IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Repairify, Inc., d/b/a asTech,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:19-CV-1370**
	§	
AirPro Diagnostics LLC,	§	
	§	
Defendant.	§	

DEFENDANT AIRPRO DIAGNOSTICS, LLC'S MOTION TO DISMISS, AND IN THE ALTERNATIVE, MOTION TO TRANSFER VENUE

Defendant AirPro Diagnostics, LLC files this Motion to Dismiss Plaintiff Repairify, Inc., d/b/a asTech's suit pursuant to Federal Rules of Civil Procedure 12(b)(2) (lack of personal jurisdiction), 12(b)(3) (improper venue), and 28 U.S.C. § 1406 (improper venue). Alternatively, Defendant AirPro Diagnostics seeks to transfer the venue for this suit, pursuant to 28 U.S.C. § 1404, to the Middle District of Florida, Jacksonville Division.

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I. INTRODUCTION

This Honorable Court should dismiss this suit for lack of personal jurisdiction and improper venue. If this Court determines that it does in fact possess personal jurisdiction over the Defendant, the Court should nevertheless transfer the suit to the Middle District of Florida, Jacksonville Division, for the convenience of the Defendant and its witnesses, and in the interest of justice.

The Plaintiff is attempting to gain a second bite at the apple due to its discontent in settling a previous lawsuit with Defendant AirPro Diagnostics for the same allegations contained in Plaintiff's instant complaint. Instead of filing this lawsuit in the Middle District of Florida, Jacksonville Division (a proper forum), Plaintiff has engaged in improper forum shopping and has filed this lawsuit in the Southern District of Texas, Houston Division, a district that has no connection to the parties involved, or the events in dispute

Specifically, in 2016, Repairify, Inc. d/b/a asTech, ("asTech" or "Plaintiff") filed suit against AirPro Diagnostics (along with two AirPro employees) in the Middle District of Florida, Jacksonville Division. The 2016 lawsuit included claims based on the same or similar alleged acts for which asTech again complains, including Lanham Act violations.[1] On or about June 9, 2017, the parties settled that lawsuit with a "walk away" settlement agreement wherein neither party paid the other for any alleged claims or damages. asTech released and waived all claims it had against AirPro, including all claims arising under the Lanham Act, tort claims, and any claims for attorney's fees or expenses.

Plaintiff's instant complaint, filed on April 15, 2019, in the Southern District of Texas, Houston Division, asserts substantially similar claims, but this time, in a jurisdiction and venue

[1] *See* Repairify, Inc. v. AirPro Diagnostics, LLC, et al., Case No. 3:16-cv-984-J-34-JKR, in the United States District Court, Middle District of Florida, Jacksonville Division.

that asTech believes will be either more favorable to its plight, or in an attempt to substantially increase the cost of litigation on its competitor. In short, Plaintiff asserts that AirPro Diagnostics is using its website to host false and misleading claims about asTech's remote diagnostic device. asTech contends that the information on AirPro Diagnostic's website is (1) false (which AirPro denies), and (2) somehow harming its business. asTech selected the Southern District of Texas, Houston Division, because it contends that AirPro "conducts business in Texas, committed tortious acts in Texas, and has intentionally directed its conduct…in Texas." (DK. 1 at ¶ 11). In truth, the seemingly only connection to the Southern District is that AirPro's Senior Vice President of Sales lives in Houston. As explained in full below, proceeding in the Southern District of Texas is improper because this Honorable Court lacks personal jurisdiction over AirPro and because the Southern District has no true connection to this case whatsoever.

II. FACTUAL BACKGROUND

Modern automobiles rely on most of its systems operation through computerized and electronic components that send and receive electronic signals to control systems operation and features. Various engine, drivetrain, body, lighting, suspension, steering, airbag, and multiple safety systems rely on the self-testing capabilities and computerized communications with scan tools (a computer with specific automotive program applications) to insure proper operation and/or to determine corrective action needed should a component fail or become damaged.

When an electronic or computerized component fails, or is damaged, the vehicle system will record a trouble code and sometimes additional data within the systems control module. These failures may or may not turn on a vehicle warning lamp or message in the driver display. To diagnose these issues, a scan tool is connected to the vehicle's diagnostic port and used to read diagnostic trouble codes and other data that provides a vehicle technician with the information

they need to properly determine an appropriate solution. These codes identify and include information regarding the system performance of components such as anti-lock braking, airbags, engine performance, and more.

There are two main diagnostic tool categories in which to diagnose these systems and be able to read data and the diagnostic trouble codes: either Original Equipment Manufacturer ("OEM") scan tool applications that are purchased and licensed directly from the vehicle manufacturer, or through a third party diagnostic tool that uses information derived from OEM scan-tool applications for vehicle diagnostics.

AirPro Diagnostics and asTech are competitors in this vehicle remote diagnostic device industry. While the two are competitors, their devices operate very differently. AirPro Diagnostics connects its device with scan tool software applications resident and directly to the vehicle. The scan tool information is retrieved directly at the vehicle and uploaded into AirPro's proprietary cloud-based diagnostic system for review and diagnostic analysis at AirPro's Jacksonville, Florida headquarters. There, it is accessed, reviewed, and diagnosed by an AirPro technician. AirPro Diagnostics uses and licenses OEM diagnostic software applications and installs them directly on the AirPro scan tool, allowing it to more accurately and more reliably read and diagnose various system codes and data. This leads to fewer "missed" codes and a more accurate diagnosis.

In contrast, asTech's device is not a true "scan tool." In order for diagnostic or trouble codes to be accessed by asTech, the vehicle data must pass through two asTech devices, one of which is connected to the vehicle, while yet another is then connected to a scan tool application at asTech's office; only then is it accessible by an asTech technician. These extra steps in the process allow for timing or dropped information errors to affect diagnostic data results, which has the potential to cause inaccurate diagnoses. This is something asTech admits in its own scan reports.

Defendant AirPro Diagnostics is a Florida limited liability company, with its principal place of business located at 11737 Central Parkway, Jacksonville, Florida 32224. *See* **Exhibit A** at ¶¶ 12-13. AirPro Diagnostics is a member-managed limited liability company comprised of many members, all of whom are Florida residents. *Id.* at ¶ 14. AirPro Diagnostics' Senior Vice President of Sales, Frank LaViola, does reside in Houston, Texas, but Mr. LaViola is not a manager, nor is he a member of AirPro Diagnostics, LLC. *Id.* at ¶ 9. Mr. LaViola's job requires him to manage AirPro's sales staff, all of whom are located in its Jacksonville, Florida, headquarters. *Id.* Mr. LaViola frequently travels to the Jacksonville, Florida headquarters to train the staff in person, but also conducts meetings remotely. *Id.* AirPro Diagnostics has over 400 clients nationwide, but only roughly 2% of those clients are in Texas. AirPro has no offices in Texas, and no employees other than Mr. LaViola living in Texas. *Id.* at ¶¶ 10-11.

asTech, on the other hand, is a Delaware corporation, believed to be headquartered in Plano, Texas. asTech's website lists its corporate headquarters as 2600 Technology Drive, Suite 900, Plano, Texas 75074. Its website also lists an "East Coast Office" located in Jacksonville, Florida. For several years, asTech was headquartered at its Jacksonville, Florida office before moving to Plano, Texas.

III. ARGUMENTS & AUTHORITIES

A. Rule 12(b)(2) Legal Standard

Federal courts do not have jurisdiction over non-resident defendants unless authorized by rule or statute, and a court must dismiss a suit if it does not have personal jurisdiction over the defendant. *See Dallas Texans Soccer Club v. Major League Soccer Players Union*, 247 F. Supp. 3d 784, 787 (E.D. Tex. 2017) (citing Fed. R. Civ. P. 12(b)(2)). When a non-resident defendant files a motion under Rule 12(b)(2), "the party seeking to invoke the court's jurisdiction must

'present sufficient facts as to make out a prima facie case supporting jurisdiction.'" *Id.* (quoting *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000)). The court may consider affidavits or other recognized methods of discovery. *See Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002).

Texas courts may only exercise personal jurisdiction over a non-resident defendant if both the Texas long-arm statute and federal due process requirements are satisfied. *See* Tex. Civ. Prac. & Rem.Code § 17.042(1); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 412–13 (1984). The Texas long-arm statute authorizes personal jurisdiction over a non-resident defendant who "does business" in Texas. Tex. Civ. Prac. & Rem.Code Ann. § 17.042; *see also Schlobohm v. Schapiro,* 784 S.W.2d 355, 356 (Tex. 1990) ("Our long arm statute authorizes the exercise of jurisdiction over those who do business in Texas."). However, the long-arm statute is limited by federal due process requirements. *See Moki Mac River Expeditions v. Drugg,*, 221 S.W.3d 569, 575 (Tex. 2007); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991). Thus, the statute's requirements are satisfied only if the exercise of personal jurisdiction comports with federal due process requirements. *See Guardian Royal*, 815 S.W.2d at 226.

Federal due process requirements are satisfied if (1) the non-resident defendant has "minimum contacts" with Texas; and (2) the exercise of personal jurisdiction over the non-resident defendant does not offend "traditional notions of fair play and substantial justice." *See Helicopteros*, 466 U.S. at 412–13; *Moki Mac*, 221 S.W.3d at 575. Minimum contacts are sufficient when a non-resident defendant "purposefully avails itself of the privilege of conducting

activities within the forum state, thus invoking the benefits and protections of its laws." *Moki Mac*, 221 S.W.3d at 575 (internal quotation marks omitted).

To determine whether a non-resident defendant has sufficient minimum contacts with Texas to support the exercise of personal jurisdiction, a court must determine whether the non-resident defendant "purposefully availed" itself of the privilege of conducting business in Texas. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005). Three key principles govern analysis of purposeful availment: first, a court considers the defendant's own actions; it does not consider the unilateral activity of another party. *Id.* at 785. Second, a court considers whether the defendant's actions were purposeful rather than "random, isolated, or fortuitous." *Id.* Third, the defendant must seek "some benefit, advantage, or profit by availing itself" of the privilege of doing business in Texas. *Id.* A defendant may purposefully avoid being subject to personal jurisdiction in Texas by structuring transactions to neither profit from Texas's laws nor have enough contacts with Texas to satisfy the minimum contacts analysis. *Burger King*, 471 U.S. at 472; *Moki Mac*, 221 S.W.3d at 575. The defendant's contacts must be considered as a whole and not in isolation, focusing on the nature and quality of the contacts. *Guardian Royal*, 815 S.W.2d at 230 n. 11.

The minimum contacts analysis is further analyzed in terms of (1) specific jurisdiction; and (2) general jurisdiction. When specific jurisdiction is asserted, the court focuses on the relationship between the defendant, the forum, and the litigation. *Helicopteros*, 466 U.S. at 414; *Moki Mac*, 221 S.W.3d at 575–76. The cause of action must "arise from or relate to" the non-resident defendant's contacts with the forum. *Guardian Royal*, 815 S.W.2d at 228. Specific jurisdiction over a non-resident defendant is established if (1) the defendant's activities were purposefully directed to the

forum state; and (2) there is a substantial connection between the defendant's forum contacts and the operative facts of the litigation. *Moki Mac,* 221 S.W.3d at 585.

An assertion of general jurisdiction compels a more demanding minimum contacts analysis and requires a showing of substantial activities within the forum. *See Guardian Royal,* 815 S.W.2d at 228. The cause of action need not "arise from or relate to" the non-resident defendant's contacts with the forum. *See id.* In 2014, the Supreme Court changed the landscape of general jurisdiction law, by requiring that a corporation be "at home" in the forum and shifting away from the "substantial, continuous, and systematic" contacts test. *Daimler AG v. Bauman,* 571 U.S. 117, 138 (2014) (finding plaintiffs' request that the Court "approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business' [to be] unacceptably grasping"). Since then, it has been "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business." *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014); *Head v. Las Vegas Sands, LLC*, 298 F. Supp. 3d 963, 972, 976–77 (S.D. Tex. 2018) ("general business contacts with a forum—even substantial, continuous, and systematic business contacts—are not enough to establish general jurisdiction over a defendant").

asTech contends that AirPro is subject to this Court's personal jurisdiction "because AirPro conducts business in Texas (in fact AirPro's Senior Vice President of Sales Frank La Viola resides in Houston, Texas and conducts business there), has committed tortious acts in Texas, and has intentionally directed its conduct against asTech in Texas, where the primary effects of the conduct were felt." Plaintiff Original Complaint, at ¶ 11 (Dk. 1). As set forth herein, however, AirPro does not have "minimum contacts" with Texas such that an exercise of personal jurisdiction would not

offend traditional concepts of fair play and substantial justice. Specifically, AirPro should not be subject to either general or specific jurisdiction in Texas.

1. AirPro's Contacts with Texas Are Not Sufficient Such That AirPro Can Be Said to Be Essentially at Home in Texas; Thus AirPro is Not Subject to General Jurisdiction in Texas.

As stated in *Daimler*, a court may assert general jurisdiction over a non-resident defendant only when the defendant's "affiliations with the State are so 'continuous and systematic' as to render it essentially at home in the forum State." *Daimler*, 571 U.S. at 122 (quoting *Goodyear Dunlop Tires Operation, S.A. v. Brown*, 564 U.S 915, 919 (2011)); *see also NexLearn, LLC v. Allen Interactions, Inc.*, 859 F.3d 1371, 1375 (Fed. Cir. 2017). "[O]nly a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Daimler*, 571 U.S. at 137. "[F]or a corporation, it is an equivalent [domicile], one in which the corporation is fairly regarded as at home." *Id.* (quoting *Goodyear*, 564 U.S. at 922-23); *see also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017).

A corporation is domiciled in its state of incorporation and where it has its principal place of business. 28 U.S.C. § 1332 (West 2018). Plaintiff admits that "AirPro is a Florida limited liability company with its principal place of business in Jacksonville, Florida." (Dk. 1 at ¶ 7). The domicile of a limited liability company is determined by the citizenship of all of its members. *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008).

In *Transverse, LLC v. Info Directions, Inc.*, the Western District of Texas, Austin Division, held there was no personal jurisdiction over a New York corporation that had all of its offices in New York, but had registered to do business in Texas, transacted some sales to Texas, made business payments to Texas entities, and had one employee who worked in Texas. *Transverse, LLC v. Info Directions, Inc.*, No. A-13-CA-101-SS, 2013 WL 12133970, at *5 (W.D. Tex. Aug.

30, 2013). Similarly in *Marin v. Michelin N. Am., Inc.*, the Western District of Texas, San Antonio Division, held that it had no personal jurisdiction over the defendant corporation even though the defendant had employees, corporate officers, offices, bank accounts, and real property in Texas, as defendant was a New York corporation with its principal place of business in South Carolina. *Marin v. Michelin N. Am., Inc.*, No. SA-16-CA-497-FB-HJB, 2017 WL 5494087, at *4 (W.D. Tex. July 13, 2017), report and recommendation adopted, SA-16-CA-0497-FB, 2017 WL 5505323 (W.D. Tex. Sept. 26, 2017). Other jurisdictions have held that the mere presence of a single representative of a corporation who is limited to one type of activity does not ordinarily confer jurisdiction over the corporation as to matters unrelated to those activities. *See, e.g., Aanestad v. Beech Aircraft Corp.,* 521 F.2d 1298, 1301 (9th Cir. 1974) (two wholly-owned subsidiary corporations); *Bernardi Bros., Inc. v. Pride Manufacturing, Inc.,* 427 F.2d 297, 300 (3rd Cir. 1970) (exclusive manufacturer's representative); *Del Monte Corp. v. Everett Steamship Corp.,* 402 F. Supp. 237, 242 (N.D.Cal.1973) (corporate officer and telephone directory listing).

As stated above, all of AirPro's members are citizens of Florida. (Dk. 1 at ¶ 7); *see also* **Exhibit A** at ¶ 14. Like in *Transverse* and *Marin*, asTech attempts to claim this Court has general jurisdiction over AirPro due to the presence of one employee: Frank LaViola. This contention goes against the great weight of case law addressing this issue. While Mr. LaViola does in fact reside in Houston, Texas, his role is to oversee the sales team that is based in Florida. *Id.* at ¶¶ 8-9. He is the only employee of AirPro that resides in Texas. *Id.* at ¶¶ 8-9, 11. In fact, only two percent (2%) of AirPro's customers are located in Texas. *Id.* at ¶ 10. Further, Plaintiff attempts to confer Mr. LaViola's senior vice president title, and his residency in Houston, as a basis for its assertion that the Southern District of Texas is proper, both from a jurisdictional and venue perspective. Mr. LaViola's title should be of no consideration to this Court's determination because he is not a

member or manager of AirPro. *Id.* at ¶ 9. It cannot be said that AirPro is at home in Texas, or that its contacts with Texas are so systematic and continuous to trigger the exercise of general jurisdiction. The Supreme Court has made clear that it "is unacceptably grasping" to "approve the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business." *Daimler*, 571 U.S. at 137–138. Florida is where AirPro maintains its principal place of business, where the entity was created, and where all of its members are domiciled. *See* **Exhibit A** at ¶¶ 4, 12-14. Florida is where AirPro is fairly regarded at home. Therefore, general jurisdiction over AirPro does not exist in Texas.

2. AirPro Has Not Engaged in Any Conduct Related to This Suit That Creates a Substantial Connection with Texas, and Thus is Not Subject to Specific Jurisdiction in Texas.

Specific jurisdiction is "very different" from general jurisdiction. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1780 (2017). When specific jurisdiction is asserted, the court focuses on the relationship between the defendant, the forum, and the litigation. *Helicopteros*, 466 U.S. at 414; *Moki Mac*, 221 S.W.3d at 575–76. The cause of action must "arise from or relate to" the non-resident defendant's contacts with the forum. *Guardian Royal*, 815 S.W.2d at 228. Specific jurisdiction over a non-resident defendant is established if (1) the defendant's activities were purposefully directed to the forum state; and (2) there is a substantial connection between the defendant's forum contacts and the operative facts of the litigation. *Moki Mac*, 221 S.W.3d at 585.

a. AirPro Did Not Purposefully Direct Any Activities Toward Texas.

asTech alleges the following actions by AirPro that form the basis for this lawsuit: (1) "AirPro used the ASTECH trademark as part of a paid Google search result;" (2) "the AirPro website includes misleading statements suggesting that AirPro does have insider knowledge of the

current asTech Device;" and (3) Airpro distributed PDF copies of the false misrepresentations on the AirPro website [. . .] to untold dozens of AirPro and asTech customers, OEMs, and other industry participants, including media outlets." (Dk. 1 at ¶¶ 37, 39, and 44). These activities AirPro has allegedly engaged in did not in any way occur in Texas, nor were they directed toward Texas. *See* **Exhibit A** at ¶¶ 16-22.

