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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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VOIP-PAL.COM, INC.,
Plaintiff,
v.
TWITTER, INC.,
Defendants.

Case No. 2:16-cv-02338-RFB-CWH

ORDER

I. INTRODUCTION

This matter is before the Court on Defendant Twitter, Inc. (“Defendant” or “Twitter”)’s Motion to Change Venue. (ECF No. 27). For the reasons stated below, this motion is granted.

II. PROCEDURAL BACKGROUND

On October 6, 2016, Plaintiff VoIP-Pal.com, Inc. (“Plaintiff” or “VoIP-Pal.com”) filed its Complaint against Defendant, alleging infringement of two patents. (ECF No. 1). On January 31, 2017, the Court entered a Stipulation to stay the case due to pending proceedings before the Patent Trial and Appeal Board (“PTAB”). (ECF No. 12). Pursuant to the Stipulation, the Court also directed the parties to file a Joint Status Report by January 26, 2018, outlining the parties’ respective positions on how the case should proceed in light of the PTAB’s final written decisions. The parties filed a Joint Status Report on January 26, 2018, requesting that the stay in the case be lifted. (ECF Nos. 13 & 14). On February 27, 2018, the Court lifted the stay and ordered the parties to submit a proposed pretrial order. (ECF No. 25).

Defendant filed the instant Motion to Change Venue on February 28, 2018. (ECF No. 27). Plaintiff filed its Response on March 14, 2018. (ECF No. 31). On March 21, 2018, Defendant filed

1 its Reply. (ECF No. 32). The Court held a hearing on the matter on July 6, 2018, and ordered
2 Defendant to file a Supplemental Declaration to address whether Defendant has any physical
3 equipment or leases any space in Nevada, including space for data storage, or other support
4 equipment/hardware, within two weeks. This Order now follows.

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6 **III. RELEVANT FACTUAL FINDINGS FOR JURISDICTION**

7 The Court finds the following facts. Plaintiff is a Nevada corporation, with its principal
8 place of business located at 10900 NE 4th Street, Suite 2300, Bellevue, Washington 98004.
9 Plaintiff is in the business of Voice-over-Internet Protocol (“VoIP”) technology, and owns a
10 portfolio of VoIP-related patents and patent applications. Based on publicly available information,
11 Plaintiff does not have any officers, directors, or employees based in Nevada. Plaintiff has no
12 office, land, facilities, or sales in Nevada. All of the Plaintiff’s patent inventors reside outside of
13 the United States. Plaintiff’s company does not generate income.

14 On September 24, 2013, U.S. Patent No. 8,542,815 (“the ‘815 patent”) entitled “Producing
15 Routing Messages for Voice Over IP Communications” was duly and legally issued with Clay
16 Perreault, Steve Nicholson, Rod Thomson, Johan Emil Viktor Bjorsell, and Faud Arafa as the
17 named inventors after full and fair examination. Plaintiff is the owner of all rights, title, and interest
18 in and to the ‘815 patent and possesses all rights of recovery under the ‘815 patent. On November
19 3, 2015, U.S. Patent No. 9,179,005 (“the ‘005 patent”) entitled “Producing Routing Messages for
20 Voice Over IP Communications” was duly and legally issued with Clay Perreault, Steve
21 Nicholson, Rod Thomson, Johan Emil Viktor Bjorsell, and Faud Arafa as the named inventors
22 after full and fair examination. Plaintiff is the owner of all rights, title, and interest in and to the
23 ‘005 patent and possesses all rights of recovery under the ‘005 patent.

24 In this lawsuit, Plaintiff alleges that Defendant violated the ‘815 and ‘005 patents by
25 utilizing a caller dialer profile comprising a plurality of calling attributes to establish network
26 classification criteria for routing communications such as calls and messages between
27 callers/initiators and callees/recipients, which incorporates the patented technology. Plaintiff
28 contends that the damages arising from this infringement amounts to \$2,699,256,418.

