice of forum] to strongly weigh against transfer, a plaintiff must prove a legitimate connection to the district.") (citing In re Microsoft Corp., 630 F.3d 1361 (Fed. Cir. 2011)). Second, the Federal Circuit's decision in In re Microsoft Corp. was based largely on the Circuit Court's application of principles outlined in Supreme Court case law. See In re Microsoft Corp., 630 F.3d at 1364 (discussing relevant Supreme Court case law and providing, "This court has diligently followed these principles in matters of transfer").[3] The Federal Circuit invoked Fifth Circuit case law primarily to support the proposition that although a trial court has great discretion in ruling on a § 1404(a) motion to transfer venue, the Federal Circuit has "applied Fifth Circuit law in cases arising from district

[3] See also In re Microsoft Corp., 630 F.3d at 1363 ("A motion to transfer under § 1404(a) calls upon the trial court to weigh a number of case-specific factors relating to the convenience of the parties and witnesses, and the proper administration of justice, based on individualized facts on record.") (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988)), at 1364 ("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.") (citing Hertz Corp. v. Friend, 130 S.Ct. 1181, 1195 (2010); Miller & Lux, Inc. v. East Side Canal & Irrigation Co., 211 U.S. 293 (1908); Lehigh Min. & Mfg. Co. v. Kelly, 160 U.S. 327 (1895); Morris v. Gilmer, 129 U.S. 315, 328 (1889)), at 1365 ("[T]he Supreme Court explained that '[u]nder modern conditions corporations often obtain their charter from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far from the chartering state. The Court further explained that the '[p]lace of corporate domicile in such circumstances might be entitled to little consideration' under the doctrine of forum non conveniens, 'which resists formalization and looks to the realities that make for doing justice.'") (quoting Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 527–28 (1947)).

courts in that circuit to hold that mandamus may issue when the trial court's application of [the § 1404(a)] factors amounts to a clear abuse of discretion." Id. at 1363. No impropriety exists in the Alexandria District Judge's citation of In re Microsoft Corp..

Pragmatus also argues that it was inappropriate for the District Judge in the Alexandria Pragmatus case to rely on In re Microsoft Corp. because the facts of In re Microsoft Corp. were distinguishable from the facts before the District Judge:

> In that case [In re Microsoft Corp.], 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. 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. In addition, Mr. Marino, one of Pragmatus' two members, has lived in Virginia since 2005, five years before he formed Pragmatus.

Doc. 19 at 8 (internal citations omitted) (emphasis in original). The Court rejects any intimation that the above factual distinction was lost on the District Judge in Alexandria. In fact, because this Court has no doubt that the above factual distinction was fully comprehended, the existence of that factual distinction combined with the District Judge's ultimate decision to grant transfer to the Northern District of California lends credence to this Court's view that In re Microsoft Corp. was cited merely to support the proposition that a plaintiff's choice of forum is entitled to substantial deference only if the plaintiff shows a genuine connection to the chosen forum. The distinctions Pragmatus highlights do not undercut the propriety of the Alexandria District Judge's reasoning, which properly weighed the § 1404(a) factors, including Pragmatus' choice of forum, and afforded Pragmatus' choice of forum an appropriate level of deference based on the significance of the contacts between this District and Pragmatus and the underlying action.

Finally, in arguing that this Court should disregard the Alexandria Pragmatus case, Pragmatus contends that the present matter is different from the matter that was before the

District Judge in Alexandria because (1) "[t]he two cases involve different patents" and (2) the Alexandria Pragmatus case involved multiple defendants who all claimed that their employee witnesses and documents were in California, but here "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." Doc. 19 at 8 (emphasis in original). These arguments will be discussed as the Court analyzes the § 1404(a) factors.

A. Whether the Claims Might Have Been Brought in Northern District of California

Title 28 United States Code, Section 1400(b) provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b). "[A] corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 USCS § 1391(c). Facebook is headquartered in the Northern District of California, resides there, and is subject to personal jurisdiction in that forum. Thus, this civil action could have been brought in the Northern District of California.

B. The Interest of Justice and Convenience to Parties and Witnesses

"The second prong of the § 1404(a) analysis is a balancing test that weights '(1) plaintiff's choice of forum, (2) convenience of the parties, (3) witness convenience and access, and (4) the interest of justice.'" Pragmatus AV, LLC, 2011 WL 320952 at * 2 (quoting Heinz Kettler GmbH & Co. v. Razor USA, LLC, No. 1:10cv708, 2010 U.S. Dist. LEXIS 119954, at *16 (E.D. Va. Nov. 5, 2010)).

1. PLAINTIFF'S CHOICE OF FORUM

Typically, a plaintiff's choice of forum is entitled to substantial weight, "especially where the chosen forum is the plaintiff's home or bears a substantial relation to the cause of action." Id. (quoting Heinz Kettler GmbH & Co., 2010 U.S. Dist. LEXIS 119954 at *17). However, the level of deference a court shows a plaintiff's forum choice "varies with the significance of the contacts between the venue chosen and the underlying cause of action." Id. (quoting Board of Trustees v. Baylor Heating & Air Conditioning, Inc., 702 F. Supp. 1253, 1256 (E.D. Va. 1998)). It follows that for this §1404(a) factor to weigh heavily against transfer, "a plaintiff must prove a legitimate connection to the district." Id. (citing In re Microsoft Corp., 630 F.3d 1361 (Fed. Cir. 2011)).