When AirPro used the word "asTech" as part of a paid Google search result, that activity was not directed specifically toward Texas. *Id.* That activity occurred in Florida, and in no way was targeted specifically at Texas. *Id.* To make that a basis for asserting specific jurisdiction against AirPro would result in AirPro being subject to specific jurisdiction in every possible federal forum in the United States. Such a result would surely be deemed as unacceptably grasping, and would have wide spread consequences for any company that conducts business with Google to create a paid search result.

asTech alleges that when a consumer performed a search with Google for "asTech," a paid advertisement appeared in the results for AirPro. (Dk. 1 at ¶ 37). This would be best categorized as "passive advertisements," similar to any other advertisement circulated nationally that gives the reader the opportunity to visit a web address and order a product. *See LCW Auto. Corp. v. Restivo Enterprises*, No. SA-04-CA-0361-XR, 2004 WL 2203440, at *4 (W.D. Tex. Sept. 24, 2004); s*ee also Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1136–37 (5th Cir. 1987) (concluding that advertisements by themselves are generally insufficient to establish personal jurisdiction). Nothing about this paid Google search result was directed specifically toward Texas.

Like the Google search result, AirPro's website is not specifically directed toward Texas, and can be accessed from anywhere in the world with an internet connection. *See* **Exhibit A** at ¶ 20. The Fifth Circuit has established a standard for assessing personal jurisdiction in Internet

cases. In *Mink v. AAAA Development LLC*, the Fifth Circuit adopted the "sliding scale" test set forth in *Zippo*. *See Mink*, 190 F.3d 333, 336 (5th Cir. 1999) (citing *Zippo Mfg., Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997)). Texas district courts have interpreted *Mink's* adoption of *Zippo* to apply in both general jurisdiction and specific jurisdiction cases. *See Revell*, 317 F.3d 467; *Tivo Inc. v. Echostar Communications Corp.*, 2:04-CV-1-DF, 2005 WL 8160424, at *5 (E.D. Tex. Mar. 9, 2005); *Am. Eyewear, Inc. v. Peeper's Sunglasses & Accessories, Inc.*, 106 F. Supp. 2d 895, 901 n.10 (N.D. Tex. 2000). *Zippo* requires a court to look to the "nature and quality of commercial activity that an entity conducts over the Internet." *Zippo*, 952 F.Supp. at 1124. The level of activity conducted may be classified into three categories. On one outer limit is the first category, which consists of situations where a defendant does business over the Internet by entering into contracts with residents of other states by knowingly and repeatedly transmitting computer files over the Internet. *Id.* Jurisdiction is proper in those situations. However, that is not the kind of website AirPro operates. AirPro does not enter into contracts via its website, it does not sell its product online, nor does it knowingly or repeatedly transmit computer files over the internet to any specific forum state. *See* **Exhibit A** at ¶ 21.

The second category consists of situations where a defendant has a website that allows a user to exchange information with a host computer. *Zippo*, 952 F.Supp. at 1124. Jurisdiction is determined in these types of cases by looking at "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Id.* The more interactive and commercial the website is, the more likely it is that a court will find that the minimum contacts requirement is met. *See, e.g., Carrot Bunch Co., Inc. v. Computer Friends, Inc.*, 218 F.Supp.2d 820, 825 (N.D. Tex. 2002). This is not the kind of website AirPro operates. The only interactive feature is for existing customers, less than two percent (2%) of whom are based anywhere in Texas.

See **Exhibit A** at ¶¶ 10, Nowhere in asTech's Complaint does asTech make any allegations or claims based on these customers or the interactive portion of AirPro's website. *See, generally,* Plaintiff's Original Complaint (DK. 1).

On the other outer limit is the third category, which consists of situations where a defendant has merely posted information on an Internet website which is accessible to out of state users. *Zippo,* 952 F.Supp. at 1124. Jurisdiction is not proper in these situations. That is the sort of website AirPro maintains. For non-customers, it is merely a place where information is posted and is accessible. *See* **Exhibit A** at ¶¶ 20-21. The posts that asTech complains of are in no way interactive. *Id.* They are informative posts on a passive website, which are not directed toward Texas in anyway. Thus, these posts asTech complains of cannot be the basis to assert specific jurisdiction over AirPro.

All of the above statements also apply for the PDF documents that were posted on AirPro's website and distributed to customers and other industry participants. Again, these were passive posts. Importantly, of the PDFs that were sent out to various individuals or entities, none of those individuals or entities were in Texas or based in Texas. *See* **Exhibit A** at ¶22. In other words, none of the PDF documents of which asTech complains were sent to Texas by AirPro. *Id.*

b. Jurisdiction Should Not Be Imposed Simply Because Plaintiff Contends Its Injury Was Felt in Texas.

asTech contends that AirPro committed a tortious act in Texas and that the primary effects of its conduct were felt in Texas. (Dk. 1 at ¶ 11). In the first instance, AirPro did not commit a tortious act in Texas because none of the acts alleged by asTech were directed toward Texas. *See* **Exhibit A** at ¶ 16. To establish personal jurisdiction over a non-resident defendant, it is not enough to simply allege or even establish prima facie proof that a tort has occurred. *Wyatt v. Kaplan,* 686 F.2d 276, 280 (5th Cir. 1982). Because the plaintiff bears the burden of establishing jurisdiction,

it must also make a prima facie showing that the tort occurred *within the forum state*. *Id.* (emphasis added). asTech cannot meet that burden in this case because none of the alleged actions that give rise to this lawsuit occurred in Texas, nor were they directed toward Texas. In *Revell v. Lidov*, Revell sued Lidov and Columbia University for defamation arising out of Lidov's authorship of an article that he posted on an internet bulletin board hosted by Columbia. *Revell,* 317 F.3d at 468. The Fifth Circuit held that because the article written by Lidov about Revell contained no reference to Texas, it did not refer to the Texas activities of Revell, nor was it directed at Texas readers as distinguished from readers in other states, these were "insurmountable hurdles to the exercise of personal jurisdiction by Texas courts. *Id.* at 473. All these same factors are true for the various website posts and PDFs authored by AirPro. The posts and PDFs did not make any reference to Texas, they did not refer to the Texas activities of asTech, and they were not directed at Texas readers as distinguished from readers in other states. *See* **Exhibit A** at ¶ 22. Simply put, AirPro did not direct any activities toward Texas. *Id.*

Secondly, Texas does not comport personal jurisdiction upon a non-resident defendant simply because the allegedly tortious conduct caused an injury in Texas. In fact, a finding of such jurisdiction is "rare." *Stroman Realty, Inc. v. Wercinski,* 513 F.3d 476, 486 (5th Cir. 2008). To find personal jurisdiction over a non-resident defendant for tortious conduct, a court must find that not only did the alleged tort-feasor know the brunt of the injury would be felt in the forum state, but that the defendant expressly targeted its allegedly tortious activities at the forum state. *See Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988). As stated above, AirPro did not directly target any advertising, its website, or any mail activities toward Texas. *See* **Exhibit A** at ¶¶ 16, 20-22. Thus, AsTech cannot establish that any conduct by AirPro creates "a substantial

connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014); *see also Southmark Corp.*, 851 F.2d at 772. Therefore, AirPro should not be subject to this Court's specific jurisdiction.

c. The Assertion of Personal Jurisdiction over AirPro Is Both Unreasonable and Unfair.

The strictures of the Due Process Clause forbid a state court from exercising personal jurisdiction over a defendant under circumstances that would offend traditional notions of fair play and substantial justice. *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987) (internal quotation marks omitted) (citing *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945)). In analyzing whether personal jurisdiction exists, "a court must consider a variety of interests," such as the interests of the forum state, the interest of the plaintiff in proceeding in its choice of forum, and the burden on the defendant. *E.g., Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1780 (2017); *see also Burger King Corp.*, 471 U.S. at 477 (stating courts may consider "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies" (internal quotation marks omitted)).

The "primary concern" is the burden on the defendant. *Bristol-Myers Squibb Co*, 137 S. Ct. at 1780. The court must consider the practical problems resulting from litigation in its forum but also "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Id.* This is because the requirement of personal jurisdiction is "more than a guarantee of immunity from inconvenient or distant litigation," it is "a consequence of territorial limitations on the power of the respective States." *Id.* For this reason,

the "federalism interest may be decisive." *Id.* at 1780-81 ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)).

Here, the burden on AirPro is great and the imposition of jurisdiction over it and its property would be extraordinary. AirPro has virtually no presence in Texas, outside of one employee who is not a major decision maker, not a manager or member of the company, and would not play any role in this lawsuit. *See* **Exhibit A** at ¶ 23. All of the fact witnesses for AirPro reside in Florida. *Id.* Nearly all of AirPro's employees are in Florida. *Id.* at ¶ 15. The entirety of AirPro's evidence to be used in this matter is located in Jacksonville, Florida. *Id.* at ¶ 23. Thus, should the Court exercise jurisdiction over it, AirPro will be required to travel a great distance to a state in which it has no contacts. *Id.*

In fact, asTech has no significant presence in Houston either. It is a Delaware company with its principal place of business in Plano, Texas, which is in the Northern District of Texas. It is believed that the evidence to be relied on by asTech will be located either in Plano, Texas, or in its "East Coast Office" in Jacksonville, Florida. asTech will have to travel regardless of whether the case stays in Houston or is properly transferred to Florida. It serves the best interest of justice to transfer this case to Florida.

It is more convenient for the Middle District of Florida, Jacksonville Division, to preside over this case than the Southern District of Texas, Houston Division, because the parties have no ties to the Southern District of Texas, and Plaintiff already has a strong presence in the Middle

District of Florida due to it being the location of asTech's previous headquarters, and because Plaintiff still maintains what it calls an "East Coast Office" there. Plaintiff could obtain convenient and effective relief in the Middle District of Florida and lessen the burden on both parties.

B. Rule 12(b)(3) – Legal Standard

If a suit is filed in an improper district, a court may dismiss the suit upon timely objection, or, in the interest of justice, it may transfer the suit to a district where the suit could have been brought. Fed. R. Civ. P. 12(b)(3); 28 U.S.C. § 1406(a), (b). Here, venue is improper in the Southern District, Houston Division. Therefore, the Court should dismiss this suit, or in the alternative, transfer the suit to the Middle District of Florida, Jacksonville Division.

Plaintiff's choice of venue is improper because AirPro does not reside in the Southern District of Texas, all of the events giving rise to Plaintiff's alleged claims occurred outside the Southern District of Texas, and in the interest of justice, and in the alternative to outright dismissal, a more convenient forum and venue exists for this dispute – namely, the Middle District of Florida, Jacksonville Division.

Plaintiff alleged that venue is proper in the Southern District, Houston Division pursuant to 28 U.S.C. § 1391(b)(1), (c), and (d). (DK. 1 at ¶ 12). Under 28 U.S.C. § 1391(b)(1), venue is based on the defendant's residence. Under section (c), only subsection (2) would apply because AirPro is not a natural person, and is a resident of Florida. For section (d), it appears Plaintiff is intimating that sufficient contacts exist in the Southern District, Houston Division, to warrant its selection of venue. Regardless of Plaintiff's specific venue code selection, none should survive AirPro's Motion to Dismiss.

1. Defendant AirPro Does Not Reside in This District.

Under 28 U.S.C. § 1391(b)(1), venue is proper in a district in which any defendant resides. As stated above, a corporation is domiciled in its state of incorporation and where it has its principal place of business. 28 U.S.C. § 1332 (West 2018). Plaintiff admits that AirPro is a Florida company with its principal place of business in Jacksonville, Florida. (Dk. 1 at ¶ 7). For purposes of a limited liability company, the domicile is determined by the citizenship of all of its members. *Harvey*, 542 F.3d at 1080. Here, all of AirPro's members are Florida citizens. *See* **Exhibit A** at ¶ 14. AirPro "resides" in Florida and not the Southern District of Texas. Therefore, Plaintiff's venue selection based on section 1391(b)(1) is without merit.

2. This District Does Not Have a Substantial Connection to Plaintiff's Claims.

Plaintiff's remaining allegations regarding venue rest on the Southern District, Houston Division being the location where a substantial part of the claim occurred, and where AirPro has sufficient contacts to subject it to the Court's personal jurisdiction. Simply put, this district does not have any connection to Plaintiff's claim.

In section III(A) above, AirPro has articulated why it should not be subjected to general or specific jurisdiction in Texas. AirPro's residency for purposes of jurisdiction is in Florida and therefore cannot be subjected to general jurisdiction in Texas. *See Daimler*, 571 U.S. at 122*; see also Harvey*, 542 F.3d at 1080. Further, as stated above in section III(A)(2), the alleged acts for which Plaintiff complains were not directed at Texas, nor where they were committed in Texas. Accordingly, Plaintiff's attempt at "effects-based' jurisdiction should be denied by the Court because asTech cannot establish sufficient conduct by AirPro to create a substantial connection to the forum state. *See Walden*, 571 U.S. at 284; *Wyatt*, 686 F.2d at 280; *Southmark Corp.*, 851 F.2d at 772; *Mink*, 190 F.3d at 336; *Zippo*, 952 F.Supp. at 1119. Allowing otherwise would offend the

traditional notions of fair play and substantial justice, and violate AirPro's Due Process rights under the Fourteenth Amendment. *Asahi Metal Indus.*, 480 U.S. at 113.

3. In the Alternative, This Case Should Be Transferred in the Interest of Justice to the Middle District of Florida, Jacksonville Division.

If this Court chooses not to dismiss this lawsuit, in the alternative, AirPro requests that the Court transfer the case to the Middle District of Florida, Jacksonville Division. The Court may transfer the case if (1) the defendant is subject to the jurisdiction of the proposed forum, (2) venue is proper in the proposed forum, and (3) the transfer is in the interest of justice. *See* 28 U.S.C. § 1406(a); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962).

Defendant AirPro is subject to the jurisdiction of the Middle District of Florida, Jacksonville Division because its principal place of business is in Jacksonville, Florida, and all of its members are citizens of Florida. *See* **Exhibit A** at ¶¶ 12-14. Venue is also proper in the Middle District of Florida, Jacksonville Division under 28 U.S.C. § 1391(b). First, Defendant AirPro is a resident of the state of Florida. *Id.* Second, all of the alleged acts for which Plaintiff complains, if true, would have occurred in Jacksonville, Florida. *Id.* at ¶ 16. For instance, all of the content on AirPro's website was created by AirPro employees based in Jacksonville, Florida. *Id.* at ¶ 19. AirPro makes all advertising decisions in Jacksonville, Florida. *Id.* Any information contained in mailers sent to certain contacts was created and drafted in Jacksonville, Florida. *Id.* at ¶¶ 16, 22. Therefore, taken as true, Plaintiff's allegations can properly be asserted in the Middle District of Florida, Jacksonville Division.

Finally, transfer to the Middle District of Florida, Jacksonville Division, is in the interests of justice. *See Goldlawr*, 369 U.S. at 467. As stated in section III(A)(2)(c) above, the interest of justice strongly favors transferring this case to the proper venue. Neither party is located in this district, and the only connection Defendant is alleged to have with this specific district is that one

of its employees (who is not a manager or a member) lives in Houston. Further, asTech has little connection to this District. As stated above, its headquarters is in the Northern District of Texas, in Plano. In contrast, both parties have substantial operations in the Middle District of Florida, Jacksonville Division. *See* **Exhibit A** at ¶¶ 12-16, 19, 22. Plaintiff contends that AirPro committed several acts that caused harm to its reputation and its business; those acts, if they occurred at all, occurred in the Middle District of Florida, Jacksonville Division because that is where AirPro operates. *Id.* at ¶¶ 12-22. Further, AirPro's witnesses and documentary evidence is located in Jacksonville. *Id.* at ¶ 23. For the reasons stated above, this District is improper and the Court should dismiss Plaintiff's suit, or in the alternative, transfer it to the Middle District of Florida, Jacksonville Division.

C. 28 U.S.C. § 1404(a) – Legal Standard

Finally, in the alternative to dismissing this suit, or transferring pursuant to Federal Rule of Civil Procedure 12(b)(3) or 28 U.S.C. § 1406, AirPro respectfully requests that this Court transfer the case to the Middle District of Florida, Jacksonville, Division, for the convenience of AirPro and AirPro's witnesses, and in the interests of justice. *See* 28 U.S.C. § 1404(a). When ruling on a motion to transfer under § 1404(a), the court is not limited to any set factors, but must employ a case-by-case consideration of convenience and fairness. *See Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). And while there is no requirement that a court be bound to certain factors, many courts consider a version of the "private-interest" and "public-interest" factors set out in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). *See Houston Trial Reports, Inc. v. LRP Publications, Inc.*, 85 F.Supp.2d 663, 668-72 (S.D. Tex. 1999). Further, there is no forum-selection clause between the parties, so no analysis on such a clause is warranted.

1. Private Interest Factors Favor Transfer

First, the current district has no meaningful ties to this controversy. *See Reed v. Fina Oil & Chem. Co.*, 995 F.Supp. 705, 714 (E.D. Tex. 1998). When there is no meaningful tie to the plaintiff's original choice of district, any deference usually accorded plaintiffs for their choice of venue disappears. *Id.* As stated above, neither party resides in the Southern District. Plaintiff's principal place of business is Plano, Texas, in the Northern District, while Defendant resides in Florida. Plaintiff, as a resident of the Northern District of Texas, has no particular connection to this district. AirPro has demonstrated that Plaintiff's venue allegations are insufficient and do not provide a proper basis for this case to be heard in this district.

Also, the current district is inconvenient for Defendant and its key witnesses, and Plaintiff will not be inconvenienced by the transfer to the Middle District of Florida, Jacksonville Division. Perhaps the factor most important to a court's determination of whether to transfer venue to another district is the availability and convenience of witnesses and parties. *Houston Trial Reports*, 85 F.Supp.2d at 668 (citing *LeBouef v. Gulf Operators, Inc.*, 20 F. Supp. 2d 1057, 1060 (S.D. Tex. 1998)). All of Defendant's witnesses known at this time are citizens of Florida, including all key witnesses, evidence, and documents. *See* **Exhibit A** at ¶ 23. Mr. Margol and Mr. Olsen are two individuals named by Plaintiff as having previously worked for asTech and who now manage and work (respectively) for AirPro. These two individuals are key witnesses for Defendant's case and it would undoubtedly be more convenient for them if the case was tried in the Middle District of Florida, Jacksonville Division. *Id.* Further, Plaintiff would suffer less inconvenience by the transfer than a typical plaintiff because Plaintiff has its East Coast Office located in Jacksonville, Florida.

Next, while a court's goal in transferring the case is to serve the efficient administration of justice, it tries to avoid simply shifting the inconvenience of a chosen venue from one party to

another. *Houston Trial Reports*, 85 F.Supp.2d at 670 (citing *Boyd v. Snyder*, 44 F. Supp. 2d 966, 969 (N.D. Ill. 1999) (internal quotation marks omitted). However, when both parties are subject to the personal jurisdiction of the court in the potential venue for which the movant requests, the costs are diminished and the factor favors transfer. *Id.* Here, both parties are subject to the jurisdiction of the Middle District of Florida and venue would be proper in the Jacksonville Division because, as explained above, Defendant's principal place of business is located there, and Plaintiff's East Coast Office is located there. *See* **Exhibit A** at ¶¶ 12-13. Therefore, based on the private-interest factors, the Court should transfer the case to the Middle District of Florida, Jacksonville Division.

