

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

VOXER, INC. AND VOXER IP LLC,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	CIVIL ACTION 6:20-cv-00011-ADA
	§	
FACEBOOK, INC AND	§	
INSTAGRAM LLC,	§	
<i>Defendants.</i>	§	

**ORDER GRANTING IN PART DEFENDANT FACEBOOK’S
MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a)**

Came on for consideration this date the Motion of Defendants Facebook, Inc. and Instagram LLC, (collectively, “Facebook”¹) to transfer under 28 U.S.C. § 1404(a), filed on February 28, 2020. ECF No. 29. Plaintiffs Voxer Inc. and Voxer IP LLC, (collectively, “Voxer”²) filed its response on March 16, 2020 (ECF No. 36). Facebook submitted its reply on March 19, 2020 (ECF No. 41). After careful consideration of the above briefing the Court **DENIES** Facebook’s motion to transfer the case to the Northern District of California (“NDCA”), but **GRANTS** Facebook’s alternative motion to transfer the case to the Austin Division of the Western District of Texas (“WDTX”), for the reasons described below.

¹ Defendant Instagram is a Delaware limited liability company and a wholly-owned subsidiary of Facebook. ECF No. 1 at ¶¶10–11 Facebook is a Delaware corporation with a principal place of business in NDCA. *Id.*

² Plaintiff Voxer, Inc. is a Delaware corporation with its principal place of business in NDCA, Voxer IP, LLC., is Delaware limited liability company and the legal owner of the Asserted Patents. *Id.* at ¶9 Voxer IP, LLC, is a wholly-owned subsidiary of Voxer Inc. *Id.*

I. Factual Background and Procedural History

Voxer filed this lawsuit on January 7, 2020, alleging infringement of the five patents-in-suit.³ ECF No. 1 at 2. According to the Complaint, these highly technical patents enable the reliable transmission of voice and video communications with the immediacy of live communication. *Id.* at 1. Further, these technologies work together to enable streaming media, as it is created to be instantly transmitted, under poor and varying network conditions, to other viewers to watch in real time or the media can be stored on networks for later views. *Id.* at 15–40. Voxer alleges that both Defendants’ have multiple products⁴ that directly and continuously infringed on the asserted patents. *Id.* at 3–4.

Facebook filed a motion to transfer venue under 28 U.S.C. § 1404(a) requesting that the case be transferred to the Northern District of California (“NDCA”) or, in the alternative, to the Austin Division of the Western District of Texas (“WDTX”). ECF No. 29 at 1.

II. Standard of Review

Title 28 U.S.C. § 1404(a) provides that, for the convenience of parties and witnesses, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented. “Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an ‘individualized, case-by-case consideration of convenience and fairness.’” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). The party moving for transfer carries the burden of showing good cause. *In re Volkswagen of Am.,*

³ U.S. Patent Nos. 8,180,030 (the “’030 Patent”); 9,634,969 (the “’969 Patent”); 10,109,028 (the “’028 Patent”); 10,142,270 (the “’270 Patent”); and 10,511,557 (the “’557 Patent”), (collectively, the “Asserted Patents”).

⁴ The four products include: (1) facebook.com and instagram.com websites; (2) Facebook Live and Instagram Live services; (3) the Facebook and Instagram applications for mobile and other devices; and (4) devices running the Facebook or Instagram applications. *See*, ECF No. 1 at 3–4.

Inc., 545 F.3d 304, 314 (5th Cir. 2008) (hereinafter “*Volkswagen II*”) (“When viewed in the context of § 1404(a), to show good cause means that a moving party, in order to support its claim for a transfer, must . . . clearly demonstrate that a transfer is ‘[f]or the convenience of parties and witnesses, in the interest of justice.’”) (quoting 28 U.S.C. § 1404(a)).

“The preliminary question under § 1404(a) is whether a civil action ‘might have been brought’ in the destination venue.” *Volkswagen II*, 545 F.3d at 312. If so, in the Fifth Circuit, the “[t]he determination of ‘convenience’ turns on a number of public and private interest factors, none of which can be said to be of dispositive weight.” *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004). The private factors include: “(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.” *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (hereinafter “*Volkswagen I*”) (citing to *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1982)). The public factors include: “(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 of the application of foreign law.” *Id.* Courts evaluate these factors based on “the situation which existed when the suit was instituted.” *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960).