1 Defendant is a Delaware corporation, with its principal place of business / headquarters at
2 1355 Market Street, Suite 900, San Francisco, California 94103. Defendant operates a global
3 Internet platform for public self-expression and conversation that is free-of-charge and open for
4 virtually anyone to use. Defendant’s product design, development, implementation, and financial
5 activities are centered in San Francisco. Of its 3,490 employees, 1,706 work out of the San
6 Francisco headquarters, including 636 of its 938 software engineers. The San Francisco
7 headquarters are also home to Defendant’s key business teams, including non-technical personnel
8 supporting product management, marketing, finance, and sales. VoIP-Pal’s infringement
9 allegations relate to what it refers to as Defendant’s “messaging platform” (or the “Twitter
10 System”). The accused technology is largely designed and built in San Francisco, and the bulk, if
11 not all, of any relevant technical documentation, manuals, and product specifications, as well as
12 all financial data relevant to revenue derived from Defendant’s products, are located in San
13 Francisco. Defendant does not own or lease any offices, buildings, or other facilities in Nevada,
14 and does not directly or indirectly store any data in Nevada. It has no Nevada telephone number
15 or local address listed on its website or in any directory. Defendant is a software company that has
16 no physical product inventory, and its advertising and marketing are primarily conducted online.
17 It does not store inventory or product literature in Nevada.

18 Defendant has a single employee, a software engineer, that lives in Nevada. Given the
19 nature of his work—which can be performed from anywhere in the world—this particular engineer
20 chose to live in Nevada for personal reasons and works from home. He reports to a manager in
21 San Francisco and uses San Francisco support staff. Defendant does not own his home or pay his
22 rent. The decision to live in Nevada was the employee’s alone; Defendant does not condition his
23 employment on his location. He is free to move out of Nevada if he desires. If he were to leave
24 Defendant’s company or Nevada, Defendant would have no plans to hire another Nevada-based
25 employee.

26 27 **IV. LEGAL STANDARD**

28 **A. Motion to Change or Transfer Venue**

1 “Any civil action for patent infringement may be brought in the judicial district where the
2 defendant resides, or where the defendant has committed acts of infringement and has a regular
3 and established place of business.” 28 U.S.C. § 1400(b). “For the convenience of parties and
4 witnesses, in the interest of justice, a district court may transfer any civil action to any other district
5 or division where it might have been brought or to any district or division to which all parties have
6 consented.” 28 U.S.C. § 1404(a). However, when a district court determines that venue is
7 improper, the court “shall dismiss, or if it be in the interest of justice, transfer such case to any
8 district or division in which it could have been brought.” 28 U.S.C. § 1406(a). “Whether venue is
9 ‘wrong’ or ‘improper’ depends exclusively on whether the court in which the case was brought
10 satisfies the requirements of federal venue laws[.]” Atlantic Marine Const. Co. v. U.S. Dist. Court
11 for W. Dist. of Tex., 571 U.S. 49, 55 (2013).

12 For a motion to transfer, the law applicable under Section 1404(a) is the law of the circuit
13 in which the district court sits. Storage Tech. Corp. v. Cisco Sys., Inc., 329 F.3d 823, 836 (Fed.
14 Cir. 2003). In the Ninth Circuit, “[u]nder § 1404(a), the district court has discretion ‘to adjudicate
15 motions for transfer according to an ‘individualized, case-by-case consideration of convenience
16 and fairness.’” Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000) (quoting Stewart
17 Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988)). Where a request to transfer venue does not
18 involve a forum selection clause, the court should consider factors related to the convenience of
19 the parties, including: “[the] relative ease of access to sources of proof; availability of compulsory
20 process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;
21 possibility of view of premises, if view would be appropriate to the action; and all other practical
22 problems that make trial of a case easy, expeditious and inexpensive.” Atlantic Marine, 571 U.S.
23 at 63 n.6 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241, n.6 (1981)) (quotation marks
24 omitted). The court may also consider the following public interest factors: “the administrative
25 difficulties flowing from court congestion; the local interest in having localized controversies
26 decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home
27 with the law.” Id. (quoting Piper Aircraft, 454 U.S. at 241 n.6) (alteration in original) (quotation
28

1 marks omitted). Additionally, the court should give some weight to the plaintiff’s preferred choice
2 of forum. Id. (citing Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955)).