2. Public Interest Factors Favor Transfer

The public interest factors courts consider include: (1) the courts' congestion; (2) local interest in the dispute; and (3) the familiarity of the forum with the law that will govern the case; and (4) any conflict of laws between the forums. *See Watson v. Fieldwood Energy Offshore, LLC*, 181 F. Supp. 3d 402, 408 (S.D. Tex. 2016). The point of the focus on the courts' congestion is to determine whether transfer will result in a speedier trial because of a less crowded docket. *Id.* at 412 (citing *Rosemond v. United Airlines, Inc.*, No.-H-13-2190, 2014 WL 1338690 at *4 (S.D. Tex. Apr. 2, 2014)). Courts typically consider the median time interval from case filing to disposition. *Id.*, (citing *ExpressJet Airlines, Inc. v. RBC Capital Markets, Corp.*, No. H-09-992, 2009 WL 2244468, at *12 (S.D. Tex. Jul. 27, 2009). In 2018, the Southern District had 15,628 filings, up over fourteen percent (14%) from 2017, with each judgeship having a total of 715 pending cases. *See* https://www.uscourts.gov/sites/default/files/fcms_na_distcomparison1231.2018.pdf (last accessed May 13, 2019). The median time from filing to disposition for civil trials was 7.6 months. *Id.* In contrast, the Middle District of Florida had 10,777 filings in 2018, up only a little over two percent (2.0%) from 2017, with each judgeship having a total of 544 pending cases. *Id.* Further,

the median time from filing to disposition for civil trials was 6.0 months. *Id.* Therefore, this public interest factor favors transfer to the Middle District of Florida.

Second, little interest exists in this district regarding a dispute between two entities that do not reside in the district, and a dispute with alleged actions that did not occur in this district. Any wrongdoing on AirPro's part (which AirPro denies) occurred in the Middle District of Florida, while Plaintiff resides in the Northern District of Texas. *See* **Exhibit A** at ¶¶ 16-22. Therefore, due to the Southern District's lack of meaningful connection to this dispute, this factor should favor transfer to the Middle District of Florida. *See generally Financial Cas. and Sur., Inc. v. Zouvelos*, Civil Action No. H-11-2509, 2012 WL 2886861 at *8 (S.D. Tex. Jul. 13, 2012).

The Middle District of Florida has familiarity not only with these types of disputes, but also with these same parties. As stated above, the Middle District of Florida has presided over claims made by Plaintiff for similar actions that were settled in 2017. *See* **Exhibit A** at ¶ 6. Further, none of Plaintiff's causes of action are unique to the Southern District of Texas. The Middle District of Florida recognizes similar, if not identical, causes of action alleged by Plaintiff. Therefore, the Middle District of Florida should be the district in which this lawsuit is brought. Finally, there is no conflict of law to consider between the forums, so that factor is moot. On the whole, the consideration of the public interest factors favors transfer to the Middle District of Florida, and AirPro respectfully requests the same.

IV. CONCLUSION

For the foregoing reasons, Defendant AirPro Diagnostics, LLC respectfully requests that this Honorable Court dismiss this case: (1) for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2); (2) for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) and/or 28 U.S.C. § 1406(a) and (b); and in the alternative, if the Court declines

to dismiss this case, Defendant respectfully requests that the Court transfer the case to the Middle District of Florida, Jacksonville Division for the convenience of Defendant and its witnesses, and in the interest of justice. Defendant AirPro further requests any and all relief, at law or in equity, to which it may show itself justly entitled.

Dated: May 15, 2019

Respectfully submitted,

/s/ Brett M. Chisum

Brett M. Chisum
Attorney-in-Charge
State Bar No. 24082816
Southern District of Texas Bar No. 2099500
bchisum@mccathernlaw.com
Doni Mazaheri
State Bar No. 24110864
Southern District of Texas Bar No. 3380638
dmazaheri@mccathernlaw.com
McCathern, PLLC
Regency Plaza
3710 Rawlins, Suite 1600
Dallas, Texas 75219
214-741-2662 Telephone
214-741-4717 Facsimile
Attorneys for Defendant AirPro Diagnostics, LLC

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1(D), counsel for the Defendant conferred counsel for Plaintiff and provided Defendant's basis for filing its Motion to Transfer Venue under 28 U.S.C. §1404(a) and § 1406(a), (b). Despite this conference, counsel could not agree about the disposition of the motion.

/s/ Brett M. Chisum
Brett M. Chisum

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of the Southern District of Texas, a copy of the foregoing has been served on all counsel of record through the Court's electronic filing system on May 15, 2019.

/s/ Brett M. Chisum
Brett M. Chisum

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Repairify, Inc., d/b/a asTech,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:19-CV-1370**
	§	
AirPro Diagnostics LLC,	§	
	§	
Defendant.	§	

APPENDIX OF EXHIBITS TO DEFENDANT AIRPRO DIAGNOSTICS, LLC'S MOTION TO DISMISS, AND IN THE ALTERNATIVE, MOTION TO TRANSFER VENUE

Defendant AirPro Diagnostics, LLC attaches this Appendix of Exhibits to its Motion to Dismiss Plaintiff Repairify, Inc., d/b/a asTech's suit pursuant to Judge Procedure 6B.

IDENTIFIER	EXHIBIT DESCRIPTION	RECORD PAGES
A	Affidavit of Lonnie E. Margol	Appendix 001 – Appendix 005
B	*ExpressJet Airlines, Inc. v. RBC Capital Markets Corp.*	Appendix 006 – Appendix 017
C	*Financial Cas. and Sur., Inc. v. Zouvelos*	Appendix 018 – Appendix 025
D	*LCW Auto. Corp. v. Restivo Enterprises*	Appendix 026 – Appendix 032
E	*Marin v. Michelin N. Am., Inc.*	Appendix 033 – Appendix 037
F	*Rosemond v. United Airlines, Inc.*	Appendix 038 – Appendix 042
G	*Tivo Inc. v. Echostar Communications Corp.*	Appendix 043 – Appendix 053
H	*Transverse, LLC v. Info Directions, Inc.*	Appendix 054 – Appendix 058

Respectfully submitted,

/s/ Brett M. Chisum
Brett M. Chisum
Attorney-in-Charge
State Bar No. 24082816
Southern District of Texas Bar No. 2099500
bchisum@mccathernlaw.com
Doni Mazaheri
State Bar No. 24110864

Southern District of Texas Bar No. 3380638
dmazaheri@mccathernlaw.com
McCathern, PLLC
Regency Plaza
3710 Rawlins, Suite 1600
Dallas, Texas 75219
214-741-2662 Telephone
214-741-4717 Facsimile
Attorneys for Defendant AirPro Diagnostics, LLC

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of the Southern District of Texas, a copy of the foregoing has been served on all counsel of record through the Court's electronic filing system on May 15, 2019.

/s/ Brett M. Chisum
Brett M. Chisum

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Repairify, Inc., d/b/a asTech,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:19-CV-1370**
	§	
AirPro Diagnostics LLC,	§	
	§	
Defendant.	§	

AFFIDAVIT OF LONNIE E. MARGOL

Before me the undersigned authority personally appeared, Lonnie Margol, who, after being duly sworn, deposes and states as follows:

1. I am over 18 years of age and am fully competent to make this Affidavit. I have never been convicted of a felony or a crime of moral turpitude.

2. I make the following statements based on personal knowledge of the facts stated herein.

3. I am the CEO of AirPro Diagnostics, LLC ("AirPro Diagnostics").

4. AirPro Diagnostics is a Florida limited liability company, that markets an Original Equipment Manufacturer ("OEM") compliant remote diagnostic scan-tool called the AirPro.

5. While Reparify, Inc., d/b/a asTech ("asTech") markets a competing device called the asTech, the asTech device is inferior to the AirPro. Since asTech, cannot beat the AirPro in the marketplace, asTech, has once again taken this matter to the courts.

6. asTech, filed a similar lawsuit against AirPro Diagnostics in 2016. However, that lawsuit was filed in the Middle District of Florida, Jacksonville Division. Now, asTech seeks to re-litigate that lawsuit but has chosen to file suit in Houston, Texas.

7. AirPro Diagnostics has few contacts with the State of Texas, let alone Houston, Texas. In fact, none of the acts alleged in asTech's complaint occurred in the State of Texas, and none of the small number of contacts that AirPro Diagnostics does have in Texas have any relation to this suit or to asTech's claims.

8. AirPro Diagnostics' only connection to Houston, Texas, is that AirPro Diagnostics' Senior Vice President of Sales, Frank LaViola, resides in Houston, Texas.

9. Mr. LaViola is not a manager or member of AirPro Diagnostics. He manages AirPro Diagnostics' sales staff, all of whom are located in Jacksonville, Florida. Mr. LaViola frequently travels to Jacksonville, Florida to train staff in person and also conducts meetings remotely. Mr. LaViola has no involvement in any content or advertisements placed on the AirPro Diagnostics' website. Further, Mr. LaViola has no involvement in any advertising, press releases, or other documents or information distributed to clients, media contacts, or industry representatives.

10. Additionally, AirPro Diagnostics' clients are located throughout the United States and Canada. Out of all of AirPro Diagnostics' clients, only roughly two percent (2%) of its clients are located in the State of Texas.

11. With the exception of Mr. LaViola's residency in Texas and roughly two percent (2%) of AirPro Diagnostics' clients being located in the State of Texas, AirPro Diagnostics does not have any other contacts with the State of Texas.

12. AirPro Diagnostics was formed in 2016 and has at all times maintained is principal place of business in Jacksonville, Duval County, Florida.

13. AirPro Diagnostics' physical office is currently located at 11737 Central Parkway, Jacksonville FL 32224.

14. AirPro Diagnostics has many members, all of whom are residents of the State of

Florida.

15. The majority of AirPro Diagnostics' staff is located in Jacksonville, Florida.

16. I have reviewed the Complaint filed by asTech, and none of the acts alleged by asTech occurred in the State of Texas and none of the alleged acts were directed towards the State of Texas.

17. Many of the allegations in asTech's complaint are concerned with the information contained in the "Truth Campaign" located on AirPro Diagnostics' website.

18. The Truth Campaign was started to debunk the false and defamatory allegations being made by asTech about the AirPro.

19. AirPro Diagnostics' website is located at https://airprodiagnostics.com and is maintained and updated from Jacksonville, Florida. All statements made on the website were made in Jacksonville, Florida.

20. AirPro Diagnostics' website can be accessed from anywhere in the world with an internet connection and is not directed towards the State of Texas.

21. AirPro Diagnostics' website provides information readily available and accessible to viewers. AirPro Diagnostics does not enter into contracts via its website; it does not sell products online; and its website does not knowingly and repeatedly transmit files over the internet to a specific state.

22. asTech's complaint also complains about a "packet" that was distributed. While truthful information was distributed, none of the individuals or entities that received the information were located in the State of Texas or based in the State of Texas. Additionally, the information was compiled and sent from Jacksonville, Florida.

23. Defending a lawsuit in Houston, Texas would be extremely difficult for AirPro Diagnostics because AirPro Diagnostics' witnesses are located in Jacksonville, Florida; the

documents and evidence that AirPro will use to defend against asTech's baseless allegations are located in Jacksonville; and it will be extremely costly and burdensome for AirPro Diagnostics to travel to the State of Texas to defend a lawsuit. For instance, Chuck Olsen, who is listed in the complaint, is a key witness for AirPro Diagnostics that will rebut several of the allegations regarding AirPro Diagnostics' understanding of how the asTech device operates. Mr. Olsen is a vital employee that oversees the day-to-day operations of our diagnostic technicians and having him away from the Jacksonville, Florida area to defend a suit in Houston, Texas, would create a tremendous burden on AirPro Diagnostics' ability to continue to operate during the pendency of this litigation.

[*Remainder of Page Left Intentionally Blank*]

FURTHER AFFIANT SAYETH NOT

Lonnie E. Margol

STATE OF FLORIDA
COUNTY OF DUVAL

Sworn to and subscribed before me this 15 day of May, 2019. Such person did take an oath and: *(Notary must check applicable box).*

- ☐ is/are personally known to me.
- ☑ produced a current Florida driver's license as identification.
- ☐ produced _____ as identification.

{Notary Seal must be affixed}

JOSHUA NESS
Notary Public – State of Florida
Commission # GG 094406
My Comm. Expires Apr 16, 2021

SIGNATURE OF NOTARY

Joshua Ness

Name of Notary *(Typed, Printed or Stamped)*

EXHIBIT B

KeyCite Yellow Flag - Negative Treatment
Distinguished by BCS Fluids, L.L.C. v. Alpine Exploration Companies, Inc., E.D.La., March 18, 2019

2009 WL 2244468
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas,
Houston Division.

EXPRESSJET AIRLINES, INC., Plaintiff,
v.
RBC CAPITAL MARKETS CORPORATION f/k/a RBC Dain Rauscher, Inc., et al., Defendants.

Civil Action No. H–09–992.
|
July 27, 2009.

West KeySummary

1 **Federal Courts**
Securities regulation and internal corporate affairs

A corporation's action against defendant brokers of auction rate securities (ARS) alleging securities fraud, was transferred to the Southern District of New York. The corporation alleged defendants engaged in a scheme which manipulated and ultimately caused the ARS market to collapse, and initially filed suit in the state of Texas. Because several similar suits were pending in the Southern District of New York involving common questions of law and fact, a transfer of venue was ordered in the interest of efficiency and as a tool to avoid duplicative discovery and conserve the resources of the parties, their counsel and the judiciary. 28 U.S.C.A. § 1404(a).

7 Cases that cite this headnote

Attorneys and Law Firms

Don Jackson, Melissa M. Davis, Ware Jackson Lee & Chambers, John Hooshik Kim, The Kim Law Firm, Scott A. Hooper, Attorney at Law, Houston, TX, for Plaintiff.

Janiece M. Longoria, Thomas Melvin Gregor, Ogden Gibson Broocks and Longoria LLP, Houston, TX, Joshua R. Pater, Sean M. Murphy, Milbank Tweed Hadley & McCloy LLP, New York, NY, for Defendants.

ORDER

GRAY H. MILLER, District Judge.

***1** Pending before the court is defendants RBC Capital Markets Corporation ("RBCCM"), Royal Bank of Canada ("RBC"), and John Piemonte's ("Piemonte") (collectively, "defendants") motion to transfer venue to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1404(a). Dkt. 19. After considering the motion, the plaintiff's response, the record, and the applicable law, the court GRANTS defendants' motion to transfer.

I. BACKGROUND

This action arises from the sale of a large volume of auction rate securities ("ARS") to plaintiff ExpressJet Airlines, Inc. ("ExpressJet") by defendants in the weeks immediately preceding the failure of the ARS market. ARS are long-term debt investments that are traded at periodic, usually monthly, Dutch auctions. The securities are frequently marketed as an alternative short-term investment. Dkt. 17.

In January 2008, RBCCM, through broker Piemonte, contacted ExpressJet's cash manager, Eva Holtwick ("Holtwick"), to solicit purchases of ARS from RBCCM. Holtwick informed Piemonte that she was not familiar with such securities and asked Piemonte to provide her and ExpressJet's Director of Corporate Finance, Brian Feldott ("Feldott"), with an overview of: how the securities were traded, the holder's ability to sell the securities before maturity, and any other risks associated with the securities. ExpressJet informed Piemonte that it was looking for a "safe and

liquid alternative" to commercial paper, and that any prospective investment must comply with the short-term investment liquidity requirements outlined in ExpressJet's corporate investment policy. Piemonte purportedly assured Holtwick and Feldott that the ARS sold by RBCCM were like cash, and served as a safe, liquid, short-term investment. When specifically questioned about the risk of auction failure, Piemonte allegedly told Holtwick and Feldott that the market had never failed and that there was no risk of exposure. ExpressJet contends that Piemonte promised that ExpressJet would not encounter any issues if it attempted to liquidate its securities at the end of each quarter, a requirement of ExpressJet's corporate investment policy. And, as a fail-safe, should ExpressJet encounter any delay in selling the securities prior to the end of the quarter, RBCCM would buy back the ARS at par value, plus any accrued interest. Piemonte also provided marketing materials created by RBC and/or RBCCM relating to ARS, which specifically touted the liquidity of ARS. *Id.*

Based on Piemonte's representations, and those contained in the marketing materials, ExpressJet purchased approximately $62.8 million worth of ARS from RBCCM between January 11, 2008, and February 7, 2008. At the time of these purchases, ExpressJet maintains that the market was artificially supported by defendants and other underwriters and broker—dealers who acted as principals for their own accounts, trading on information not known to the general public or the market in order to prevent auction failures. When defendants and other key players stopped supporting the market in mid-February 2008, it collapsed, leaving ARS investors, including ExpressJet, with wholly illiquid, long-term debt instruments. At the time of the collapse, ExpressJet held approximately $28 million of ARS. Contrary to the alleged representations of Piemonte, and despite repeated requests from ExpressJet, RBCCM refused to buy back the ARS from ExpressJet. *Id.*

***2** ExpressJet contends that, at the time it purchased the ARS, defendants failed to disclose that defendants and other underwriters and broker—dealers manipulated the ARS market to prevent auction failures. Further, ExpressJet alleges that Piemonte had knowledge of RBCCM's involvement in the manipulation of the ARS market and RBCCM's financial position in the market when he made the aforementioned representations and aggressively marketed these securities to ExpressJet. *Id.*

After the collapse of the ARS market, the Securities Exchange Commission ("SEC"), along with various state Attorneys General and other regulatory agencies, began investigating the practices of RBCCM and other ARS underwriters and broker—dealers. Ultimately, RBCCM entered into a settlement agreement with the SEC and the Attorney General of New York, in which RBCCM agreed to buy back its ARS from all entities with $10 million or less on deposit. Additionally, RBCCM was required to use "its best efforts to provide liquidity by the end of 2009" to its ARS investors who did not qualify for the settlement buy-back. *Id.*

Having obtained no recourse or remedy via the settlement agreement, ExpressJet filed suit against defendants in the 280th Judicial District of Harris County, Texas, alleging: violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Securities Exchange Act") and Rule 10b–5, promulgated thereunder; common law fraud; statutory fraud, pursuant to Texas Business & Commerce Code § 27.01; breach of contract; breach of fiduciary duty; negligent misrepresentation; negligence; professional negligence; negligent hiring, training, and supervision; unjust enrichment; and disgorgement. *Id.; see also* Dkt. 1. Defendants removed the case[1] and subsequently moved for transfer of venue to the Southern District of New York, in accordance with 28 U.S.C. § 1404(a). Dkts. 1, 19.

II. ANALYSIS

Section 1404(a) of Title 28 of the United States Code, the venue transfer statute, provides that "for the convenience of the 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 court's inquiry into the propriety of transfer is two-prong. First, the court must determine if the transferee court, as specified by the movant, is one in which the case originally could have been brought. Second, the court must determine whether the convenience of the parties and witnesses and the interest of justice require that the case be transferred. *In re Horseshoe Entm't,* 337 F.3d 429, 433 (5th Cir.2003).

