

EXHIBIT S

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

CALYPSO WIRELESS, INC. AND
DRAGO DAIC

vs.

T-MOBILE USA, INC.

§
§
§
§
§
§

CASE NO. 2:08-CV-441-TJW-CE

ORDER

I. Introduction

Before the court is the defendant T-Mobile USA, Inc.'s ("T-Mobile") motion to transfer venue (Dkt. No. 17). The court, having considered the venue motion and the arguments of counsel, DENIES the motion to transfer venue to the United States District Court for the Western District of Washington pursuant to 28 U.S.C. § 1404(a). The balance of the private and public factors does not demonstrate that the transferee venue is "clearly more convenient" than the venue chosen by the plaintiff. See *In re Volkswagen of Am., Inc.* (Volkswagen III), 566 F.3d 1349 (Fed. Cir. 2009); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008); *In re Volkswagen of Am., Inc.* (Volkswagen II), 545 F.3d 304 (5th Cir. 2008) (en banc) (emphasis added).

II. Factual and Procedural Background

The plaintiff Calypso Wireless, Inc. ("Calypso") is a Delaware corporation and has its principal place of business in Montgomery County, Texas. The plaintiff Drago Daic is a citizen of Texas and resides in Harris County, Texas. The crossclaimant Jimmy Williamson, P.C. is a Texas professional corporation and has its principal place of business in Houston, Texas. T-

Mobile is a Delaware corporation and has its principal place of business in Bellevue, Washington.

On November 13, 2008, Calypso filed its complaint in the Eastern District of Texas against T-Mobile and alleged infringement of U.S. Patent No. 6,680,923 B1 (“the ‘923 patent”). The plaintiff Drago Daic, who allegedly owns certain rights to the ‘923 patent, was added as a co-plaintiff on March 16, 2009. On May 29, 2009, T-Mobile filed the motion to transfer under consideration.

Around September 2009, a long-running dispute over ownership of the ‘923 patent resurfaced and has taken center stage in this lawsuit. There are past¹ and pending² Texas state court lawsuits regarding ownership of the patent, as well as two settlement agreements (“2008 Settlement Agreement” and “2009 Settlement Agreement”), both of which are contested. Calypso filed an amended complaint on January 25, 2010 that sought a declaratory judgment against Jimmy Williamson, P.C. with respect to ownership of the ‘923 patent. Jimmy Williamson, P.C. answered and filed a crossclaim for patent infringement against T-Mobile. On February 8, 2010, Calypso, Mr. Daic, and Jimmy Williamson, P.C. filed a stipulation that purportedly sets aside their ownership disputes in this lawsuit; however, the pending state court proceeding is ongoing. Calypso dismissed its claims against Jimmy Williamson, P.C. without prejudice on March 30, 2010.

¹ *Daic v. Calypso Wireless, Inc.*, No. 63048 (151st Dist. Ct., Harris County, Tex. 2004).

² *Calypso Wireless, Inc. v. Daic*, No. 02545 (333rd Dist. Ct., Harris County, Tex. 2010).

III. Analysis

A. Applicable Law Regarding Motions to Transfer

“For the convenience of parties, 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 Fifth and Federal Circuits have enunciated the standard to be used in deciding motions to transfer venue. *See Volkswagen III*, 566 F.3d 1349; *In re Genentech.*, 566 F.3d 1338; *In re TS Tech USA Corp.*, 551 F.3d 1315 (applying the Fifth Circuit’s en banc *Volkswagen II* decision to rulings on transfer motions out of this circuit); *Volkswagen II*, 545 F.3d 304. The moving party must show “good cause,” and this burden is satisfied “when the movant demonstrates that the transferee venue is clearly more convenient.” *Volkswagen II*, 545 F.3d at 314.