3
4 **V. DISCUSSION**

5 For the purposes of determining venue under the patent venue statute, the location where a
6 defendant corporation “resides” is limited to the corporation’s State of incorporation. TC Heartland
7 LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1517 (2017). Courts shall not interpret the
8 patent venue statute to consider the factors relevant for personal jurisdiction in determining
9 whether venue is proper. Id. In light of TC Heartland, and resulting uncertainty and inconsistency
10 among district courts, the Federal Circuit addressed the question of where a defendant corporation
11 has a “regular and established place of business” under the patent venue statute. In re Cray, 871
12 F.3d 1355 (Fed. Cir. 2017). The Federal Circuit found that there are three requirements for the
13 second prong of the § 1400(b) venue test: “(1) there must be a physical place in the district; (2) it
14 must be a regular and established place of business; and (3) it must be the place of the defendant.”
15 Id. at 1360. All three requirements must be satisfied for venue to be proper. Id. The Federal Circuit
16 analyzed the legislative history underlying the patent venue statute and found that “[c]ourts should
17 be mindful of this history in applying the statute and be careful not to conflate showings that may
18 be sufficient for other purposes, *e.g.*, personal jurisdiction or the general venue statute, with the
19 necessary showing to establish proper venue in patent cases.” Id. at 1361.

20 Defendant argues that, because it was incorporated in Delaware, only the second prong of
21 § 1400(b) is potentially applicable. For the purposes of this motion, and without conceding
22 liability, Defendant argues that the allegations of infringement satisfy the “committed acts of
23 infringement” inquiry. However, Defendant argues that this district is not one where Defendant
24 has a regular and established place of business, under In re Cray. Plaintiff does not dispute that
25 Defendant does not reside in Nevada, but argues that the second prong of the § 1400(b) test is
26 satisfied. Plaintiff asks this Court to recognize the nature of Defendant’s business – facilitating
27 communication over the web, in every state including Nevada – and to limit the application of In
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1 re Cray to factual circumstances where physical products are involved. Both parties argue that the
2 interests of justice weigh in their favor.

3 The Court finds that the In re Cray factors weigh in favor of transferring venue.

4 **A. “Place of business”**

5 The Federal Circuit defines a “place of business” as a “physical, geographical location in
6 the district from which the business of the defendant is carried out.” In re Cray, 871 F.3d at 1362.
7 Where a defendant stores its literature, documents, and products may be considered a place of
8 business. The Court finds that the undisputed facts show that Defendant does not have a physical
9 location in this district where its business is carried out. Nor does Defendant store any of its data
10 on servers located in Nevada. The fact that one software engineer resides in this district is
11 insufficient to establish such location. The employee works remotely and reports to a team in San
12 Francisco. This employee is not required to live in Nevada. Plaintiff does not introduce any fact
13 that the employee’s location is available to the public or otherwise held out as a location for the
14 operations of Defendant’s business.

15 **B. “Regular” and “established” business**

16 For proper venue to lie, the place of business must be “regular” such that operations are
17 conducted “‘in a steady[,] uniform[,] orderly[,] and] methodical’ manner.” Id. (alterations in
18 original) (citation omitted). The place of business must also be “established;” it must be settled or
19 permanently fixed, and not transient. Id. at 1363. There are no facts to suggest that any of the
20 business conducted out of the software engineer’s home meets this requirement. The ability for
21 the employee to move his home out of the district on his own accord, without Defendant’s
22 approval, is significant, and “cut[s] against the employee’s home being considered a place of
23 business of the defendant.” Id.

24 **C. The place is the *defendant’s* place**

25 Thirdly, the place of business must be the *defendant’s* place, “not solely a place of the
26 defendant’s employee.” Id. For the place of business to be considered the defendant’s, the
27 defendant must ratify the location. A location may be considered the place of the defendant when
28 the defendant owns, leases, or otherwise exercises control over the place; this requirement may

1 also be satisfied when the defendant conditions employment on an employee’s residence in a
2 particular location or stores materials in the district “so that they can be distributed or sold from
3 that place.” Id. (citations omitted). There is no dispute that Defendant neither owns nor leases the
4 software engineer’s residence. There is no dispute that Defendant does not condition the engineer’s
5 employment upon his location in this district; in fact, he is free to leave this district and Defendant
6 has no plans to replace him with another employee located here.