This court performs each portion of the inquiry in turn. In order to transfer the case *sub judice* to the Southern

District of New York, the court must first be satisfied that personal jurisdiction can be properly exercised over each defendant and that venue is proper in the Southern District of New York. If the court concludes that the exercise of personal jurisdiction and venue are proper, the court proceeds by analyzing various public and private factors to determine whether transfer is convenient for the parties and witnesses and in the interest of justice.

A. Is the Southern District of New York a District Where the Action Might Have Been Brought?

1. Jurisdiction & Venue

a. Standard for Jurisdiction

***3** A federal court sitting in diversity may exercise personal jurisdiction to the extent permitted by the laws of the state in which the federal court sits. *Fielding v. Hubert Burda Media, Inc.,* 415 F.3d 419, 424 (5th Cir.2005) (citing *Allred v. Moore & Peterson,* 117 F.3d 278, 281 (5th Cir.1997)). The Texas long-arm statute allows jurisdiction to be exercised to the extent allowable under the Due Process Clause of the Fourteenth Amendment. *Id.* at 424–25 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 413–14, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). The due process analysis entails a two-part inquiry. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475–76, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291–92, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The first prong of the due process test requires sufficient minimum contacts with the forum, "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co.,* 326 U.S. at 316 (quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). Minimum contacts are established through the assertion of either general or specific jurisdiction. *Panda Brandywine Corp. v. Potomac Elec. Power Co.,* 253 F.3d 865, 865 (5th Cir.2001). Specific jurisdiction exists when a suit "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros,* 466 U.S. at 414 n. 8. Even a single contact can support specific jurisdiction if the defendant "purposefully avails itself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp.,* 471 U.S. at 475. "[I]f a plaintiff's claims relate to different forum contacts of the defendant, specific jurisdiction must be established for each claim." *Seiferth v. Helicopteros Atuneros, Inc.,* 472 F.3d 266, 275 (5th Cir.2006). In contrast, general jurisdiction refers to a suit which does not arise from a nonresident defendant's contacts with the forum, and is asserted only over a defendant who maintains "continuous and systematic" contacts in a particular forum. *Id.* at 415.

However, when a federal court exercises personal jurisdiction over a defendant in a suit arising under a federal statute that specifically provides for nationwide service of process, the relevant inquiry is whether the defendant has minimum contacts with the United States, rather than the forum state. [2] *Busch v. Buchman & O'Brien, Law Firm,* 11 F.3d 1255, 1258 (5th Cir.1994) (citing *Sec. Investor Protection Corp. v. Vigman,* 764 F.2d 1309, 1315–16 (9th Cir.1985), *rev'd on other grounds sub nom.,* 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) and *Texas Trading & Milling Corp. v. Fed. Republic of Nig.,* 647 F.2d 300, 314–15 (2d Cir.1981), *cert. denied,* 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982)). Section 27 of the Securities Exchange Act provides that:

> ***4** Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

15 U.S.C. § 78aa. Section 27 provides for nationwide service and also "extend[s] personal jurisdiction to the full reach permitted by the due process clause." *Leasco Data Processing Equipment Corp. v. Maxwell,* 468 F.2d 1326, 1339 (2d Cir.1972). "Thus, in analyzing whether personal jurisdiction is proper under [Section 27], we analyze whether the defendants had sufficient minimum contacts with the United States." *Luallen v. Higgs,* 277 Fed. Appx. 402, 404 (5th Cir.2008); *see also Busch,* 11 F.3d at 1258; *Sec. Investor Protection Corp.,* 764 F.2d at 1315 (citing *Mariash v. Morrill,* 496 F.2d 1138 (2d Cir.1974)).

If a defendant possesses the requisite minimum contacts with the forum state, or the United States, depending upon the claims and statutes at issue, the court then determines whether the exercise of personal jurisdiction would be

unfair, unreasonable, or otherwise violate traditional notions of fair play and substantial justice. *Burger King Corp.,* 471 U.S. at 476. In performing this inquiry, the court balances: (1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the states' common interest in fundamental social policies. *Asahi Metal Indus. Co. Ltd. v. Superior Court of Calif.,* 480 U.S. 102, 115, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

b. Supplemental Jurisdiction

Common law developed the doctrine of pendent jurisdiction to avoid piecemeal and parallel litigation when, like here, a plaintiff's complaint contained causes of action arising under both state and federal law. Traditionally, the doctrine permitted a federal court to entertain state claims, over which it would not otherwise have jurisdiction, when the claims were "derived from the same nucleus of operative facts." *Rodriguez v. Pacificare of Tex. ., Inc.,* 980 F.2d 1014, 1018 (5th Cir.1993). This doctrine was codified under the umbrella of supplemental jurisdiction in 28 U.S.C. § 1367, which provides that:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy ....

28 U.S.C. § 1367(a).

c. Standard for Venue

Cited previously, Section 27 of the Securities Exchange Act provides that venue for civil suits arising under the Securities Exchange Act is proper in the district where "any act or transaction constituting the violation occurred." 15 U.S.C. § 78aa. "The 'act' contemplated by the statute need not be crucial, nor must 'the fraudulent scheme be hatched in the forum district.' " *Hilgeman v. Nat'l Ins. Co. of Am.,* 547 F.2d 298, 301 (5th Cir.1977) (quoting *Hooper v. Mountain State Sec. Corp.,* 282 F.2d 195, 204 (5th Cir.1960)). Nonetheless, the act must be material to the consummation of the alleged scheme. *Id.* However, "the defendant need not be physically present in the forum district nor need he commit more than a single act in the district if that act is important to the consummation of the scheme." *Id.* at 302 n. 11; *see also Luallen,* 277 Fed. Appx. at 405 n. 2.

2. Application of the Law to the Facts

***5** In the instant case, ExpressJet claims that RBCCM and Piemonte violated Section 1 0(b) of the Securities Exchange Act and Rule 10b5 and that RBC violated Section 20(a) of the Securities Exchange Act. Dkt. 17. Thus, the jurisdiction and venue provisions of Section 27 are implicated as to each defendant. Accordingly, the court can consider the defendants' contacts with the United States as a whole in performing the jurisdictional inquiry. [3]

From the outset, the court observes that, to the extent that defendants have sufficient contacts with Texas, per a diversity-based analysis, which the parties have not disputed and defendants have waived by not raising previously, defendants have sufficient contacts with the United States as a whole, thereby justifying the exercise of personal jurisdiction in the Southern District of New York based on the federal securities claims pending against each defendant. Regardless, the court specifically notes that Piemonte is a U.S. citizen and RBCCM, a Minnesota corporation, has its principal executive office in New York City, New York; therefore, their contacts with the United States are sufficient to confer personal jurisdiction in the Southern District of New York for the federal claims arising under the Securities Exchange Act, pursuant to Section 27. Dkt. 17.

Despite ExpressJet's protestations that RBC does not maintain an office in New York, RBC claims that its contacts with New York arise from the existence of an RBC branch office in New York City, New York. *See* Dkts. 27, 29. While questions of fact in "dueling affidavits" are usually resolved in favor of the nonmoving plaintiff, RBC is undoubtedly more knowledgeable of the locations of its offices. *See Bullion v. Gillespie,* 895 F.2d 213, 217 (5th Cir.1990) (holding that failure to construe factual conflicts contained in affidavits in favor of plaintiff that were submitted to resolve a dispute

regarding propriety of personal jurisdiction constitutes reversible error). Nonetheless, the court need not consider this factual discrepancy, because it is undisputed that RBC maintains offices elsewhere in the United States. Dkt. 27 (acknowledgment by ExpressJet that "[RBC] does have branches throughout the southeastern United States"). Therefore, RBC possesses sufficient contacts with the United States to subject it to personal jurisdiction the Southern District of New York for the federal securities claim pending against it, in accordance with Section 27.

Having found that minimum contacts exist for each defendant, the court proceeds with an inquiry into the second element of the jurisdictional analysis: whether the exercise of personal jurisdiction would be unfair, unreasonable, or otherwise violate traditional notions of fair play and substantial justice. Although the court finds, as explained below, that the case should be transferred to the Southern District of New York, neither party has raised concerns sufficient to meet the high burden required for a finding that proceeding in either venue, the Southern District of Texas or the Southern District of New York, does not "comport with fair play and substantial justice." *Burger King,* 471 U.S. at 476. Therefore, the court concludes that the Southern District of New York can properly exercise personal jurisdiction over each defendant.

***6** Additionally, the Southern District of New York can exercise jurisdiction over all of ExpressJet's state-law claims, which include common law fraud; statutory fraud under Texas Business & Commerce Code § 27.01; breach of contract; breach of fiduciary duty; negligent misrepresentation; negligence; professional negligence; negligent hiring, training and supervision; unjust enrichment; and disgorgement. All of the claims center on the alleged ARS market manipulation, defendants' roles therein, defendants' failure to disclose these activities, and any false, affirmative representations made by defendants regarding the stability and liquidity of the ARS market. Because all of the claims arise from the same set of factual allegations, the court concludes that the claims arise from the same controversy under Section 1367. Thus, the Southern District of New York can exercise supplemental jurisdiction over the state-law claims in the instant case.

Finally, the court examines whether venue is proper in the Southern District of New York. The parties do not seriously contend that venue is improper in the Southern District of New York. Nonetheless, the court observes that Piemonte allegedly called RBCCM's New York office frequently in connection with the sale of ARS. Further, RBCCM maintained its ARS trading desk in New York City, New York, which is also where the ARS market operated. Hence, ARS sales were actually consummated in New York City, New York. The consummation of the sales of ARS is not only *material,* but essential to the ultimate objective of the alleged fraudulent scheme: enticing investors into purchasing ARS in order to maintain the artificial market, thereby profiting from the alleged fraudulent representations regarding the liquidity of the ARS and the viability of the ARS market. Therefore, the court concludes that venue is proper in the Southern District of New York.

B. Do the Transfer Factors Suggest that Transfer to the Southern District of New York Is Convenient and in the Interest of Justice?

Because the court has concluded that the case at bar could have been brought in the Southern District of New York, the court proceeds with the second step of the transfer inquiry: a balancing of the private and public interest factors. "There can be no question but that the district courts have 'broad discretion in deciding whether to order a transfer.' " *In re Volkswagen of Am., Inc.,* 545 F.3d 304, 311 (5th Cir.2008) (quoting *Balawajder v. Scott,* 160 F.3d 1066, 1067 (5th Cir.1998), in turn quoting *Caldwell v. Palmetto State Sav. Bank,* 811 F.2d 916, 919 (5th Cir.1987) (internal quotation omitted in original)). Although there are some limitations on this discretion, which are imposed by Section 1404 and Supreme Court precedent, the Fifth Circuit will, "in no case," "replace a district court's exercise of discretion with [its] own; [it] review[s] only for clear abuses of discretion that produce patently erroneous results." *Id.* at 312.

1. Private and Public Interest Factors

***7** The Fifth Circuit has "adopted the private and public interest factors articulated in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), a *forum non conveniens* case, as appropriate for the determination of whether a § 1404(a) venue transfer is for the convenience of parties and witnesses and in the interest of justice." *Id.* at 315. In weighing the public and private interest factors, no single factor is determinative, and the weight given each factor is generally determined on a case-by-case basis.

The private interest 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.

Id. (quoting *In re Volkswagen AG (Volkswagen I),* 371 F.3d 201, 203 (5th Cir.2004)). The public interest factors are:

> (1) the administrative difficulties flowing from the 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 [or in] the application of foreign law.

Id.

Although the *Gilbert* factors are generally sufficient in a transfer analysis, "they are not necessarily exhaustive or exclusive." *Id.* For example, with respect to the public interest factors, "[c]ourts also consider judicial economy, that is whether a transfer would avoid duplicative litigation and prevent waste of time and money." *Nature Coast Collections, Inc. v. Consortium Serv. Mgmt. Group, Inc.,* No. C–06–273, 2006 WL 3741930, at *6 (S.D.Tex., Dec.18, 2006) (citing *Zoltar Satellite Sys., Inc. v. LG Elecs. Mobile Commc'n Co.,* 402 F.Supp.2d 731, 735 (E.D.Tex.2005); *Jordan v. Dixie Pump and Supply, Inc.,* No. Civ. A. 05–4027, 2006 WL 861022, at *1 (E.D.La. Mar.29, 2006); and *Gregoire v. Delmar Sys., Inc.,* No. Civ. A. 05–2812, 2005 WL 3541051, at *1 (E.D.La. Dec.5, 2005)); *see also Van Dusen v. Barrack,* 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964).

Importantly, plaintiff's choice of forum is not an *independent* factor in the court's inquiry. Rather, the plaintiff's choice of forum is treated as a "burden of proof question." *In re Volkswagen of Am., Inc.,* 545 F.3d at 314 (quoting *Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.,* 321 F.2d 53, 56 (5th Cir.1963) and *Time, Inc. v. Manning,* 366 F.2d 690, 698 (5th Cir.1966)) (internal quotation omitted). The en banc panel in *In re Volkswagen of America, Inc.,* drew a distinction between transfer and dismissal for *forum non conveniens:* A defendant seeking transfer faces a less imposing burden than a defendant seeking a *forum non conveniens* dismissal. "In order to obtain a new federal [venue], the statute requires only that the transfer be '[f]or the convenience of the parties, in the interest of justice.' " *Id.* (quoting *Veba–Chemie A.G. v. M/V Getafix,* 711 F.2d 1243, 1247 (5th Cir.1983), and Section 1404) (internal quotation omitted) (alterations in original). The Fifth Circuit held that the defendant seeking transfer must show only "good cause."

> ***8** This "good cause" burden reflects the appropriate deference to which the plaintiff's choice of venue is entitled. 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 satisfy the statutory requirements and clearly demonstrates that a transfer is "[f]or the convenience of parties and witnesses, in the interest of justice." Thus, when the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff's choice should be respected. When the movant demonstrates that the transferee venue is clearly more convenient, however, it has shown good cause and the district court should therefore grant the transfer.

Id. (quoting Section 1404(a)) (alterations in original).

2. Application of the Law to the Facts

a. Private Factors

i. Ease of Access to Sources of Proof

Defendants claim that most of the records relevant to this case are housed in RBCCM's New York City office; however, defendants have not suggested that the records are so voluminous as to make transporting them to Houston impracticable or that a tremendous imbalance exists between the volume of documents located in New York City as opposed to other locations. Documents are frequently copied for use in litigation and assuredly

documents will have to be transported regardless of the forum in which the case proceeds. Moreover, the Fifth Circuit has acknowledged that modern technological developments have made sources of proof more accessible regardless of their physical location. *Id.* at 316. While these technological advancements do not render this element superfluous, absent a more specific showing by defendants explaining how a transfer will ease access to the evidence, this factor weighs neither in favor of nor against transfer. *Id.*

ii. Compulsory Process of Witnesses

Federal Rule of Civil Procedure 45(b)(2) outlines the subpoena power of a federal district court, limiting the subpoena range to: places within the district of the issuing court; outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection; within the state of the issuing court if a statute or court rule allows and the subpoena is issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; and where the court authorizes on motion and for good cause, if permitted by a federal statute. FED. R. CIV. P. 45(b)(2). Similarly, trial subpoenas for nonparty witnesses residing more than 100 miles from the courthouse are subject to motions to quash. FED. R. CIV. P. 45(c)(3).

Here, neither the Southern District of Texas nor the Southern District of New York enjoys absolute subpoena power over all of the proposed witnesses. The parties have identified Holtwick, Feldott, Piemonte, and other RBCCM employees, Lourdes Massanet, EJ Jeoung, and Patricia Garland, as key witnesses. Holtwick and Feldott are located in Houston, Texas; Piemonte and Massanet in Chicago, Illinois; and Jeoung and Garland in Seattle, Washington. Dkt. 27. However, the availability of employee—witnesses is often given less weight, as their attendance can be compelled by their party—employer, if not by the procedural mechanisms available to the court. *See Lemery v. Ford Motor Co.,* 244 F.Supp.2d 720, 731 (S.D.Tex.2002). But, the court tempers this line of reasoning by observing that, merely because a prospective witness is *currently* employed by a party, there is no assurance that the employee will remain in the employ of the party at the time of trial.

***9** Defendants also intend to elicit testimony from unnamed ARS broker—dealers from Citigroup and Banc of America, who are purportedly located in New York City, New York, and Charlotte, North Carolina. *Id.* However, plaintiff contends that these individuals can be found in Dallas, Texas, and Atlanta, Georgia. Regardless of these individuals' locations, none is found within the transferor or transferee district, or the 100–mile subpoena range of either. Therefore, the factor is neutral.

iii. Convenience & Cost of Attendance for Willing Witnesses

Issues of convenience and costs for willing witnesses are perhaps the important factors in the transfer analysis. "When the distance between an existing venue for trial of a matter and a proposed venue ... is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." *In re Volkswagen of Am., Inc.,* 545 F.3d at 317 (quoting *Volkswagen I,* 371 F.3d at 204–05) (internal quotation omitted). "[A]dditional 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." *Id.* (quoting *Volkswagen I,* 371 F.3d at 204–05) (internal quotation omitted). The availability, or unavailability, of direct flights can also impact the court's determination. But, the convenience analysis is not a "battle of numbers." Instead, the court's inquiry is a qualitative one, based on the anticipated legal and factual nature of each witness's testimony. The convenience of one material witness may outweigh that of several less significant witnesses. 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3851. Regardless, transfer should not be granted where the *sole* result is to shift the inconvenience from one party to another.

Here, the majority of willing witnesses identified are RBCCM employees, including: those involved in the creation of the marketing materials; those with knowledge of RBC entities' positions in the ARS market; those who work on the ARS desk; and various supervisors and corporate representatives. Dkt. 19. Defendants contend that the vast majority of these unnamed individuals can be found in New York. *Id.* Yet, as noted above, plaintiffs indicate that at least some of the individuals are located throughout the country, in New York City, New York; Chicago, Illinois; and Seattle, Washington. Dkt. 27. As with compulsory service, the convenience of

employee—witnesses is often given less weight; however, the same observation regarding continued employment applies. *See Lemery v. Ford Motor Co.,* 244 F.Supp.2d 720, 731 (S.D.Tex.2002). And, although the court gives these witnesses *less* weight, that does not equate to a total lack of consideration of these witnesses. Further, in the instant case, the court notes that plaintiff is a transportation company, which can more easily transport its two Houston-based witnesses to the transferee venue should transfer be granted, as compared to a more significant number of defendants' witnesses that would require transportation to Texas. *See Cont'l Airlines, Inc. v. Am. Airlines, Inc.,* 805 F.Supp. 1392, 1397 (S.D.Tex.1992). Ultimately, the time and distance concerns prove largely inconsequential because neither location is convenient to all of the anticipated witnesses. And, neither party has suggested that transportation between the various metropolitan areas where the expected witnesses can be found and either venue would be particularly difficult due to a lack of available means of transportation. Regardless of the venue in which the case proceeds, willing witnesses will be required to travel. This factor, therefore, is neutral.

iv. Other Practical Problems: The "Catch–All" Factor

***10** Significantly, multiple cases, similar both legally and factually, as they also relate to fraud in connection with the collapse of the ARS market, are pending before courts in the Southern District of New York. [4]

One case is a class action proceeding brought by plaintiff Brigham against two of the three defendants in the case before this court, RBCCM and RBC, styled *Brigham v. Royal Bank of Canada.* Dkt. 27, Ex. 7; *see also* Complaint, *Brigham v. Royal Bank of Canada,* No. 08–CV–4431 (WHP) (S.D.N.Y., filed May 12, 2008). In *Brigham,* like the instant case, plaintiff claims that defendants violated Section 10(b) of the Securities Exchange Act. The *Brigham* class action also contains allegations that defendants misrepresented the true nature of ARS and that "defendants knew, but failed to disclose to investors, material facts about auction rate securities." Finally, the *Brigham* plaintiff contends that the failure of the ARS market was a "result of the withdrawal of support by all of the major broker—dealers." Although Piemonte is not named personally in the *Brigham* complaint, the *Brigham* plaintiffs do contend that "Piemonte failed to disclose that the auction rate securities he was selling were only liquid at the time of sale because RBCCM and other broker—dealers in the auction market were artificially supporting and manipulating the market to maintain the appearance of liquidity and stability." Dkt. 27, Ex. 7.