The initial threshold question is whether the suit could have been brought in the proposed transferee district. *In re Volkswagen AG (Volkswagen I)*, 371 F.3d 201, 203 (5th Cir. 2004). If the transferee district is a proper venue, then the court must weigh the relative conveniences of the current district against the transferee district. In making the convenience determination, the Fifth Circuit considers several private and public interest factors, none of which are given dispositive weight. *Id.* “The private interest factors are: ‘(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.’” *Volkswagen II*, 545 F.3d at 315 (quoting *Volkswagen I*, 371 F.3d at 203). “The public interest factors are: ‘(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests

decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [in] the application of foreign law.”

Id. (quoting *Volkswagen I*, 371 F.3d at 203).

B. Proper Venue

As a threshold matter, the court must determine if venue is proper in the Western District of Washington. Venue requirements are satisfied in patent infringement cases “where the defendant has committed acts of infringement and has a regular and established place of business.” 28 U.S.C. § 1400(b). T-Mobile’s principal place of business is located in the Western District of Washington, and it sells allegedly infringing products there, so venue is proper in that district.

C. Private Interest Factors

1. Relative Ease of Access to Sources of Proof

The relative ease of access to sources of proof is the first factor to consider. “That access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous.” *Volkswagen II*, 545 F.3d at 316. Calypso, Mr. Daic, and Jimmy Williamson, P.C. are all located in or near Houston, Texas. Calypso and Mr. Daic have stipulated that all of their documents are located in Texas. Mr. Daic claims that T-Mobile’s partner, Radio Shack, may have relevant evidence in Fort Worth, Texas. Both the inventor and the firm that prosecuted the ‘923 patent are located in Florida. T-Mobile’s documents and physical evidence are located in Washington. No sources of proof appear to be in the Eastern District of Texas.

The court finds that this factor weighs slightly against transfer. Transfer to the Western

District of Washington would provide much easier access to the defendant's physical evidence. In contrast, the Eastern District of Texas is much closer to the plaintiffs' and the crossclaimant's physical evidence. In general, the ease of accessing the defendant's sources of proof weighs more heavily than the ease of plaintiff's proof, because the majority of relevant evidence in patent infringement suits usually comes from the accused infringers. *In re Genentech*, 566 F.3d at 1345. In this case, however, ownership of the '923 patent remains a contested issue; thus access to Calypso's, Mr. Daic's, and Jimmy Williamson, P.C.'s documentation and state court filings and orders will be relatively important. Furthermore, access to the inventor's and prosecution firm's documentation is easier from this district than the proposed transferee district.

Because the sources of proof are not clustered near the proposed transferee district, this case is distinguishable from *Volkswagen II* and *In re TS Tech*. In *Volkswagen II*, all of the physical evidence was located within the proposed transferee venue. *Volkswagen II*, 545 F.3d at 316. Similarly in *TS Tech*, all of the sources of proof were located within 300 miles of the proposed transferee district, the Southern District of Ohio, and the original venue, the Eastern District of Texas, was about 900 additional miles away. *In re TS Tech Corp.*, 551 F.3d at 1320-21. In these two cases, access to the physical evidence was clearly more convenient in the proposed transferee venue.

In contrast to *Volkswagen II* and *In re TS Tech*, the physical evidence in this case is distributed across the country, and the plaintiffs', crossclaimant's, and some of the third parties' proof is closer to the Eastern District of Texas than the Western District of Washington. Accordingly, this factor is neutral.

2. *Availability of Compulsory Process*

The next private interest factor is the availability of compulsory process to secure the attendance of non-party witnesses. Rule 45(c)(3)(A)(ii) limits the court's subpoena power by protecting non-party witnesses who work or reside more than 100 miles from the courthouse. *Volkswagen II*, 545 F.3d at 316.

Neither party has identified any non-party witnesses residing within 100 miles of Marshall, Texas. T-Mobile argues that this factor weighs heavily in favor of transfer as its current employees are located in the Western District of Washington. Because this factor considers the court's ability to subpoena non-party witnesses, the location of T-Mobile's current employees is not as relevant to the analysis. *See In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1337-38 (Fed. Cir. 2009); *Volkswagen II*, 545 F.3d at 316 (discussing the subpoena power over non-party witnesses). But several of T-Mobile's former employees are also located in the Western District of Washington; the proposed transferee venue's absolute subpoena power over these witnesses favors transfer.