The parties in the present dispute repeat arguments made in the Alexandria Pragmatus case. Facebook argues that Pragmatus choice of forum is entitled to little if any weight because there is little connection between Pragmatus and this forum and the alleged acts of infringement are unrelated to this District. Doc. 13 at 1. Pragmatus argues that because it is based in this District, its choice of its home forum is entitled to substantial deference. Doc. 19 at 5.

In the Alexandria Pragmatus case, the District Judge found, *inter alia*, (1) that Pragmatus' connection to this district is tenuous; (2) that Pragmatus is a non-practicing entity, "meaning that it does not research and develop new technology but rather acquires patents, licenses the technology, and sues alleged infringers;" and (3) that "Pragmatus's only employee in this district is a co-owner who has owned a home in Alexandria and works here part-time." Pragmatus AV, LLC, 2011 WL 320952 at *3. Then, the District Judge concluded that Pragmatus' choice of the Eastern District of Virginia would be given minimal weight in the court's § 1404(a) analysis. Id.

Pragmatus has not asserted that Alexandria District Judge's above findings were in any way incorrect. As previously discussed, in urging this Court to disregard the Alexandria Pragmatus case, Pragmatus (1) argues, unpersuasively, that the District Judge's legal reasoning in the Alexandria Pragmatus case was incorrect and (2) contends that because different patents are involved here and because Facebook is the sole defendant in this action, this case is factually distinguishable from the Alexandria Pragmatus case. Neither of these two arguments undermines the accuracy of the Alexandria District Judge's findings concerning the tenuous nature of Pragmatus' connection to this District.

The Alexandria District Judge's findings were accurate. Pragmatus has only two members, William Marino and Anthony Grillo. Doc. 19 at 3. Mr. Marino works in Pragmatus' Alexandria office four days a week. Id. At that office, "Pragmatus, among other things, manages its intellectual property portfolio, including the patents-in-suit, acquires patent rights, and licenses its patents." Id. Pragmatus filed its business registration with the Commonwealth of Virginia on June 9, 2010. Doc. 13-3, Ex. 1. Pragmatus acquired the patents-in-suit on June 16, 2010—one week after Pragmatus was formed and filed its Virginia registration. Doc. 13-5, Ex. 3. Pragmatus filed the instant lawsuit five months later. Doc. 1. Based on the above, as the District Judge in Alexandria found, this Court finds that Pragmatus' connection to the Eastern District of Virginia is tenuous.

For the above reasons, the Court affords little weight to this § 1404(a) factor.[4]

[4] Pragmatus also argues that substantial deference should be afforded its choice of this District because "Facebook's infringement is occurring on its Virginia servers." Doc. 19 at 6. This argument is unconvincing. As the District Judge in the Alexandria Pragmatus case noted, "Pragmatus does not claim that these servers contain any evidence that would be presented in this civil action." Pragmatus AV, LLC, 2011 WL 320952 at *3. Further, even if a defendant possesses some fragile connection to a plaintiff's chosen forum, that plaintiff's choice of forum may still be afforded only slight weight when no relevant evidence or persons with relevant knowledge are located within the chosen forum. See Lycos, Inc. v. Tivo, Inc., 499 F. Supp. 2d 685, 692–93 (E.D. Va. 2007) (affording little weight to a plaintiff's choice of forum despite the fact that one defendant maintained a distribution center in Virginia).

2. CONVENIENCE OF PARTIES

Facebook claims that the Northern District of California is "clearly more convenient" than the Eastern District of Virginia for litigation of the instant dispute. Doc. 13 at 1. Facebook asserts that the vast majority of Facebook employees with knowledge of the development, implementation, and operation of Facebook's systems and services are located in Facebook's Palo Alto headquarters in the Northern District of California. Id. at 5. Facebook also asserts that the vast majority of likely sources of proof, including documentation for any allegedly infringing systems or services, are located in Palo Alto. Id. Facebook maintains that it has no offices or technical employees in Virginia. Id.

Pragmatus argues that "Facebook totally ignores the sharp inconvenience Pragmatus' witnesses would suffer if the Court transfers this case to California." Doc. 19 at 9. Pragmatus contends that it would be far more convenient for both Pragmatus employees, Mr. Marino and Mr. Grillo, to attend trial in Virginia. Id. As it did in the Alexandria Pragmatus case, Pragmatus insists that the convenience of Facebook's employees does not justify transfer because of "the ease of travel to Virginia by plane" and because "Facebook is a billion-dollar company that is able to bear the costs of litigation." Doc. 19 at 14–15.