Notably, the *Bringham* case was voluntarily dismissed, *see* Dkt. 34; however, other similar actions are pending in the Southern District of New York before the same district court judge to whom the *Brigham* class action was assigned. For example, the SEC filed suit in connection with a finalized ARS-related settlement between the SEC and RBCCM in an action styled *SEC v. RBC Capital Markets Corporation.* Dkt. 34; *see also* Complaint, *SEC v. RBC Capital Markets Corp.,* No. 09–CV–5172 (S.D.N.Y., filed June 3, 2009). When the SEC filed suit, it noted that the case was related to four other ARS cases currently pending before courts in the Southern District of New York.

Additionally, two antitrust actions are pending against Citigroup and a number of other financial institutions, including defendants. One action was brought on behalf of a purported class of ARS investors. Dkt. 27, Ex. 5; *see also* Complaint, *Mayfield v. Citigroup, Inc.,* No. 08–CV–7747 (BSJ) (S.D.N.Y., filed Sept. 4, 2008). The other suit was brought on behalf of a purported class of ARS issuers, rather than investors. Dkt. 27, Ex. 6; *see also* Complaint, *Mayor and City Council of Baltimore, Md. v. Citigroup, Inc.,* No. 08–CV–7746 (BSJ) (filed S.D.N.Y. Sept. 4, 2008). The two complaints describe similar factual scenarios as the instant case. Central to the antitrust complaints is the allegation that "[when] defendants and their broker—dealers stopped artificially supporting and manipulating the auction markets, those markets immediately failed, resulting in the auction rate securities becoming illiquid." Dkt. 27, Ex. 6. This same scheme is echoed in ExpressJet's complaint in the case *sub judice.*

***11** Yet another action substantially similar to the case at hand, *Monster Worldwide, Inc. v. RBC Capital Markets Corporation,* was filed more recently in the Southern District of New York. *See* Dkt. 34; 43, Ex. B; *see also* Second Amended Complaint, *Monster Worldwide, Inc. v. RBC Capital Markets Corp.,* No. 09–CV–4542 (DAB) (S.D.N.Y, filed June 16, 2009). Like ExpressJet, Monster Worldwide alleges violations of Section 10(b) of the Securities Exchange Act and Rule 10b–5; negligent misrepresentation; common law fraud; and breach of contract. *Id.*

In each of these actions, plaintiffs raise similar claims against defendants and other underwriters and broker—dealers. Defendants' alleged role in manipulating and contributing to the ultimate collapse of the ARS market, the means through which investors were induced into purchasing ARS, and defendants' knowledge at that time will be at issue in each case. Because these cases involve common questions of law and fact, a transfer of venue to the Southern District of New York will be more convenient for the parties and witnesses and will likely promote the just and efficient resolution of the litigation. Centralization is likely to assist in avoiding duplicative discovery and to conserve the resources of the parties, their counsel, and the judiciary. Should the cases be tried in different districts, sitting in different circuits, the courts and juries deciding the legal and factual issues may arrive at inconsistent results. These concerns were precisely what prompted the Judicial Panel on Multidistrict Litigation ("Panel") to enter an order consolidating three ARS actions against Citigroup in the Southern District of New York on June 10, 2009. Although Citigroup is not a defendant in this case, and the transfer was pursuant to Section 1407, the Panel's reasoning nonetheless applies to this court's analysis of a motion to transfer, pursuant to Section 1404(a), and, in particular, whether economies of scale and efficiencies can be realized by transferring the instant case to the Southern District of New York. The Panel recognized that the

> three actions involve common questions of fact, and ... centralization under Section 1407 in the Southern District of New York will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. All actions arise from allegations that Citigroup entities and/or its employees made misrepresentations or omissions in the context of the sale of [ARS]. Centralization under Section 1407 will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.
>
> ...
>
> All actions focus on defendants' conduct in the market for ARS, which experienced widespread auction failures in February 2009. While the specific representations Citigroup made to each purchaser of ARS may vary from ARS to ARS, the actions arise under the common factual background surrounding Citigroup's alleged role in manipulating (and contributing to the ultimate collapse of) the ARS market.

***12** Dkt. 43, Ex. A; *see also* Citigroup MDL Order, *In re Citigroup, Inc., Auction Rate Securities (ARS) Marketing Litigation (No. II)* (JPML, filed June 10, 2009). The cases pending in the Southern District of New York and the case before this court may be ripe for consolidation, like the ARS cases involving Citigroup, but that will be a decision to be made in the Southern District of New York. And, numerous courts have held that transfer for the purpose of consolidating concurrent, ongoing actions is proper where the concurrent actions are based on precisely the same issues. *See Cont'l Grain Co. v. Barge FBL–585,* 364 U.S. 19, 26, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960)); *see also Nature Coast Collections, Inc. v. Consortium Serv. Mgmt. Group, Inc.,* No. C–06–CV–273, 2006 WL 3741930, at *7 (S.D.Tex. Dec.18, 2006). In summary, the risk of duplicative discovery and inconsistent pretrial and trial rulings is significant. Therefore, this factor weighs heavily in favor of transfer.

b. Public Factors

i. Administrative Difficulties

In their motion to transfer, defendants do not highlight any administrative difficulties that would confront the parties in either the Southern District of Texas or the Southern District of New York. The time between filing and the disposition of a civil case in the Southern District of Texas is 6.2 months, compared to 8.4 months in the Southern District of New York. Dkt. 19; *see also* FED. COURT MGMT. STATISTICS, JUDICIAL CASELOAD PROFILE: DISTRICT COURTS (2008), *available at* http://www.uscourts.gov/cgi-bin/cmsd2008.pl. This difference in disposition time is negligible and does not weigh in favor of or against transfer.

However, ExpressJet notes that the difference of approximately nine months in the median times between filing and trial of civil cases in the Southern District of New York and the Southern District of Texas favors the Southern District of Texas. Dkt. 27. While that may be true to some extent, exclusive reliance on this median statistic is slightly myopic in light of the potential for discovery and pretrial efficiencies should the cases be centralized in the Southern District of New York. Given the multiple ARS cases pending before courts in the

Southern District of New York, the case will proceed in a venue that is familiar with the factual background and legal issues pertinent to this litigation. Therefore, this factor is neutral.

ii. Local Interest

Defendants in the instant case include: a Canadian bank; a subsidiary of the bank, incorporated in Minnesota with its principal place of business and an ARS trading desk in New York City, New York; and an ARS broker—dealer, employed by the subsidiary, who resides in Illinois. And, ExpressJet is a Delaware corporation with its principle executive offices in Houston, Texas. While the complaint indicates that defendants reached out to the Texas plaintiff and fraudulently induced it to purchase ARS, a broader perspective exposes an alleged scheme of national proportion, involving broker—dealers from across the country and violations of federal securities laws in the ARS market, which operates out of New York City, New York. In fact, the only connection to Houston, Texas, is the location of the alleged victim's executive offices, where the purportedly fraudulent statements were received.

***13** This court does not dispute that a state has an interest in preventing fraud committed against its citizens and citizen corporations; however, here, national interests and those of New York, in particular, prevail. While the Southern District of Texas has a strong interest in adjudicating a case involving harm to a Texas-based entity, the Southern District of New York has an equally compelling interest in policing New York entities operating within its borders and engaging in interstate business activities. Because the conflict being litigated arose from transactions made via RBCCM's New York City trading desk, with investors half-way across the country, the court finds that New York has an equal or greater interest than Texas in this litigation. Moreover, New York City, New York, is widely known as the nation's financial capital, if not that of the world. Investors throughout the country trade in markets operating out of New York. New York's interest in regulating these markets predominates because the financial industry is critical to its overall economic health and viability, as well as that of the nation. Therefore, the local interest factor weighs in favor of transfer to the Southern District of New York.

iii. Familiarity of the Forum with the Governing Law

ExpressJet asserts claims under both Texas state law and federal law in the instant case. While the Southern District of Texas is undoubtedly more familiar with Texas law, [5] courts in the Southern District of New York will have no difficulty applying the Texas law at issue in the case *sub judice.* The state law claims are predominantly based on common law, with the statutory fraud claim being the exception. Notably, the elements for a fraud and breach of contract under New York law are strikingly similar to those under Texas law. Further, federal district courts, particularly when sitting in diversity, often apply foreign law in resolving the controversies before them. The Southern District of New York, itself, has recognized that familiarity with the governing law is "only one of many factors and is 'accorded little weight on a motion to transfer, especially when no complex issues of foreign law are at stake.' " *Zangiacomi v. Saunders,* 714 F.Supp. 658, 662 (S.D.N.Y.1989) (quoting *Noreiga v. Lever Bros. Co., Inc.,* 671 F.Supp. 991, 996–97 (S.D.N.Y.1987)). "Unlike foreign law, applying the law of another jurisdiction within the United States poses no particular problem to any federal forum." *Id.* (quoting *Ayers v. Arabian Am. Oil Co.,* 571 F.Supp. 707, 710 (S.D.N.Y.1983)) (internal quotation omitted). Therefore, this factor is also neutral.

iv. Avoidance of Unnecessary Problems of Conflict of Laws

In both tort and contract cases, Texas follows the "most significant relationship test," as set forth in Sections 6 and 145 of the Restatement (Second) of Conflict of Laws. Likewise, New York courts apply the law of the jurisdiction with the most significant interest in or relationship to the dispute. *See DTEX, LLC v. BB VA Bancomer, S.A.,* 508 F.3d 785, 802 (5th Cir.2007); *White Plains Coat & Apron Co., Inc. V.v. Cintas Corp.,* 460 F.3d 281, 284 (2d Cir.2006). Thus, no conflict of law issue should arise if the instant case is transferred to New York and, accordingly, this factor is neutral.

v. Judicial Economy

***14** "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different district courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *DataTreasury Corp. v. First Data Corp.,* 243 F.Supp.2d 591, 594 (N.D.Tex.2003); *see also Jarvis*

Christian College v. Exxon Corp., 845 F.2d 523, 529 (5th Cir.1988) (upholding transfer to district where other cases were pending that "involve[d] issues either identical, or substantially related, to the issues pending before the [transferor d]istrict."); *Fisherman's Harvest, Inc. v. Weeks Marine, Inc.,* 401 F.Supp.2d 745, 748 (S.D.Tex.2005) ("[I]t would be in the interests of judicial economy and justice to transfer this case in its entirety ... so that all of the issues may be brought before and resolved by one court.").

The impact of having multiple, similar cases pending before courts in the Southern District of New York has been discussed previously. Addressing the cases in piecemeal fashion, in district courts throughout the country is likely to result in duplicative discovery and pretrial motions, which may result inconsistent rulings. Allowing the cases to proceed in a more centralized fashion, within a single district, will promote the effectiveness and efficiency of the litigation and conserve resources of the parties, witnesses, and courts. Additionally, because of the volume of related cases filed and the fact all of the cases will, to some degree, involve factual determinations regarding the defendants' conduct and role in the ARS market collapse, the potential for conflicting findings is high. Ultimately, "the existence of related litigation in a transferee court is a factor that weighs strongly in favor of transfer." *DataTreasury Corp.,* 243 F.Supp.2d at 594 (citing *Jarvis Christian College,* 845 F.2d at 528–29 (5th Cir.1988)). Therefore, this factor favors of transfer.

II. CONCLUSION

Transfers pursuant to Section1404 turn on a series of practical considerations, including: judicial economy, whether the transfer will avoid duplicative litigation efforts, and the possibility of wasted time and resources. While the majority of the private and public interest factors neither favor nor weigh against transfer, several critical factors strongly support transfer of the case to the Southern District of New York. The court cannot conceive of an arrangement more expensive, time consuming, or exhaustive of judicial resources, than keeping this single ARS suit in Texas while all of the other similar suits against defendants are litigated in the Southern District of New York. The concurrent litigation of these suits, over 1,600 miles apart, would defeat many of the public and private interests protected by Section 1404(a). In conclusion, the court finds that the public and private factors weigh in favor of transferring this case to the Southern District of New York. The convenience of the parties and witnesses and the interests of justice require that this case be transferred. Therefore, defendants' motion to transfer (Dkt.19) is GRANTED. [6] Further, it is ORDERED that the case be transferred to the Southern District of New York.

***15** It is so ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 2244468

Footnotes

1 Although the notice of removal cites diversity as the basis for removal, the original and amended complaints reflect both diversity and federal question jurisdiction, amongst other bases.

2 Where the federal statute does not provide for nationwide service of process, the distinction between federal question and diversity jurisdiction is one without a difference. In such cases, the federal court may only reach those parties over which it could exercise jurisdiction pursuant to the state long-arm statute.

3 The court's reliance on the jurisdictional and venue provisions contained in Section 27 is not intended to speak to the ability or inability of the parties to establish jurisdiction under the more limited diversity-based inquiry, which would focus exclusively on defendants' contacts with the transferee forum state, New York.

Notably, Piemonte, phoned New York on multiple occasions "in connection with the sale of ARS to ExpressJet," and RBCCM maintains an office in New York City, New York. Dkt. 29. As noted previously, even a single contact can give rise to specific jurisdiction. And, the existence of a New York office, which housed the ARS trading desk, is clearly sufficient for the exercise of jurisdiction over RBCCM.

4 Although defendants suggest that the case should be transferred pursuant to the first-to-file doctrine, the court concludes that analysis of the Section 1404 public and private interest factors is a more sound basis for transfer. Nonetheless, the rationale underlying the first-to-file doctrine is encompassed within the court's balancing of the public and private factors,

namely the practical problems and judicial inefficiency caused by parallel litigation proceeding in Texas and New York. *See W. Gulf Maritime Ass'n v. ILA Deep Sea Local 24,* 751 F.2d 721, 729 (5th Cir.1985). Accordingly the court does not rely solely upon the first-to-file doctrine in ruling on defendants' motion to transfer.

5 Presumably, the theory is one of proximity, which, in the instant case, may bolster the argument that the Southern District of New York would be more familiar with securities law due to its location in the nation's financial capital. However, as with the Southern District of New York's ability to apply Texas law, the court is confident that the both districts are equally capable of interpreting and applying federal securities law.

6 Accordingly, the court does not rule on defendants' pending motion to dismiss ExpressJet's amended complaint. Dkt. 24.

End of Document

EXHIBIT C

2012 WL 2886861
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas,
Houston Division.

FINANCIAL CASUALTY
AND SURETY, INC., Plaintiff,
v.
George ZOUVELOS and
Anastasia Mancini, Defendants.

Civil Action No. H–11–2509.
|
July 13, 2012.

Attorneys and Law Firms

Cassandra M. McGarvey, Bradford Wald Irelan, Irelan Hargis PLLC, Houston, TX, for Plaintiff.

George Zouvelos, Brooklyn, NY, pro se.

Anastasia Mancini, Brooklyn, NY, pro se.

Craig A. Washington, Attorney At Law, Houston, TX, for Defendants.

MEMORANDUM AND ORDER

LEE H. ROSENTHAL, District Judge.

***1** This is a commercial dispute involving bail bonds. The court assumes the parties' familiarity with the lengthy, and acrimonious, history. Four motions are currently pending:

- The defendants, George Zouvelos and Anastasia Mancini (collectively, "Zouvelos"), proceeding *pro se,* have again moved to transfer venue to the United States District Court for the Eastern District of New York. (Docket Entry No. 82). The plaintiff, Financial Casualty and Surety, Inc. ("FCS"), has responded. (Docket Entry No. 93).

- FCS has moved to dismiss Zouvelos's amended counterclaims for failure to state a claim. (Docket Entry No. 88). Zouvelos has responded by filing a second amended answer, which contains second amended counterclaims. (Docket Entry No. 91). This court treats that filing as a motion for leave to file second amended counterclaims.

- FCS has moved to compel the production of documents under Federal Rule of Civil Procedure 34 and disclosures under Rule 26. (Docket Entry No. 92). Zouvelos appears to have responded. (Docket Entry No. 97).

- FCS has moved for an order "compelling Defendants George Zouvelos and Anastasia Mancini to comply with Rule 5 of the Federal Rule[s] of Civil Procedure[.]" (Docket Entry No. 100).

Based on the motions and related filings, the extensive record, and the applicable law, this court grants the motion to transfer. The remaining motions—FCS's motion to dismiss the amended counterclaims, Zouvelos's motion for leave to file second amended counterclaims, and FCS's motions to compel—are denied, but without prejudice to reassertion before the United States District Court for the Eastern District of New York.

The reasons for this ruling are explained below.

I. The Applicable Law

"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). A district court has "broad discretion in deciding whether to order a transfer." *In re Volkswagen of Am., Inc.,* 545 F.3d 304, 311 (5th Cir.2008) (en banc) (internal quotation marks omitted). The party seeking transfer must show that "the transferee venue is clearly more convenient[.]" *Id.* at 315. To determine "whether a § 1404(a) venue transfer is for the convenience of parties and witnesses and in the interest of justice," a district court must consider both private and public interest factors. *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. 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 or in the application of foreign law.

***2** *Id.* (internal quotation marks, citations, and alterations omitted). These factors are "not necessarily exhaustive or exclusive" and "none can be said to be of dispositive weight." *Id.* (internal quotation marks and alterations omitted).