No district court has absolute subpoena power over all of the likely witnesses. *Compare Volkswagen II*, 545 F.3d at 317. Yet the Western District of Washington's subpoena power over some witnesses must be considered. *See In re Hoffmann-La Roche*, 587 F.3d at 1337-38. Thus, this factor favors transfer.

3. *Cost of Attendance for Willing Witnesses*

Next, the court must weigh the cost for witnesses to travel and attend trial in the Eastern District of Texas versus the Western District of Washington. The Fifth Circuit has explained:

[T]he factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled. Additional distance means additional travel

time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment.

Volkswagen I, 371 F.3d at 205. The court must consider the convenience of both the party and non-party witnesses. *See id.* at 204 (requiring courts to “contemplate consideration of the parties and witnesses”); *Fujitsu Ltd. v. Tellabs, Inc.*, 639 F. Supp. 2d. 761, 765-66 (E.D. Tex. 2009).

The issues here are similar to those discussed above in ease of access to sources of proof. Calypso, Drago Daic, and Jimmy Williamson, P.C. are located in Texas. Radio Shack witnesses likely reside in Texas as well. The ‘923 patent’s inventor and prosecuting attorney live in Florida. Although none of these parties live within 100 miles of Marshall, Texas or within this district, travel time and distance to the Eastern District of Texas is much shorter than to the Western District of Washington. *See Deep Nines, Inc. v. McAfee, Inc.*, 2009 WL 3784372, at *3 n.3 (E.D. Tex. Nov. 10, 2009) (noting that witnesses and evidence in the Northern District of Texas are much closer to the Eastern District of Texas than the District of Minnesota); *Emanuel v. SPX Corp. / OTC Tools Div.*, 2009 WL 3063322, at *8 (E.D. Tex. Sept. 21, 2009) (stating that a Houston-based plaintiff “is located in close proximity to the Eastern District of Texas”). On the other hand, most of T-Mobile’s employees and third-party witnesses live within the proposed transferee district, and travel to the Eastern District of Texas is much less convenient. Calypso asserts that T-Mobile’s “vague reference to the location of witnesses is insufficient, rather the movant must . . . explain what their testimony will cover.” Contrary to Calypso’s argument, T-Mobile is not required to outline the anticipated testimony of its specified witnesses. *See Volkswagen II*, 545 F.3d at 317 n.12.

The plaintiffs, crossclaimant, and some witnesses will be significantly inconvenienced by

a transfer to the Western District of Washington. But the presence of the defendant's employees and witnesses within the proposed transferee district slightly favors transfer, as neither the plaintiffs, the crossclaimant, nor the Texas-based witnesses are located in the Eastern District of Texas.

4. *Other Practical Problems*

Practical problems include issues of judicial economy. *Volkswagen III*, 566 F.3d 1349, 1351 (Fed. Cir. 2009). Judicial economy weighs against transfer when the court already has familiarity with the case's factual issues. *Id.*

The plaintiffs argue that transfer to the Western District of Washington would result in prejudicial delays and increased expense to counsel. This case has already been delayed for several months while Calypso sought substitute counsel and the plaintiffs and crossclaimant fought for ownership of the patent; any additional delay caused by venue transfer is not prejudicial. The location of parties' counsel and any additional travel expenses for counsel is irrelevant. *In re Horseshoe Entm't*, 337 F.3d 429, 434 (5th Cir. 2003).

Familiarity with this case's convoluted procedural history and patent ownership disputes is relevant to resolving T-Mobile's pending motion to dismiss (Dkt. No. 109). In the motion to dismiss, T-Mobile argues that the original complaint's sole plaintiff, Calypso, lacked standing to file this patent infringement suit because it was not the sole owner of the '923 patent. Calypso, Mr. Daic, and Jimmy Williamson, P.C. respond that the alleged standing defect was cured through the addition of Mr. Daic and Jimmy Williamson, P.C. as parties and the stipulation regarding ownership disputes. Because this court is familiar with the underlying factual issues necessary to resolve T-Mobile's motion to dismiss, this factor weighs against transfer.

