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

NEONODE SMARTPHONE LLC, *Plaintiff,*	§	
	§	
	§	
v.	§	**6-20-CV-00505-ADA**
	§	
APPLE INC.,	§	
Defendant.	§	
	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Apple Inc.'s ("Apple") Motion to Transfer venue (ECF No. 27) to the Northern District of California ("NDCA") pursuant to 28 U.S.C. § 1404(a). After careful consideration of the parties' briefs and the applicable law, the Court **DENIES** Apple's motion.

I. BACKGROUND

Plaintiff Neonode Smartphones LLC ("Neonode") filed this lawsuit against Apple on June 8, 2020, alleging infringement of U.S. Patent Nos. 8,095,879 and 8,812,993 (the "Asserted Patents"). ECF No. 1. On the same day, Neonode filed another lawsuit against Samsung Electronics Co. Ltd. and Samsung Electronics America, Inc. (collectively, "Samsung), asserting the same two patents. *See Neonode Smartphone LLC v. Samsung Elecs. Co. Ltd*., No. 6-20-cv-00507-ADA, Dkt. #1 (Jun. 8. 2020). Apple filed the instant Motion to Transfer under 28 U.S.C. § 1404(a), requesting that this case be transferred from the Western District of Texas ("WDTX") to the NDCA. ECF No. 27. The Motion has been subsequently fully briefed by the parties. ECF Nos. 52 (Response) and 59 (Reply).

Neonode is a Wyoming limited liability company with its principal place of business also in Wyoming. ECF No. 1 at ¶ 6. Apple is a California corporation headquartered in Cupertino, California, which is in the NDCA. ECF No. 27 at 3. Apple also has one of its largest corporate campuses in Austin, Texas, within the WDTX, "with approximately 7,000 employees in the City" as of November 20, 2019.[1] *See also* ECF No. 1 at ¶ 7.

II. LEGAL STANDARD

In patent cases, motions to transfer under 28 U.S.C. § 1404(a) are governed by the law of the regional circuit. *In re TS Tech USA Corp*., 551 F.3d 1315, 1319 (Fed. Cir. 2008). 28 U.S.C. § 1404(a) provides that, "[f]or 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." *Id*. "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 preliminary question under Section 1404(a) is whether a civil action "might have been brought" in the transfer destination venue." *In re Volkswagen, Inc.*, 545 F.3d 304, 312 (5th Cir. 2008) ("*Volkswagen II"*). If the destination venue would have been a proper venue, then "[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

[1] https://www.apple.com/newsroom/2019/11/apple-expands-in-austin/

case easy, expeditious and inexpensive." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*Volkswagen I*") (citing *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 at the time of filing, rather than relying on hindsight knowledge of the defendant's forum preference. *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960).

The burden to prove that a case should be transferred for convenience falls squarely on the moving party. *In re Vistaprint Ltd.*, 628 F.3d 1342, 1346 (Fed. Cir. 2010). The burden that a movant must carry is not that the alternative venue is more convenient, but that it is clearly more convenient. *Volkswagen II*, 545 F.3d at 314 n.10. Although the plaintiff's choice of forum is not a separate factor entitled to special weight, respect for the plaintiff's choice of forum is encompassed in the movant's elevated burden to "clearly demonstrate" that the proposed transferee forum is "clearly more convenient" than the forum in which the case was filed. *In re Vistaprint Ltd.*, 628 F.3d at 314–15. While "clearly more convenient" is not necessarily equivalent to "clear and convincing," the moving party "must show materially more than a mere preponderance of convenience, lest the standard have no real or practical meaning." *Quest NetTech Corp. v. Apple, Inc.*, No. 2:19-cv-118, 2019 WL 6344267, at *7 (E.D. Tex. Nov. 27, 2019).

III. ANALYSIS

The threshold determination under the Section 1404 analysis is whether this case could initially have been brought in the transferee venue—here, the NDCA. Neither party contests that

venue is proper in the NDCA and that this case could have been brought there. Thus, the Court proceeds with its analysis of the private and public interest factors as provided in *Volkswagen I*.

A. Private Interest Factors

i. The 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." *Fintiv Inc. v. Apple Inc.*, No. 6:18-cv-00372, 2019 WL 4743678, at *2 (W.D. Tex. Sept. 10, 2019). "[T]he question is *relative* ease of access, not *absolute* ease of access." *In re Radmax*, 720 F.3d 285, 288 (5th Cir. 2013) (emphases in original). Witnesses are not sources of proof to be analyzed under this factor; rather, analyses pertaining to witnesses are assessed under the second or third private factors. *In re Apple Inc.*, 979 F.3d 1332, 1339 (Fed. Cir. 2020) ("This factor relates to the ease of access to non-witness evidence, such as documents and other physical evidence."); *Netlist, Inc. v. SK hynix Inc. et al*, No. 6:20-cv-00194-ADA, Dkt. #87 at 11 (W.D. Tex. Feb. 2, 2021) ("The first private factor, ease of access to sources of proof, considers 'documents and physical evidence' *as opposed to witnesses.*") (emphasis added).

Although the physical location of electronic documents does affect the outcome of this factor under current Fifth Circuit precedent (*see Volkswagen II*, 545 F.3d at 316), this Court has stressed that the focus on physical location of electronic documents is out of touch with modern patent litigation. *Fintiv*, 2019 WL 4743678, at *8; *Uniloc 2017 LLC v. Apple Inc.*, 6-19-CV-00532-ADA, 2020 WL 3415880, at *9 (W.D. Tex. June 22, 2020) ("[A]ll (or nearly all) produced documents exist as electronic documents on a party's server. Then, with a click of a mouse or a few keystrokes, the party [can] produce[] these documents" and make them available at almost any location.). Other courts in the Fifth Circuit similarly found that access to documents that are

available electronically provides little benefit in determining whether a particular venue is more convenient than another. *See, e.g., Uniloc USA Inc. v. Samsung Elecs. Am.*, No. 2:16-cv-642-JRG, 2017 U.S. Dist. LEXIS 229560, at *17 (E.D. Tex. Apr. 19, 2017) ("Despite the absence of newer cases acknowledging that in today's digital world computer stored documents are readily moveable to almost anywhere at the click of a mouse, the Court finds it odd to ignore this reality in favor of a fictional analysis that has more to do with early Xerox machines than modern server forms."); *see also LBS Innov'ns LLC v. Apple Inc*., 2020 WL 923887, at *5 (E.D. Tex. Feb. 26, 2020).

Apple contends that the research, design, and development of the accused technology in the accused products took place in the NDCA and the relevant key documents were generated in the NDCA. ECF No. 27 at 9-10. Apple does not contend that those documents are electronically stored and can be accessed outside the NDCA, including in the WDTX. Instead, Apple contends that its "electronically-stored information is only accessible to employees 'with the proper credentials' on a need-to-know basis." ECF No. 59 at 1. However, Apple does not show that the "proper credentials" have not been or cannot be given to Apple employees located in Austin, Texas for the purpose of this litigation or in general. If anything, cooperating in discovery in a litigation would be a good "need-to-know" basis to provide the proper credentials to Apple's employees located in this District.

Apple further contends that its relevant employees are all based in the NDCA and "likely witnesses . . . concerning the marking, sales and financial information for the Accused Products" are located there. ECF No. 27 at 10. However, Courts have made it clear that analyses related to witnesses are not proper under this factor and should instead be considered in the second and third

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