"The relative convenience to the witnesses is often recognized as the most important factor under § 1404(a)." *Mid–Continent Cas. Co. v. Petroleum Solutions, Inc.,* 629 F.Supp.2d 759, 762 (S.D.Tex.2009) (citing cases); *see also Frederick v. Advanced Fin. Solutions, Inc.,* 558 F.Supp.2d 699, 704 (E.D.Tex.2007) ("Typically, the most important of the above factors is whether substantial inconvenience will be visited upon key fact witnesses should the court deny transfer." (quoting *Mohamed v. Mazda Motor Corp.,* 90 F.Supp.2d 757, 774 (E.D.Tex.2000))); 15 C harles ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3851 (3d ed.2007) ("Often cited as the most important factor in passing on a motion to transfer under Section 1404(a) of Title 28 of the United States Code, and the one most frequently mentioned by the courts, ... is the convenience of witnesses, most particularly nonparty witnesses who are important to the resolution of the case."). What matters most is the relative convenience to nonparty witnesses, more so than party witnesses. *See Mid–Continent Cas. Co.,* 629 F.Supp.2d at 762–63 (citing cases); *Frederick,* 558 F.Supp.2d at 704; 15 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3851. "The availability and convenience of party-witnesses is generally insignificant because a transfer based on this factor would only shift the inconvenience from movant to nonmovant." *Frederick,* 558 F.Supp.2d at 704 (quoting *Quicksilver, Inc. v. Academy Corp.,* No. Civ. A. 3:98–CV–1772R, 1998 WL 874929, at *2 (N.D.Tex. Dec.3, 1998)). "When nearly all of the nonparty witnesses that will testify concerning disputed issues reside elsewhere, this factor weighs in favor of transferring the case." *Id.* Nevertheless, "although extremely important, the convenience of witnesses does not stand alone and must be weighed against the other relevant factors that typically are considered." 15 WRIGHT ET AL ., FEDERAL PRACTICE AND PROCEDURE § 3851.

To determine the relative convenience to nonparty witnesses, a district court must consider the content of their testimony. "[T]he movant must specifically identify the key witnesses and outline their testimony." *Mid–Continent Cas. Co.,* 629 F.Supp.2d at 763 n. 3. As explained by *Wright and Miller.*

> The courts also have been careful not to let a motion for transfer become "a battle of numbers." The party seeking the transfer must specify clearly, typically by affidavit, the key witnesses to be called and their location and must make a general statement of what their testimony will cover. The emphasis, as has been articulated by many courts, is properly on this showing rather than on which party can present a longer list of possible witnesses located in its preferred district. The focus on this point is a qualitative, not a quantitative one[.]

***3** 15 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3851 (internal footnotes omitted).

II. Analysis

Zouvelos previously moved to dismiss this case for lack of personal jurisdiction or, in the alternative, to transfer venue to the United States District Court for the Eastern District of New York. (Docket Entry No. 59). The court denied that motion during the hearing held on March 28, 2012. (Docket Entry No. 71). As to the motion to transfer, the court noted that Zouvelos had not identified those nonparty witnesses located in New York or the importance of those witnesses' testimony. (Docket Entry No. 75, at 8–9). The court allowed Zouvelos to file an

amended motion to transfer venue by May 25. (Docket Entry No. 79).

Zouvelos did not file the motion to transfer until May 30. (Docket Entry No. 82). The motion is untimely, even if it was mailed on May 24 (the date on the document). (*Id.,* at 18). "The posting of papers addressed to the clerk's office does not constitute 'filing' under Rule 5(e). Unlike some state court rules the Federal Rules of Civil Procedure do not authorize filing to be accomplished by deposit of papers in the mail." *Raymond v. Ameritech Corp.,* 442 F.3d 600, 604–05 (7th Cir.2006) (internal footnote omitted); *see also Lee v. Dallas Cnty. Bd. of Educ.,* 578 F.2d 1177, 1178 n. 1 (5th Cir.1978) (per curiam) ("[C]ompliance with a Filing requirement is not satisfied by Mailing the necessary papers within the allotted time."); *Scott v. U.S. Veteran's Admin.,* 749 F.Supp. 133, 135 (W.D.La.1990) ("[C]ourts have consistently noted that filing court papers does not occur when they are mailed."). Instead, "[a] pleading is not filed with the court until it is actually received by the clerk, or by the court." *Meza v. Massanari,* 199 F.R.D. 573, 576 (S.D.Tex.2001) (citing FED. R. CIV. P. 5(e) and *Torras Herreriay Construcciones, S.A. v. M/V Timur Star,* 803 F.2d 215, 216 (6th Cir.1986)).

Even assuming that Zouvelos mailed the motion on May 24, 2012, it was not received by the Clerk of Court until May 30. The answer was not "filed," for purposes of Rule 5(d)(2), until that date. The court, however, will accept the late-filed motion. The delay was short, FCS will suffer no prejudice from the six-day delay, and FCS has not objected to the motion's timeliness.

Some of the background facts that bear on the transfer issue are undisputed. FCS is a Texas corporation located in Houston, licensed to underwrite bail bonds in New York and other states. Zouvelos is a licensed bail bondsman in New York, and his business—which he runs with his wife, Mancini—is located in New York. Between 2008 and 2010, FCS entered into four contractual agreements with Zouvelos and Mancini. These agreements authorized Zouvelos to issue bail bonds with FCS as the surety, with the industry-standard proviso that Zouvelos would indemnify FCS for all losses associated with the forfeiture of a bond. The agreements required Zouvelos to obtain collateral from an indemnitor for each bail bond issued, and to hold the collateral in a separate bank account with FCS named as trustee. After the bond's exoneration—that is, after the criminal defendant appeared at all required court dates—FCS's obligation as surety terminated, and Zouvelos was required to return the collateral to the indemnitor. The agreements required Zouvelos to keep records related to each bond and granted FCS access to these records at its discretion. Finally, each of the agreements contained a forum—selection clause, [1] which states:

> ***4** At the discretion of Company, the Agreement is to be interpreted in accordance with the laws of the State of Texas, where Company is based, or with the laws of General Agent's home state. The parties hereto do hereby consent and stipulate to the jurisdiction (at the discretion of Company) of the courts in the State of Texas, County of Harris or of the General Agent's home state for any action brought under this Agreement.
> (Docket Entry No. 80, Ex. B, ¶ 29).

This lawsuit arises out of Zouvelos's alleged mishandling of bail bonds underwritten by FCS. According to FCS, there is a shortage in Zouvelos's collateral account. FCS has repeatedly sought documents from Zouvelos that will show all deductions from collateral, including for payments to third-party vendors, in order to resolve. The parties have spent considerable time and effort—theirs and the court's—litigating the extent to which Zouvelos has responsive records available for production and whether he is willing to produce what he does have available. In addition to defending this lawsuit by FCS, Zouvelos has been under investigation by the New York State Department of Financial Services—also known by its former name, the New York State Insurance Department [2]—for matters apparently arising out of this alleged mishandling of bonds. [3] Beyond what is alleged in the complaint, (*see* Docket Entry No. 80, ¶ 11), and brief allusions to the investigation made during court hearings, the details of that investigation are not in the record.

The parties' agreement contains a permissive forum-selection clause, under which the defendants consent to submit to the personal jurisdiction of courts located in Harris County, Texas. The clause, however, does not require that litigation over the agreement be in a Harris County court. The § 1404(a) analysis applies, with the forum-selection clause as a factor to be considered.

In the motion to transfer, Zouvelos argues that New York is clearly a more convenient forum because this is a New York dispute. Zouvelos argues as follows:

> Defendant does all of his business in New York, the defendant's collateral contracts which are claimed to be in evidence in this matter are New York contracts under New York law, all of the alleged transactions are located only in New York, most (if not all) of the witness[es] to give testimony are located in [N]ew York, and the cost to defendant to transport and lodge any witnesses from New York to Texas is completely prohibitive.

(Docket Entry No. 82, ¶ 11). Zouvelos has attached a lengthy "preliminary witness list" that he contends shows "the proof that thus far 90% of defendant's witnesses slated to be called upon are located in the state of New York[.]" (*Id.,* ¶ 20).

FCS vigorously attacks this list of over 60 potential witnesses as "unreliable, unverified, and intentionally misleading." (Docket Entry No. 93, ¶ 13). According to FCS, Zouvelos misleads this court by asserting that he intends to call witnesses to testify on topics about which they lack personal knowledge. In support, FCS has submitted the affidavit of Steve Krauss, who Zouvelos identified as an FCS bail-bond agent with knowledge of FCS bail-bond practices. Krauss denies such knowledge. He states that he is not an bail-bond agent for FCS, nor does he write bail for FCS. His experience with FCS is limited to acting as an indemnitor on contracts for FCS. (Docket Entry No. 93, Ex. C, ¶¶ 2, 7–8). Additionally, Krauss is only licensed to write bail in Pennsylvania. (*Id.,* ¶ 2). He has spoken to Zouvelos by phone or communicated with him by email, but does not otherwise know him. (*Id.,* ¶ 3). Zouvelos has not spoken with him about testifying in this case. (*Id.,* ¶ 5). Indeed, Zouvelos testified that he had not spoken to most, if not all, of the potential witnesses he listed. (Docket Entry No. 93, Ex. B, at 167).

***5** FCS also asserts that many of the witnesses Zouvelos lists will offer irrelevant testimony. According to FCS, no nonparty witness is necessary, because "[t]he main issues are documenting the deductions from the collateral account and the amount of bond forfeitures entered on bonds written by Zouvelos." (Docket Entry No. 93, Ex. A, ¶ 10). The first issue will be resolved by documents, and the second by court records FCS obtained. FCS does intend to call witnesses, but only its own officers or employees who have worked with Zouvelos's account and know about his bail-bond business, the process of bond forfeitures and exonerations on bail bonds written by Zouvelos, FCS's payments of collateral to Zouvelos's indemnitors, and the calculation of the collateral shortfall. Each of these employees reside in Houston. (*Id.,* ¶ 9).

In short, according to FCS, there are no nonparty witnesses to be considered in the § 1404(a) analysis. On the other hand, Zouvelos has maintained from the outset that many of the documents he would otherwise produce were destroyed in a flood in his office. In part because of that, he must rely on testimony from third-party vendors, employees, and indemnitors to explain the amounts in the collateral account. The crux of the dispute between the parties, therefore, centers on whether Zouvelos has sufficiently identified key nonparty witnesses located in New York.

The court agrees with FCS that many—if not most—of Zouvelos's identified witnesses are duplicative. But the record does not permit this court to conclude, as FCS argues, that none of these witnesses have testimony relevant to Zouvelos's defense. Zouvelos identifies many witnesses as having knowledge about the bonds that underlie this contractual dispute. Some of the potential witnesses, such as Julio Pozo, are described as having knowledge about FCS bail-bond practices. And many of them appear to have knowledge about bail-bond practices generally in New York. Such information appears both relevant and potentially important to Zouvelos's defenses.

FCS's arguments that the main issue in the case is documenting the deductions and the bond forfeitures and that there is no need for any third-party witness fail to take into account two points. First, as noted, Zouvelos has maintained that he is unable to produce many of the relevant documents and must rely on other sources of proof, including testimony and documents to be subpoenaed from third-party vendors, former employees, clients, or bond indemnitors. Second, some of the witnesses are identified as having knowledge about FCS's business. FCS submits Krauss's affidavit to support its argument that Zouvelos "cannot guarantee the listed witnesses actually have personal knowledge of

the intended topics." (Docket Entry No. 93, ¶ 11). But Zouvelos has listed many other witnesses. Although FCS's able counsel has demonstrated that there is good reason to doubt Zouvelos's credibility in many respects, there is an insufficient basis in the record to conclude that his list of potential witnesses is a "fraud on the court" and that those identified (aside from Krauss) do not in fact have personal knowledge about the topics described.

***6** It is true that many, if not most, of these New York-based witnesses will not eventually testify at trial. Allowing all of them to testify would be duplicative, as FCS rightly points out. Nonetheless, some of these witnesses are likely to have testimony and documents that appear to be both relevant and, given the holes in the documents that Zouvelos has produced, important to Zouvelos's defenses. The witness list and the reasonable specificity with which the topics of testimony are described are sufficient to meet Zouvelos's burden of showing that there are key nonparty witnesses who are located in New York, and whose testimony cannot be compelled at trial if the case remains in Texas.

In light of this conclusion, the court analyzes the relevant factors.

A. Private–Interest Factors

The first private-interest factor, the relative ease of access to sources of proof, weighs in favor of transfer. Most of FCS's claims revolve around Zouvelos's recordkeeping and the documents he does have or had at one time but, according to him, can no longer produce because they were destroyed in a flood. Most of the relevant documents and physical evidence relating to them are located in New York. This factor supports transfer, even in an age of electronically available documents. *See Volkswagen,* 545 F.3d at 316; *Fujitsu Ltd. v. Tellabs, Inc.,* 639 F.Supp.2d 761, 767 (E.D.Tex.2009). That is particularly true when, as here, a party may need to subpoena documents from nonparty witnesses appearing at trial.

The second factor, the availability of compulsory process to secure the attendance of witnesses, also weighs in favor of transfer. Zouvelos has identified at least some New York-based nonparty witnesses whose testimony is relevant and may be important to this action. These witnesses are outside this court's subpoena power. *See* FED. R. CIV. P. 45(b)(2)(B) (explaining that a subpoena may be served "outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection"). This factor supports transfer. *See Volkswagen,* 545 F.3d at 316–17; *see also In re Genentech, Inc.,* 566 F.3d 1338, 1345 (Fed.Cir.2009) (applying Fifth Circuit precedent and holding that "[t]he fact that the transferee venue is a venue with usable subpoena power here weighs in favor of transfer, and not only slightly").

The third factor, the cost of attendance for willing witnesses, also weighs in favor of transfer. Zouvelos has identified nonparty witnesses located in New York. It will be significantly more convenient for them to have the case litigated in New York, where they reside. *See Volkswagen,* 545 F.3d at 317 (identifying the Fifth Circuit's "100–mile threshold" regarding this factor); *ATEN Int'l Co. v. Emine Tech. Co.,* 261 F.R.D. 112, 125 (E.D.Tex.2009). By contrast, the only witnesses identified by FCS are FCS executives and employees. (*See* Docket Entry No. 93, Ex. A, ¶ 9). "[T]he convenience of witnesses who are employees of a party is given less weight by the court because that party can obtain their presence at trial." 15 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3851; *see also, e.g., Carr v. Ensco Offshore Co.,* Civ. A. No. G–06–629, 2007 WL 760367, at *2 (S.D.Tex.Mar.8, 2007) ("Generally, the Court gives very little consideration to the convenience of witnesses who are still employed by Defendant." (collecting cases)). Because all of the identified nonparty witnesses reside outside Texas, this factor also favors transfer. *See Frederick,* 558 F.Supp.2d at 704.

***7** The fourth factor, all other practical problems that make trial of a case easy, expeditious and inexpensive, weighs slightly in favor of transfer. On the one hand, transfer may cause a delay in resolving this case. In addition, because of the acrimonious history between the parties and the numerous back-and-forth motions, this court is familiar with the issues; a new judge will not be. On the other hand, this case—though a year old—has not substantially advanced because it has been mired in discovery disputes. Furthermore, because of the substantial costs of appearing in person, this court has allowed Zouvelos and Mancini, who are representing themselves, to appear by telephone for pretrial proceedings, which has proven cumbersome and frustrating for all involved. The resolution of this case will on balance be served by a transfer to New York, where the pro se defendants can appear in person for

court proceedings. This factor weighs in favor of transfer, though less so than the first three private-interest factors.

The private-interest factors, on balance, support transfer.

B. Public–Interest Factors

The first public-interest factor, the administrative difficulties flowing from court congestion, is neutral. This court has previously recognized that "[t]he Houston Division [of the Southern District of Texas] is an exceedingly busy division." *In re Marquette Transp. Co. Gulf–Inland, LLC,* No. Civ. A. H–12–0623, 2012 WL 2375981, at *2 (S.D.Tex. June 21, 2012); *accord Choice Hotels Int'l, Inc. v. J. Bhagwanji, Inc.,* Civ. A. No. 4:11–cv–03768, at *3 (S.D.Tex. Dec. 30, 2011). The Eastern District of New York is similarly an extremely busy court. *See Federal Court Management Statistics: District Courts—September 2011,* UNITED STATES COURTS, ht tp://www.uscourts.gov/Statist ics/FederalCourtManagementStatistics/DistrictCourtsSep2011.aspx (last visited July 12, 2012) (showing that, as of September 30, 2011, the Southern District of Texas had 10,627 cases pending while the Eastern District of New York had 9,682 cases pending). The statistics do show that, on average, a civil case will go to trial more quickly in the Southern District of Texas than in the Eastern District of New York. *See id.* (showing that, as of September 30, 2011, the median time from filing to trial of civil cases in the Southern District of Texas is 20.1 months, while the median time in the Eastern District of New York is 32.9 months); *see also* 15 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3854 (explaining that "what is relevant to the question of whether to transfer a case" under this factor "is that getting to trial may be speedier in another district because of its less crowded docket"). A trial may occur more quickly in the Eastern District of New York, given that Zouvelos will be able to appear in person at all pretrial hearings, as opposed to by telephone before this court, which will both aid and expedite the judicial process. And the work already done on the numerous discovery disputes is likely to shorten the time to trial. This factor, in sum, is neutral, weighing neither in favor of nor against transfer.

***8** The second factor, the local interest in having localized interests decided at home, is either neutral or slightly favors transfer. FCS's causes of action arise from bail bonds issued in New York, Zouvelos's alleged failures to maintain adequate records of those bonds and of the payments made to indemnitors and to third-party vendors, and, in general, to ensure proper return of collateral to indemnitors. In short, all of the actions leading to this lawsuit occurred in New York. On the other hand, FCS is a Texas company and Texas has an interest in the legal rights of its corporations. On balance, however, New York has a greater connection to this lawsuit than Texas. *See, e.g., Wells Fargo Bank, N.A. v. Bank of Am., N.A.,* Civ. A. No. 3:10–CV–1825–L, 2010 WL 5287538, at *4 (N.D.Tex. Dec.23, 2010) (finding this factor "either neutral or weigh[ing] slightly in favor of transfer" when the plaintiff's principal place of business is in the transferor forum but the acts giving rise to the lawsuit occurred in the transferee forum); *Kelly Law Firm, P.C. v. An Attorney for You,* 679 F.Supp.2d 755, 771 (S.D.Tex.2009) (finding this factor neutral in a commercial dispute between the plaintiff, a company based in the transferor forum, and the defendant, a company based in the transferee forum).

The third factor, the familiarity of the forum with the law that will govern the case, weighs slightly against transfer. This is a diversity case. Under the agreements' choice-of-law provision,[4] the contractual causes of action arise under Texas common law. It is true that "Texas district courts, naturally, will be the most familiar with Texas statutes and common law." *LED Sign Co. v. Hwee,* Civ. A. No. H–08–1463, 2008 WL 5114957, at *6 (S.D.Tex. Dec.3, 2008). But this factor "is given significantly less weight when the case involves basic or sufficiently well-established, as opposed to complex or unsettled, issues of state law or when there is no reason to believe that the applicable law of the forum differs markedly from the law of the proposed transferee state." 15 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3854; *accord, e.g., Hawley v. Accord N. Am., Inc.,* 552 F.Supp.2d 256, 261 (D.Conn.2008); *Elemary v. Philipp Holzmann A.G.,* 533 F.Supp.2d 144, 153–54 (D.D.C.2008); *Frazier v. Comm. Credit Equip. Corp.,* 755 F.Supp. 163, 168 (S.D.Miss.1991). None of FCS's causes of action entail legally complex questions of state law and FCS has not argued that Texas law on breach of contract differs markedly from New York law. This factor weighs only slightly against transfer. *See Hawley,* 552 F.Supp.2d at 261.

On balance, the public-interest factors are neutral.