D. Public Interest Factors

1. Court Congestion

The court may consider how quickly a case will come to trial and be resolved. *In re Genentech*, 566 F.3d at 1347. This factor is the “most speculative,” however, and in situations where “several relevant factors weigh in favor of transfer and others are neutral, the speed of the transferee district court should not alone outweigh all of the other factors.” *Id.*

T-Mobile contends that the Western District of Washington has more judges and fewer cases in its docket than the Eastern District of Texas. But T-Mobile concedes that the median times from filing to trial and to final disposition are approximately the same. Therefore, this factor is neutral.

2. Local Interest

The court must consider local interest in the litigation, because “[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.” *Volkswagen I*, 371 F.3d at 206 (5th Cir. 2004). Interests that “could apply virtually to any judicially district or division in the United States,” such as the nationwide sale of infringing products, are disregarded in favor of particularized local interests. *Volkswagen II*, 545 F.3d at 318; *In re TS Tech*, 551 F.3d at 1321.

T-Mobile asserts that the Western District of Washington has a local interest in this case because T-Mobile’s principal place of business is within that district and the allegedly infringing products were developed there. In contrast, none of the parties have offices in the Eastern District of Texas. *See In re TS Tech*, 551 F.3d at 1321 (noting that none of the parties had an office in the Eastern District of Texas, so this district lacked a local interest). Calypso argues

that this district has a local interest because allegedly infringing products are sold in the Eastern District of Texas; as mentioned above, however, the nationwide sale of products is not a local interest. Thus, the Western District of Washington's local interest in this dispute favors transfer.

3. *Familiarity with the Governing Law*

One of the public interest factors is "the familiarity of the forum with the law that will govern the case." *Volkswagen I*, 371 F.3d at 203. The need to apply a particular state's law may weigh in favor of or against transfer. *Odom v. Microsoft Corp.*, 596 F. Supp. 2d 995, 1004 (E.D. Tex. 2009).

Both the Western District of Washington and the Eastern District of Texas are familiar with patent law, so the patent infringement claims do not affect the transfer analysis. *See In re TS Tech*, 551 F.3d at 1320-21. T-Mobile contends that a 2002 non-disclosure agreement between Calypso and T-Mobile is governed by Washington law, and thus favors transfer. This non-disclosure agreement may be relevant to T-Mobile's laches and other equitable defenses. On the other hand, the disputed 2008 and 2009 Settlement Agreements are governed by Texas law. To resolve T-Mobile's pending motion to dismiss for lack of standing, the court will likely need to consider the two settlement agreements. The relevance of the settlement agreements and this court's familiarity with Texas law weigh against transfer.

4. *Avoidance of Conflict of Laws*

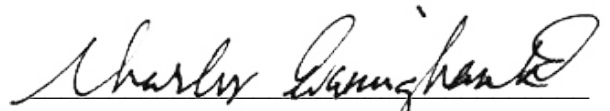
No conflict of laws issues are expected in this case, so this factor does not apply.

IV. Conclusion

Considering all of the private and public interest factors, the defendant has not met its burden of showing that the Western District of Washington is "clearly more convenient" than the

Eastern District of Texas. *See In re VTech Commc'ns, Inc.*, 2010 WL 46332, at *1 (Fed. Cir. Jan. 6, 2010) (citing *Volkswagen II*, 545 F.3d 504). Availability of compulsory process and local interest weigh in favor of transfer, and cost of witness attendance slightly favors transfer. On the other hand, other practical problems and familiarity with the governing law weigh against transfer, and ease of access to sources of proof weighs slightly against transfer. Therefore, T-Mobile's motion to transfer venue is DENIED.

SIGNED this 31st day of March, 2010.


CHARLES EVERINGHAM IV
UNITED STATES MAGISTRATE JUDGE