7 **D. The instant case is analogous to In re Cray**

8 Plaintiff asks the Court to distinguish In re Cray from the instant case, because there are no
9 physical or tangible products to be distributed or sold, and given the web-based nature of
10 Defendant’s business. The Court finds, however, that the key inquiry is not whether physical
11 objects are involved, but rather whether the public has access to the defendant corporation through
12 an employee or office located in the district where a suit is brought or if the public directly accesses
13 the services of defendant through a location in the respective forum. The three-factor analysis set
14 forth by the Federal Circuit requires the Court to consider the representations that are being made
15 to the public based upon the location of an employee residing outside of the headquarters district.
16 The Court finds that the bulk of the defendant’s employees, product development, and overall
17 operations are located in San Francisco, and that it does not own or lease any buildings in this
18 district, it has no Nevada phone numbers or addresses listed for its operations, and it stores no
19 inventory or data in Nevada. These facts demonstrate that Defendant maintains no place of
20 business in Nevada, much less one that is both regular and established. There is no means for
21 Defendant’s consumers to access the engineer and the work that he provides for Defendant, and
22 there is no evidence that his work is consumer-facing, which are critical for a finding that
23 Defendant represents that it does business in the forum. As in In re Cray, Plaintiff “points to no
24 evidence that the [employee’s] location . . . [is] material” to Defendant – or to its consumers. Id.
25 at 1365.

26 **E. Fairness and the “interests of justice”**

27 The Court also finds that convenience and fairness to the parties requires transfer of this
28 action. The Court recognizes that the purpose of § 1406(a) is to ensure that plaintiff’s suit could

1 be transferred, rather than dismissed, if plaintiff make a mistake about the proper venue. Goldlawr,
2 Inc. v. Heiman, 369 U.S. 463, 467 (1962). The Court finds that the factors set forth in Atlantic
3 Marine support its determination that the interests of justice are best served by transferring venue
4 to the Northern District of California.

5 The Court finds that the convenience of the parties is better served by transferring this
6 action. The ease of access to sources of proof and to witnesses is greater in the district of transfer.
7 If there is any need to view the premises where the development of the alleged infringing products
8 takes place, it is sensible for a court in that district to order such viewing. Further, Defendant has
9 substantially greater contacts with the Northern District of California than with this district,
10 including most if not all of the contacts out of which this litigation arises. The litigation will
11 therefore likely be more efficient and easier for both parties in the district of transfer.

12 With regard to the public interest, the court finds that the Northern District of California
13 has a local interest in deciding controversies pertaining to the businesses and corporations
14 operating within its borders, which outweighs the interest of this district.

15 The Court recognizes that Plaintiff's choice in forum is entitled some weight. However,
16 based on the evidence provided by Defendant, Plaintiff does not appear to have any corporate
17 executives or witnesses, aside from the software engineer, located in this district. Plaintiff has not
18 disputed these facts. There is no dispute that the Northern District of California is closer in
19 proximity to Plaintiff's center of operations in Bellevue, Washington. The Court also finds that the
20 burden on the inventors of the technology in question will likely be the same regardless of whether
21 the action proceeds in Northern California or in Nevada. Therefore, Plaintiff's choice in forum is
22 outweighed by the factors set forth above.

23 For these reasons, the Court finds venue in this district improper, and grants Defendant's
24 motion to change venue.

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26 **VI. CONCLUSION**

27 Accordingly,

28 **IT IS ORDERED** that Defendant's Motion to Change Venue (ECF No. 27) is GRANTED.

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IT IS FURTHER ORDERED that Defendant's Motion to Seal (ECF No. 38) is GRANTED.

IT IS FUTURE ORDERED that this case is transferred to the United States District Court for the Northern District of California. The Clerk of Court shall close this case in this district.

DATED: July 23, 2018.



RICHARD F. BOULWARE, II
United States District Judge