C. The Parties' Contractual Forum–Selection Clause

As noted, the parties' forum-selection clause is properly considered in the § 1404(a) analysis. *See Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S. 22, 29–30, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) ("The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences."). But "the existence of a forum selection clause is merely one factor for the court to consider under § 1404(a)." *Merchants & Farmers Bank v. Marquette Equip. Fin., LLC,* Civ. A. No. 1:09CV11, 2009 WL 2767678, at *1 (N.D.Miss. Aug.27, 2009); *see also Williamson–Dickie Mfg. Co. v. M/V HEINRICH J,* 762 F.Supp.2d 1023, 1029 (S.D.Tex.2011) ("Although the forum selection clause is a significant factor in the transfer analysis, on it[s] own it is insufficient to justify transfer."); *Canvas Records, Inc. v. Koch Entm't Distribution, LLC,* Civ. A. No. H–07–0373, 2007 WL 1239243, at *5 (S.D.Tex. Apr.27, 2007) (same). "A forum selection clause does not compel transfer if the factors in Section 1404(a) militate against transfer." *Williamson–Dickie Mfg. Co.,* 762 F.Supp.2d at 1029. And when "a forum selection clause is written in permissive rather than mandatory terms, federal judges understandably accord it less weight in the Section 1404(a) analysis." 15 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3854.1.

***9** The forum-selection clause at issue in this case reads, in relevant part: "The parties hereto do hereby consent and stipulate to the jurisdiction (at the discretion of Company) of the courts in the State of Texas, County of Harris or of the General Agent's home state for any action brought under this Agreement." (Docket Entry No. 80, Ex. B, ¶ 29). "For a forum selection clause to be exclusive [or mandatory], it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties' intent to make that jurisdiction exclusive." *City of New Orleans v. Mun. Admin. Servs., Inc.,* 376 F.3d 501, 504 (5th Cir.2004); *see also UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia,* 581 F.3d 210, 219 (5th Cir.2009) ("Mandatory forum-selection clauses that require all litigation to be conducted in a specified forum are enforceable if their language is clear."). The forum-selection clause in this case does not mandate Texas as the exclusive forum. The "at the discretion of Company" language allows FCS to bringing suit in any state. The language allowing suit in "the courts ... of the General Agent's home state" expressly envisions a lawsuit in a New York court. The permissive forum-selection clause, which allows New York as a potential forum, does not change the balance of the relevant factors. Nor is the balance upset by FCS's choice of this Texas forum in which to bring its suit. *See In re Horseshoe Entm't,* 337 F.3d 429, 434 (5th Cir.2003) (explaining that "the plaintiff's choice of forum is clearly a factor to be determined but in and of itself is neither conclusive nor determinative"). The balance of the private-interest factors—particularly the relative convenience to nonparty witnesses, "the most important factor under § 1404(a)," *Mid–Continent Cas. Co.,* 629 F.Supp.2d at 762—and the public-interest factors supports transferring this case to the Eastern District of New York.

After careful consideration, this court concludes that Zouvelos has met his burden of establishing that the Eastern District of New York is clearly more convenient than this court. *See also Fin. Cas. & Surety, Inc. v. Mascola,* Civ. A. H–11–0120, 2011 WL 3020934, at *3–5 (S.D.Tex. July 22, 2011) (granting, under § 1404(a), motion to transfer a lawsuit brought in the Southern District of Texas by FCS against a bail-bond agent operating in New Jersey to the District of New Jersey).

III. Conclusion

Zouvelos's motion to transfer venue, (Docket Entry No. 82), is granted. This action is transferred to the United States District Court for the Eastern District of New York. The remaining motions-FCS's motion to dismiss the amended counterclaims, Zouvelos's motion for leave to file second amended counterclaims, and FCS's motions to compel—are denied, but without prejudice to reassertion before that court. The court will enter a separate order of transfer.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2886861

Footnotes

1 There are textual variations in the forum-selection clauses, all of which are *de minimis.*

(*See* Docket Entry No. 44, at 5 n. 2).

Zouvelos had moved to stay these proceedings pending the outcome of the regulatory investigation. (*See* Docket Entry No. 74). The court denied that motion, in large part because FCS is not a party to that investigation. (Docket Entry No. 79).

"At the discretion of Company, the Agreement is to be interpreted in accordance with the laws of the State of Texas, where Company is based[.]" (Docket Entry No. 80, Ex. B, ¶ 29). FCS is assumed to have selected Texas law by filing suit in Texas.

End of Document

EXHIBIT D

2004 WL 2203440
United States District Court,
W.D. Texas, San Antonio Division.

LCW AUTOMOTIVE CORPORATION, Plaintiff,
v.
RESTIVO ENTERPRISES, d/b/
a Limelite Coach Works Defendant.

No. SA–04–CA–0361–XR.
|
Sept. 24, 2004.

Attorneys and Law Firms

Richard P. Corrigan, Attorney at Law, San Antonio, TX, for Plaintiff.

Richard R. Fancher, Stephen J. Chapman, Barker, Leon, Fancher & Matthys, LLP, Corpus Christi, TX, for Defendant.

ORDER

RODRIGUEZ, J.

***1** On this date the Court considered Defendant's Motion to Dismiss for lack of personal jurisdiction. Defendant claims that it does not have sufficient contacts with the state of Texas to enable Plaintiff to file suit against it in Texas. After consideration of Defendant's motion, as well as Plaintiff's Complaint, Plaintiff's Response in opposition of Defendant's motion, and the affidavits accompanying the filings of both parties, the Court is of the opinion that the motion should be GRANTED and this case should be DISMISSED (docket no. 3).

I. Factual and Procedural Background

Plaintiff is a Texas corporation that designs, converts and manufactures customized limousines. Plaintiff has been an interior designer of limousines for more than 30 years and sells its customized limousines to consumers worldwide. Plaintiff markets its products through various media, including its website, *www.lcwlimo .com.* This website includes various photographs of Plaintiff's customization process, including photographs of its factory, products, employees, building methods and equipment.

Defendant is a California corporation that similarly designs, converts and manufactures customized limousines. [1] Defendant does not maintain a place of business in Texas, has no employees, servants, or agents within the State, and has no customers in the State. Defendant does, however, maintain various websites that are accessible in Texas, including *www.limelitelimo.com, www.hummerstretch.com, www.stretchedhummer.com, www.longlimo.com, www.hummerbuilder.com,* and *www.buildalimo.com.* [2] Plaintiff alleges that Defendant has misappropriated photographs and language from Plaintiff's website and placed them on both Defendant's website and Defendant's advertising brochures.

On approximately December 11, 2003, Plaintiff notified Defendant of its position and requested Defendant cease its activities. Plaintiff subsequently filed this action on April 29, 2004. Plaintiff seeks declaratory relief, injunctive relief, and damages under various causes of action, including copyright infringement under 17 U.S.C. §§ 101 *et seq.,* unfair competition under 15 U.S.C. § 1125(A), violations of the Texas Deceptive Trade Practices Act, TEX. BUS. & COM.CODE § 17.46, and common law unfair competition. Defendant has filed the instant motion to dismiss prior to the filing of its answer. FED. R. CIV. P. 12(b)(3). Defendant asserts that this Court does not have *in personum* ("personal") jurisdiction over it and that this suit should be dismissed.

II. Personal Jurisdiction Standard

A federal court may exercise personal jurisdiction only to the extent that it is permitted by the state long arm statute if exercising jurisdiction does not violate due process guaranteed by the Fourteenth Amendment of the United States Constitution. *See Allred v. Moore & Peterson,* 117 F.3d 278, 281 (5th Cir.1997). When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the burden is on the plaintiff to establish that jurisdiction exists. *Wilson v. Belin,* 20 F.3d 644, 648 (5th Cir.1994). Where a motion to dismiss for lack of personal jurisdiction does not raise any issues of fact, a court need not resort to discovery or an evidentiary hearing. *Wyatt v. Kaplan,* 686 F.2d 276, 284 (5th Cir.1982). When the Court rules on the

motion without an evidentiary hearing, the plaintiff may establish personal jurisdiction by presenting a *prima facie* case that personal jurisdiction is proper, *id.,* instead of by a preponderance of the evidence. *WNS, Inc. v. Farrow,* 884 F.2d 200, 203 (5th Cir.1992). Allegations in the plaintiff's complaint are taken as true except to the extent that they are contradicted by affidavits presented by the defendant. *Wyatt,* 686 F.2d at 282–83 n. 13. Any genuine, material conflicts between the facts established by the parties' affidavits and other evidence are resolved in favor of the plaintiff. *Jones v. Petty–Ray Geophysical Geosource, Inc.,* 954 F.2d 1061, 1067 (5th Cir.1992). The Court will not, however, accept conclusory allegations of fact as true. *Panda Brandywine Corp. v. Potomac Elec. Power Co.,* 253 F.3d 865, 868 (5th Cir.2001).

***2** In order to exercise jurisdiction over Defendant in Texas, the Court "can use a state long-arm statute only to reach those parties whom a court of the state could also reach." *Burstein v. State Bar of California,* 693 F.2d 511, 514 (5th Cir.1982). Under the Texas long arm statute, a nonresident may be subject to personal jurisdiction if the nonresident commits "acts constituting doing business" in Texas. *See* TEX. CIV. PRAC. & REM.CODE §§ 17.041–.045. This requirement is interpreted broadly as spanning to the limits of due process under the United States Constitution. *Gundle Lining Const. v. Adams County Asphalt,* 85 F.3d 201, 204 (5th Cir.1996) (citing *Schlobohm v. Schapiro,* 784 S.W.2d 355, 357 (Tex.1990)).

Exercise of personal jurisdiction over a nonresident defendant satisfies due process when two requirements are met. First, the nonresident defendant must have purposefully availed itself of the benefits and protections of the forum state by establishing "minimum contacts" with that state. *Marathon Oil Co. v. A.G. Ruhrgas,* 182 F.3d 291, 294 (5th Cir.2001). The minimum contacts prong is divided into two separate analyses: contacts that give rise to specific jurisdiction and those that give rise to general jurisdiction. *Id.* at 294–95. Exercise of specific jurisdiction is appropriate when the nonresident's contacts with the forum state arise from or are directly related to the cause of action. *Id.* at 295. Exercise of general jurisdiction is appropriate where the nonresident's contacts with the forum state are not related to the plaintiff's cause of action, but are continuous and systematic. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 415–16, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). Second, exercising jurisdiction over the nonresident defendant must not offend traditional notions of fair play and substantial justice. *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). Plaintiff has nominally limited its argument to specific jurisdiction, but makes arguments that fall within the ambit of general jurisdiction.

III. Analysis

Defendant argues that Plaintiff has not established a *prima facie* case that personal jurisdiction is proper. Plaintiff seeks to establish personal jurisdiction in Texas based on at least three contacts with the State. First, Plaintiff argues that Defendant's websites are sufficient to establish jurisdiction because the cause of action arises in part from the use of photographs on Defendant's website. Second, Plaintiff argues that jurisdiction is proper because Defendant has advertised in at least two nationally distributed publications. Third, Plaintiff argues that jurisdiction is proper because Defendant sent a brochure to the Limousine Industry Council in San Antonio, Texas which included the allegedly infringing material. None of these contacts are sufficient, by themselves or in conjunction, to establish Plaintiff's *prima facie* case of personal jurisdiction in this Court.

A. Defendant's Websites

***3** Plaintiff argues that Defendant's websites are sufficient to establish jurisdiction. Defendant's websites contain information about Defendant's business, including pictures of the manufacturing process, and also contains contact information, including Defendant's address, toll-free number and e-mail address. There is no other discernable way to contact Defendant through the websites. There is no avenue for a customer to place an order through the website. According to Phil Restivo, Defendant's President, Defendant does not have any customers in Texas and has never had any orders from customers in Texas. Restivo asserts that the purpose of Defendant's websites is advertisement and that the websites do not have the capability of processing funds or orders, but merely provides contact information for potential customers. Plaintiff essentially argues that the display of a toll-free number and e-mail address for the specific purpose of attracting customers is sufficient for the Court to find that Defendant has subjected itself

to jurisdiction in any state in which the websites are accessible.

Despite Plaintiffs contentions, a prominently displayed toll-free number or e-mail address on a website in conjunction with advertising is not sufficient to establish personal jurisdiction. *See Quick Technologies, Inc. v. Sage Group PLC,* 313 F.3d 338, 345 (5th Cir.2003). The Fifth Circuit has established a standard for assessing personal jurisdiction in Internet cases. In *Mink v. AAAA Development LLC,* the Fifth Circuit adopted the "sliding scale" test set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc. Mink,* 190 F.3d 333, 336 (5th Cir.1999) (citing *Zippo,* 952 F.Supp. 1119 (W.D.Pa.1997)). Texas district courts have interpreted *Mink*' s adoption of *Zippo* to apply in both general jurisdiction and specific jurisdiction cases. *Zippo* requires a court to look to the "nature and quality of commercial activity that an entity conducts over the Internet." *Zippo,* 952 F.Supp. at 1124. The level of activity conducted may be classified into three categories. On one outer limit is the first category, which consists of situations where a defendant does business over the Internet by entering into contracts with residents of other states by knowingly and repeatedly transmitting computer files over the Internet. *Id.* Jurisdiction is proper in these situations. On the other outer limit is the third category, which consists of situations where a defendant has merely posted information on an Internet website which is accessible to out of state users. *Id.* Jurisdiction is not proper in these situations. In between these limits is the second category. This category consists of situations where a defendant has a website that allows a user to exchange information with a host computer. *Id.* Jurisdiction is determined in these types of cases by looking at "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *Id.* The more interactive and commercial the website is, the more likely it is that a court will find that the minimum contacts requirement is met. *See, e.g., Carrot Bunch Co., Inc. v. Computer Friends, Inc.,* 218 F.Supp.2d 820, 825 (N.D.Tex.2002).

***4** Whether the Court looks at Defendant's websites as falling within *Zippo*' s second or third category, it is clear that the websites themselves are not sufficient to establish jurisdiction. The websites may be best categorized as "passive advertisements," similar to any other advertisement circulated nationally that gives the reader the opportunity to order by calling a phone number or writing a letter to a given address. *See Singletary v. B.R.X., Inc. .,* 828 F.2d 1135, 1136–37 (5th Cir.1987) (concluding that advertisements by themselves are generally insufficient to establish personal jurisdiction). The only way to contact Defendant if one were to access the websites would be to call the toll-free number or write an e-mail to the provided address. There is no way to order any of Defendant's product through the websites, nor is there apparently any way to order any of Defendant's products without affirmatively contacting one of Defendant's agents.

Plaintiff bases its argument on two cases in which the district court held jurisdiction to be proper where the defendant's website included a toll-free sales number. *See American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.,* 106 F.Supp.2d 895 (N.D.Tex.2000); *Inset Systems, Inc. v. Instruction Set, Inc.,* 937 F.Supp. 161 (D.Conn.1996). In neither of these cases, however, did the court rest on the simple inclusion of a toll-free number on the defendant's website.

In *American Eyewear,* the plaintiff based personal jurisdiction over the nonresident defendant on the defendant's website. The defendant's website allowed anyone with Internet access to access the site and make purchases. *American Eyerwear,* 106 F.Supp.2d at 898. Customers completed order forms online that specified the products they ordered, their shipping address, and their credit card number. *Id.* The court found jurisdiction based on the fact that "sales to Texas residents occurred almost daily and typically involved multiple transactions each day," even though these transactions constituted fewer than 1/2% of the defendant's total sales. *Id.* While the court noted that the defendant's website prominently displayed a toll-free sales number, it did not base its holding on this fact alone. It was this toll-free number, in conjunction with the defendant's admitted emphasis on attempting to sell to every person that had Internet access that allowed the court to find jurisdiction. [3] *Id.* at 901–03. Defendant's website does not allow the same scope of interaction as the *American Eyewear* defendant's website. Users cannot complete order forms on Defendant's website. They cannot communicate with defendant through the website. The only way potential customers can communicate with Defendant is by making contact, either through the telephone or through e-mail.

Inset Systems speaks more directly to Plaintiff's argument. There, the defendant used the plaintiff's trademark both in its website name and in its toll-free number. *Inset Systems,* 937 F.Supp. at 163. The court found that jurisdiction was proper based on its finding that the defendant had "directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states." *Id.* at 165. The court essentially rested its decision on the fact that Internet advertising is available continuously to all Internet users, and therefore the defendant had purposefully directed its advertising activities at customers in every state in which Internet users had access to the website. *Id.* While noting that there is some dispute as to the continued validity of this decision,[4] the Court is not prepared to follow its reasoning in this case. Personal jurisdiction should not be based on the mere fact that Defendant advertises over a website accessible throughout the world, or the fact that Defendant places a toll-free number or e-mail address on its site inviting inquiries from prospective customers.

***5** This case falls far below other cases within the federal district courts of Texas that have attempted to adequately define the line regarding the exercise of jurisdiction. As noted above, this case has no resemblance to the website at issue in *American Eyewear.* Similarly, this case does not have the same level of interaction as the defendant's website in the case of *People Solutions Inc. v. People Solutions Inc.,* No. CIV.A.399–CV–2339–L, 2000 WL 1030619 (N.D.Tex. July 25, 2000), in which the court refused to find personal jurisdiction. In that case, customers could test the defendant's products, download product brochures and information, and order products online. *Id.* at *1. The court found no personal jurisdiction, however, because it found no evidence that the defendant had actually ever sold any products to, or contracted with, anyone in Texas. *Id.* at *4. The court noted that "[p]ersonal jurisdiction should not be premised on the mere possibility, with nothing more, that Defendant may be able to do business with Texans over its web site; rather, Plaintiff must show that Defendant has 'purposefully availed itself' of the benefits of the forum state and its laws." *Id.* In this case, Plaintiff similarly bases its claim on the "mere possibility, with nothing more, that Defendant may be able to do business with Texans over its web site." *See also Mink,* 190 F.3d at 337 (holding that a website that provided users with a printable mail-in order form and that contained a toll-free telephone number, mailing address, and e-mail address for the defendant, but which could not be used by customers to place orders did not subject the defendant to personal jurisdiction). Therefore, the Court refuses to find that it has personal jurisdiction over Defendant based solely on Defendant's website.

B. Defendant's Advertisements

Plaintiff also attempts to base its claim of personal jurisdiction on the fact that Defendant has advertised in at least two publications distributed nationally.[5] "Advertising in nationally-circulated trade publications may be sufficient to constitute a 'purposeful availment' of the facilities of a state in which the publication circulates." *Loumer v. Smith,* 698 F.2d 759, 763 (5th Cir.1983). However, the mere fact that a defendant has placed advertisements in nationally circulated publications is insufficient, in itself, to subject a nonresident defendant to personal jurisdiction. *Id.* Advertisements have generally been thought insufficient to establish personal jurisdiction. *Singletary,* 828 F.2d at 1136–37 (concluding that advertisements did not establish personal jurisdiction where there was no evidence that the "claim arose out of or was related to" the advertisement). Advertisements in national journals will also not establish personal jurisdiction. *See Wenche Siemar v. Learjet Acquisition Corp.,* 966 F.2d 179 (5th Cir.1992). Accordingly, the mere fact that Defendant has advertised in two publications with national circulation, by itself, will not subject Defendant to jurisdiction.