A court may “consider undisputed facts outside the pleadings, but it must draw all reasonable inferences and resolve all factual conflicts in favor of the non-moving party.” *Weatherford Tech. Holdings, LLC v. Tesco Corp.*, No. 2:17-CV-00456-JRG, 2018 WL 4620636, at *2 (E.D. Tex. May 22, 2018). “The court cannot transfer a case where the result is merely to

shift the inconvenience of the venue from one party to the other.” *Sivertson v. Clinton*, 2011 WL 4100958, at *3 (N.D. Tex. Sept. 14, 2011) (Fitzwater, C.J.) (citing *Fowler v. Broussard*, 2001 WL 184237, at *6 (N.D. Tex. Jan. 22, 2001) (Fitzwater, J.).

A plaintiff’s choice of venue is not an independent factor in the venue transfer analysis, and courts must not give inordinate weight to a plaintiff’s choice of venue. *Volkswagen II*, 545 F.3d at 314 n.10, 313 (“[W]hile a plaintiff has the privilege of filing his claims in any judicial division appropriate under the general venue statute, § 1404(a) tempers the effects of the exercise of this privilege.”). However, “when the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff’s choice should be respected.” *Id.* at 315; *see also QR Spex, Inc. v. Motorola, Inc.*, 507 F.Supp.2d 650, 664 (E.D. Tex. 2007) (characterizing movant’s burden under § 1404(a) as “heavy”).

III. Discussion regarding transfer to the Northern District of California

As a preliminary matter, neither party contests that venue could be proper in NDCA and could have been filed there. Facebook argues that transfer from WDTX is appropriate because it has determined that the Voxer’s Complaint concerns only Facebook Live and Instagram Live (collectively, “Live Products”), which are primarily created and maintained in three other locations and specifically not in WDTX. ECF No. 29 at 2. In its response, Voxer illustrates how each of the accused products is intertwined with each of the others, and to focus on only two of them would ignore the majority of highly relevant information within WDTX. ECF No. 38 at 1–3. The Court resolves factual conflicts, of this nature, in favor of the non-movant. *See Weatherford Tech*, 2018 WL 4620636, at *2. Thus, the Court concludes that the other accused products may be equally as relevant to the case and should be decided by the Jury.

a. Relative ease of access to sources of proof

In considering the relative ease of access to proof, a court looks to where documentary evidence, such as documents and physical evidence, is stored. *Volkswagen II*, 545 F.3d at 316. Facebook argues that this factor weighs in favor of transfer to NDCA because the majority of the “relevant proof” is not in WDTX. ECF No. 29 at 6. Although Facebook admits it has an office and employees in WDTX, it claims “only one employee works part-time on the Live products.” *Id.* at 2. Additionally, Facebook asserts that “the relevant documentation regarding the design, development, operations, marketing, and financing of both Live products is created and maintained primarily by the employees in NDCA.” *Id.* Finally, as an additional factor, Facebook claimed that “**a great majority, if not all,**” of Voxer’s witnesses are located in the NDCA. *Id.* at 6 (emphasis in original).

In its response, Voxer makes two counterarguments regarding Facebook’s analysis of the source of proof. First, Voxer argues that Facebook has incorrectly concluded that its only relevant documents and employees to the case are those that support the Live products. ECF No. 38 at 2. Specifically, Voxer asserts that Facebook’s attempt to limit the scope of Voxer’s claim to just two Live products ignores that there would in fact be accessible proof for the non-Live products within the WDTX. *Id.* at 7. Additionally, Voxer points to the fact that although only one Facebook Live employee works part-time in Austin, there are over 1,500 other employees in the area serving in a broad range of roles that support all other products at issue. *Id.* at 3. Voxer also points to the “numerous” job openings for roles that support the accused products, specifically the video services. *Id.*

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