Pragmatus' arguments were rejected in the Alexandria Pragmatus case, and they are rejected here again. As in the Alexandria Pragmatus case, most of the employees with knowledge of the allegedly infringing systems and/or services in this case are in the Northern District of California, and Mr. Marino "is the only Virginia-based employee of any party who

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> The design and manufacture of the allegedly infringing products, as well as the design and development of the purportedly infringing online services, occurred outside of Virginia. Also, the allegedly infringing recommendation services are provided by the defendants from locations outside of Virginia. It is, therefore, not surprising that no relevant documents or persons with knowledge relevant to this action are located here. In light of the circumstances outlined above, this court gives [the plaintiff]'s choice of forum only slight weight.

Id. (footnote omitted).

might participate in the litigation." Pragmatus AV, LLC, 2011 WL 320952 at * 3. Additionally, and notwithstanding Pragmatus' assertions to the contrary, the import of these realities on the Court's § 1404(a) analysis is not diminished because there were four defendants in the Alexandria Pragmatus case but here Facebook is the sole defendant.

For the above reasons, this § 1404(a) factor weighs strongly in favor of transfer.

3. NON-PARTY WITNESSES CONVENIENCE AND ACCESS

Facebook argues that transfer to the Northern District of California would significantly increase the convenience to non-party witnesses. Doc. 13 at 7–9. Facebook informs the Court that three of the five inventors of the patents-in-suit reside in the Northern District of California; that Avistar Corporation ("Avistar"), which previously owned the patents-in-suit, is located in Northern District of California; that two of the named inventors of the patents-in-suit are officers of Avistar; and that there are no likely non-party witnesses located in Virginia. Id. at 3, 8–9. In response, Pragmatus contends that this factor does not weigh in favor of transfer because the likely non-party witnesses are willing to travel to Virginia. Doc. 19 at 10–12.

As in the Alexandria Pragmatus case, in this case, Facebook has identified a number of potential witnesses and sources of evidence in the Northern District of California, and "Pragmatus, in contrast, has not identified a single non-party witness in or near the Eastern District of Virginia." Pragmatus AV, LLC, 2011 WL 320952 at * 4. Further, this Court agrees with the Alexandria District Judge's opinion that Pragmatus' claim that some California witnesses are willing to travel to Virginia does not negate the inconvenience of cross-country trips. Pragmatus cannot escape the fact that a majority of the inventors of the patents-in-suit and previous owners of those patents reside in the Northern District of California. As the Alexandria

District Judge recognized, many of the claims and defenses in patent infringement lawsuits require the testimony of such parties. Id. at *4.

For the above reasons, this § 1404(a) factor weighs strongly in favor of transfer.

4. INTEREST OF JUSTICE

"'Relevant considerations in evaluating the 'interests 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 unfair trial; the ability to join other parties; and the possibility of harassment." Pragmatus AV, LLC, 2011 WL 320952 at * 4 (quoting Nationwide Mut. Ins. Co. v. Overlook, LLC, No. 4:10cv69, 2010 U.S. Dist. LEXIS 60300 (E.D. Va. June 17, 2010)).

Pragmatus asserts that transfer would not advance the interest of justice because this Court is capable of fairly adjudicating all of the instant issues and because docket conditions in the Northern District of California are slower than they are here in the Eastern District of Virginia. Doc. 19 at 16–18. Pragmatus' docket conditions argument was rejected in the Alexandria Pragmatus case. In that case, the District Judge reasoned:

> The Eastern District of Virginia is known as the "rocket docket" because civil actions quickly move to trial or are otherwise resolved. As Pragmatus notes in its opposition brief, the median time from the filing of a civil action to its final disposition in this district is 10 months, compared to 26.2 months in the Northern District of California. Although this efficiency may be particularly attractive to plaintiffs in complex litigation such as patent infringement actions, that efficiency also invites forum-shopping. . . . When a plaintiff with no significant ties to the Eastern District of Virginia chooses to litigate in the district primarily because it is known as the "rocket docket," the interest of justice "is not served." In fact, the Court's concern with being swamped with patent infringement cases is legitimate. Left unchecked, allowing lawsuits with such a minimal connection to the district to go forward here would result in docket overloads, unfairly slowing the cases for parties with genuine connections to this district. Therefore, transfer would advance the interest of justice.

Pragmatus AV, LLC, 2011 WL 320952 at * 4–5. The Court finds no reason to depart from the above reasoning, and, therefore, concludes that transfer of the instant matter to the Northern District of California would advance the interest of justice.

IV. CONCLUSION

The Court finds that the § 1404(a) factors weigh overwhelmingly in Facebook's favor. Accordingly, the Court **GRANTS** Facebook's Motion to Transfer Venue Pursuant to 14 U.S.C. § 1404(a), Doc. 12, and **ORDERS** this case transferred to the Northern District of California. Having so ruled, the Court **DISMISSES AS MOOT** Facebook's motion to dismiss, Doc. 10, and Facebook's motion for a more definite statement, Doc. 15. Finally, the Court **DENIES** the parties' requests for a hearing. Docs. 20, 24.

The Clerk is **REQUESTED** to send a copy of this Order to all counsel of record.

It is so **ORDERED**.

/s/
Henry Coke Morgan, Jr.
Senior United States District Judge

HENRY COKE MORGAN, JR.
SENIOR UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
Date: ~~May~~ April 29, 2011