C. Defendant's Brochure

***6** Plaintiff also argues that Defendant is subject to jurisdiction in this Court based on the fact that it mailed a promotional brochure to the office of the Limousine Industry Council in San Antonio. The Fifth Circuit has consistently been hesitant to establish personal jurisdiction based on a single contact with the forum state. In *Growden v. Ed Bowlin & Associates, Inc.,* 733 F.2d 1149, 1151 (5th Cir.1984), the Court refused to find personal jurisdiction where the defendant had made one isolated sale within the forum state. The Court noted that the defendant had not sought out the plaintiff, who lived in the forum state. *Id.* The defendant had never sent representatives, inspectors, or repair or service personnel to the forum state. *Id.* In fact, the only contact the defendant had with the forum state in regard to the sale of an airplane to the plaintiff was the plaintiff's placement of an order over the phone.[6] Similarly, in *Singletary,*

the Fifth Circuit held that personal jurisdiction could not be had based on a single sale within the forum state where that sale had nothing to do with the claim at issue. *Singletary,* 828 F.2d at 1136. The Court also refused to find sufficient contacts with the forum state based on direct advertisements by the defendant within the forum state where that advertisement did not give rise to the claim. *Id.* at 1137.

While the Court is mindful of the fact that "[e]ven a single contact can support specific jurisdiction," *American Eyewear,* 106 F.Supp.2d at 900 (citing *Bearry v. Beech Aircraft Corp.,* 818 F.2d 370, 374 (5th Cir.1987)), and that a portion of Plaintiff's cause of action arises from the alleged infringing material contained within the brochure, it is not appropriate to exercise personal jurisdiction based on this single mailing. Plaintiff asserts that it is "logical and possible [that] the infringing brochures were also sent to other residents listed in the July 2003 Limousine Digest Magazine, Page 120, including two Texas organizations." The Court cannot accept this conclusory allegation of fact as true. *See Panda Brandywine Corp.,* 253 F.3d at 868. Plaintiff is unable to allege more than a single contact with the State of Texas. This contact falls far below what is required to establish personal jurisdiction on its own. The mere fact that Defendant has sent a brochure to a industry group in the State of Texas is not enough, without more, to find that it purposefully availed itself of the benefits and protections of the State. Therefore, the Court cannot exercise personal jurisdiction over Defendant based on the mailing of the brochure to the Limousine Industry Council in Texas.

D. Combination Of Defendant's Contacts

Plaintiff's chief argument is that the combination of Defendant's contacts with the State of Texas authorizes the Court to exercise personal jurisdiction over Defendant. Plaintiff analogizes this case to the case of *International Truck & Engine Corp. v. Quintana,* 259 F.Supp.2d 553 (N.D.Tex.2003). In *Quintana,* the court found personal jurisdiction based on a combination of contacts with the State of Texas, including: (1) attending trade shows in Texas; (2) sending unsolicited promotional materials to Texas; (3) selling products in Texas; (4) calling and soliciting business in Texas; and (5) advertising on an internet website accessible in Texas. *Id.* Plaintiff argues that the combination of Defendant's contacts are similar enough to the contacts in *Quintana* to allow the Court to exercise personal jurisdiction. The flaw in this argument, however, is that there is one critical difference between this case and *Quintana:* the fact that Defendant has never had any customers in Texas. A defendant is much more likely to have purposefully availed itself of the benefits and protections of the forum state when it has entered into obligations within the state. Had Defendant sold products within Texas, in combination with its other contacts, it would be much more likely that the Court could exercise personal jurisdiction over it. While this factor is not determinative, it would be a factor that carried great weight when examining Defendant's contacts with the State of Texas. As it is, Defendant's contacts with the State are insufficient to find that the Court may exercise personal jurisdiction over it.

E. Effects Test

***7** As a final argument, Plaintiff argues that the Court may exercise jurisdiction over Defendant based on the "effects" test of *Calder v. Jones,* 465 U.S. 783, 789–90, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Under the effects test, minimum contacts exist where a nonresident defendant expressly aims intentionally tortious activity into the forum state. *Guidry v. United States Tobacco Co., Inc.,* 188 F.3d 619, 628 (5th Cir.1999) ("Even an act done outside the state that has consequences or effects within the state will suffice as a basis of jurisdiction in a suit arising from those consequences if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct."). The effects test applies to intentional business torts, including copyright infringement. *Isbell v. DM Records, Inc.,* No.CIV.A.3:02–CV–1408–G, 2004 WL 1243153, at *10 (N.D.Tex. June 4, 2004). The Court may therefore exercise jurisdiction based on defendant's intentional conduct that is purposefully directed at the State of Texas.

In *Isbell,* the court based its finding of personal jurisdiction on the fact that the defendant "could have reasonably foreseen that its licensee would sell ... [certain products] in Texas, and that [the plaintiff] would feel the effects [in Texas]." The court in *Isbell* also based its holding on certain other district court decisions [7] in which the courts held the sale or the attempted sale of infringing material in the forum state was sufficient for jurisdiction. The Court feels that Defendant's actions in this case, were they to amount to intentional tortious activity, do not rise to the level necessary to exercise jurisdiction under the effects test. Defendant has not purposefully

directed action at the State of Texas other than sending a brochure to a trade group, which has its office in Texas. Plaintiff's reasoning would stretch the effects test beyond its existing limits and encompass essentially all advertisements that contain allegedly infringing material, thereby subjecting virtually all companies that advertise in nationally circulated publication to personal jurisdiction in the State. In light of the fact that advertisements themselves are generally thought not to constitute a valid basis for personal jurisdiction, the Court is not prepared to expand *Calder's* effects test to exercise jurisdiction over Defendant based on one brochure which has led to neither the sale of a single product, nor the enrollment of a single customer, in Texas.

IV. Conclusion

Defendant has moved for dismissal of this copyright infringement case based on a lack of personal jurisdiction. Plaintiff has attempted to show its *prima facie* case of personal jurisdiction based on a combination of three separate contacts with the State of Texas by Defendant: (1) Defendant's website, which includes a prominently displayed toll-free number and e-mail address; (2) Defendant's advertisements in two nationally circulated publications; and (3) Defendant's brochure which was mailed to a trade group in Texas. These contacts are not sufficient in themselves, or in combination, to find that Defendant has purposefully availed itself of the benefits and protections of the State of Texas and therefore has sufficient minimum contacts with the State for the Court to exercise personal jurisdiction. Plaintiff has been unable to make a *prima facie* case as to either general or specific jurisdiction. Accordingly, the Court GRANTS Defendant's motion (docket no. 3) and DISMISSES this case.

All Citations

Not Reported in F.Supp.2d, 2004 WL 2203440, Fed. Sec. L. Rep. P 28,885

Footnotes

1 There is some dispute as to Defendant's proper name, which is of no concern at this moment.

2 Each of these websites apparently re-route the user to Defendant's principal website, www.limelitelimo.com.

3 The court noted that the defendant's President "concede[d] that [the defendant] attempts to reach every person, including all Texans, who have Internet access and to provide them with the opportunity to purchase [the defendant's] products from anywhere, at any time." *American Eyewear, Inc. v. Peeper's Sunglasses & Accessories, Inc.,* 106 F.Supp.2d 895, 901 (N.D.Tex.2000). In contrast, Defendant's President denies having any customers in Texas at any time.

4 *See Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.,* 297 F.Supp.2d 1154, 1159 (W.D.Wisc.2004) (calling *Inset Systems* into doubt and noting that its reasoning would likely allow anyone with a website to be sued anywhere in the world); *Milne v. Catuogno Court Reporting Servs., Inc.,* 239 F.Supp.2d 195, 201 (D.Conn.2002) (noting the dispute over the continued validity of *Inset Systems*).

5 Plaintiff does not give the names of these publications. As Defendant has not contradicted this claim, however, and as the Court must take all uncontroverted, non-conclusory allegations of Plaintiff as true at this stage, the Court accepts Plaintiff's statement as true.

6 The plaintiff also argued that personal jurisdiction was proper under the theory of general jurisdiction based on the defendant's contacts with the state, including placement of advertisements in two national publications. *Growden v. Ed Bowlin & Associates, Inc.,* 733 F.2d 1149, 1151 (5th Cir.1984). The Court rejected this argument.

7 *See, e.g., Johnson v. Tuff N Rumble Management, Inc.,* No.99–1374, 1999 WL 1201891, at * (E.D.La. Dec.15, 1999) (finding specific personal jurisdiction under the effects test where the defendant knew the plaintiff would "feel the brunt of the injury" in Louisiana and the defendant "could reasonably foresee that its affiliate would use the licensing agreement to sell the [allegedly infringing] song in Louisiana"); *Editorial Musical Latino Americana, S.A. v. Mar International Records, Inc.,* 829 F.Supp. 62, 64 (S.D.N.Y.1993) ("Offering one copy of an infringing work for sale in New York, even if there is no actual sale, constitutes commission of a tortious act within the state sufficient to imbue this Court with personal jurisdiction over the infringers."); *Lipton v. The Nature Company,* 781 F.Supp. 1032, 1035–36 (S.D.N.Y.1992) (finding jurisdiction, in part, because a license agreement to sell products allegedly violating a copyright was arguably a tortious act entered into out of state which could reasonably have been foreseen to have consequences within the forum state).

2004 WL 2203440, Fed. Sec. L. Rep. P 28,885

End of Document

EXHIBIT E

2017 WL 5494087
Only the Westlaw citation is currently available.
United States District Court, W.D.
Texas, San Antonio Division.

Velma Liza MARIN, Individually, and as Next Friend of Minors, J.A.G.–M. and S.Y.M., and as Representative of Estate of Carlos Y. Marin Calvo, and on Behalf of All Other Entitled to Recover, and Mercedes Calvo, Deceased, [1] Plaintiffs,
v.
MICHELIN NORTH AMERICA, INC., Defendant.

SA–16–CA–497–FB (HJB)
|
Signed 07/13/2017

Attorneys and Law Firms

Jeffrey Holmes Richter, David E. Harris, Jason P. Hoelscher, Sico, Hoelscher Harris & Braugh LLP, Jerry Guerra, Law Office Of Jerry Guerra, Corpus Christi, TX, Donald Lee Crook, Jr., Wayne Wright, LLP, Julian T. Lopez, San Antonio, TX, for Plaintiffs.

Chris A. Blackerby, Thomas M. Bullion, III, Germer Gertz Beaman & Brown, Debora B. Alsup, Thompson & Knight LLP, Austin, TX, Steven D. Jansma, Norton Rose Fulbright US LLP, San Antonio, TX, for Defendant.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Henry J. Bemporad, United States Magistrate Judge

***1 To the Honorable United States District Judge Fred Biery**:
This Report and Recommendation concerns Defendant's Renewed Motion to Dismiss for Lack of Personal Jurisdiction (Docket Entry 32). Dispositive motions in this case have been referred to the undersigned for recommendation. (*See* Docket Entry 11.) For the reasons set out below, I recommend that Defendant's Motion (Docket Entry 32) be **DENIED.**

I. Jurisdiction.

The District Court has original jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1) because Plaintiffs and Defendant are citizens of different states and the amount in controversy exceeds $75,000. I have authority to issue this recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

II. Background.

This is a products liability suit arising from a fatal automobile accident that occurred on August 3, 2015. (*See* Docket Entry 1.) At the time of the accident, Carlos Calvo was driving a 1998 Ford Explorer on Interstate Highway 37 in Atascosa County, Texas. (*Id.*) The vehicle's left rear tire tread separated, causing Calvo to lose control and the Explorer to rollover. (*Id.* at 3.) Calvo died as a result of the accident, and his passenger Plaintiff Mercedes Calvo sustained severe injuries. (*Id.*)

Plaintiffs Velma Liza Marin, as representative of the Carlos Calvo Estate, and Mercedes Calvo filed this suit against Defendant Michelin North America, Inc. ("Michelin") on June 2, 2016. (Docket Entry 1.) Plaintiffs assert claims against Michelin for strict product liability and negligence. (Docket Entry 54, at 13–16.) Plaintiffs allege that the tire in question was "originally designed, manufactured, sold and/or placed into the stream of commerce by Defendant [Michelin] with the intent to be sold in the Texas market, wherein it was sold in the State of Texas." (*Id.* at 13.) They claim the subject tire has several manufacturing and design defects, and that "the defective and unreasonably dangerous conditions of the tire were a producing cause of the incident made the basis of this suit, and the injuries and damages sustained by Plaintiffs." (*Id.* at 14.)

On June 22, 2017, by way of their second amended complaint, Plaintiffs added Defendant Wal–Mart Stores, Inc. ("Walmart") to this suit. (Docket Entry 54.) Plaintiffs bring claims against Walmart for negligence, negligent misrepresentation, and negligent undertaking. (*Id.* at 12.) Plaintiffs allege that the Ford Explorer was serviced and inspected at a Walmart store in Corpus Christi, Texas, prior to the accident. (*Id.*) Plaintiffs claim that "the Walmart service technician failed to properly perform the vehicle walk around a/k/a inspection of the vehicle and its tires" even though the "service technician represented to its customer that the subject left rear tire was serviceable and in safe condition and need not be replaced." (*Id.*)

Michelin has moved to dismiss the charges against it for lack of personal jurisdiction. *See* FED. R. CIV. P. 12(b)(2). Michelin alleges that Plaintiffs are unable to show that it is amenable to personable jurisdiction because they "do not know where the tire was purchased, the date of purchase, or whether the tire was in a new or used condition when purchased." (Docket Entry 32, at 3.) Plaintiffs have responded in opposition to the motion. (Docket Entries 46 and 47.)

III. Applicable Law.

***2** If a party raises the defense of lack of personal jurisdiction, the non-moving party bears the burden of proving personal jurisdiction. *Luv N'care, Ltd. v. Insta–Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006). Although the non-moving party bears the burden, "[w]hen a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing ... the nonmoving party need only make a *prima facie* showing, and the court must accept as true the nonmover's allegations and resolve all factual disputes in its favor." *Guidry v. U.S. Tobacco Co., Inc.*, 188 F.3d 619, 625 (5th Cir. 1999); *see also ITL Intern., Inc. v. Constenla, S.A.*, 669 F.3d 493, 496 (5th Cir. 2012) (Court "accept[s] as true the uncontroverted allegations in the complaint and must resolve any factual disputes in favor of the plaintiff"). [2]

Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. *See* FED. R. CIV. P. 4(k)(1)(A) (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"); *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014). Additionally, a federal court may exercise personal jurisdiction over a nonresident defendant only if "the exercise of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment." *McFadin v. Gerber*, 587 F.3d 753, 759 (5th Cir. 2009). In this instance, the state-law and due-process inquiries merge into one, since Texas law permits the exercise of personal jurisdiction to the limits of due process. *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 220 (5th Cir. 2012).

On issues of personal jurisdiction, due process is satisfied if the "nonresident defendant has certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 595 (5th Cir. 1999) (brackets in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "The 'minimum contacts' inquiry is fact intensive and no one element is decisive; rather the touchstone is whether the defendant's conduct shows that it 'reasonably anticipates being haled into court.' " *McFadin*, 587 F.3d at 759 (internal citation omitted).

The "minimum contacts" inquiry may be further subdivided into contacts that give rise to "general" personal jurisdiction, and those that provide "specific" personal jurisdiction. *Choice Healthcare, Inc. v. Kaiser Found. Health Plan of Colo.*, 615 F.3d 364, 368 (5th Cir. 2010). When a defendant has "continuous and systematic general business contacts" with the forum state, the court may exercise "general" jurisdiction over any action brought against that defendant. *Luv N'care Ltd.*, 438 F.3d at 469 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, (1984)). When the contacts are less extensive, the court may still exercise "specific" jurisdiction if a "nonresident defendant has purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities." *Choice Healthcare, Inc.*, 615 F.3d at 368.

IV. Analysis.

***3** Michelin challenges both general and specific jurisdiction in this case. While it does not dispute that it conducts significant business and markets its products in Texas, it argues that those activities are not sufficient to subject it to the general jurisdiction of Texas courts. (Docket Entry 32, at 5–6.) Michelin also argues that Plaintiffs cannot meet their burden of establishing that "there is any suit-related conduct of [Michelin] in Texas regarding the tire in question that could support the Court's exercise of specific jurisdiction over [Michelin]." (*Id.* at 9.)

For the reasons set out below, I find that general jurisdiction over Michelin does not exist. However, I find that the Court may still exercise specific jurisdiction over Michelin in this case.

A. *General Jurisdiction*

General jurisdiction is established where the defendant has "continuous and systematic" contacts with the forum state. *Choice Healthcare, Inc.*, 615 F.3d at 368. "To find

general jurisdiction over the defendant, a defendant's contacts with the forum must be substantial; random, fortuitous, or attenuated contacts are not sufficient." *Id.* For corporations, it will be rare for such jurisdiction to be available in states other than the state of incorporation and the principal place of business. *Daimler AG*, 134 S. Ct. at 760–61. A court may assert general jurisdiction over non-resident corporation "when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

Michelin is a New York corporation with its principal place of business in South Carolina. (*See* Docket Entry 54, at 2–3.) Accordingly, it concedes that it is amenable to general jurisdiction in New York and South Carolina, but not in Texas. (Docket Entry 32, at 8.) Michelin asserts that "Plaintiffs do not allege that [it] has moved its principal place of business to Texas, temporarily or otherwise, or make any other allegations that would qualify this case as an 'exceptional case' where [Michelin] is subject to general jurisdiction." (*Id.* at 7.)

Plaintiffs respond that Michelin is subject to this Court's general jurisdiction because it "has structured itself in such a way that it is 'essentially at home' in Texas." (Docket Entry 46, at 3 (quoting *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919.) Plaintiffs present several stipulated jurisdictional facts to support its position that "Michelin has continuously, systematically, and purposefully conducted business in the State of Texas." (Docket Entry 46, at 31–32.) The jurisdictional facts presented by Plaintiffs include: that Michelin intends for its tires to be sold and marketed in Texas; Michelin has employees in Texas; maintains bank accounts in Texas; owns real property in Texas; has offices in Texas; and has corporate officers in Texas. (*Id.*)

Even considering these facts, however, the Court cannot conclude that it has general jurisdiction over Michelin. While it is irrefutable that Michelin conducts significant business in Texas, the Supreme Court has made clear that it "is unacceptably grasping" to "approve the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business." *Daimler AG*, 134 S. Ct. at 760–61 (quotations omitted). The inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.' " *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919). Fifth Circuit decisions assessing general jurisdiction following the *Daimler* decision confirm that it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business." *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014).

***4** While the jurisdictional facts presented by Plaintiffs establish that Michelin conducts significant business in Texas, those contacts do not appear sufficient to render Michelin essentially at home in the forum state. For that reason, this Court cannot conclude that it has general jurisdiction over Michelin.

B. *Specific Jurisdiction.*

It remains to be determined whether this Court may exercise specific jurisdiction over Michelin. When the defendant lacks the "continuous and systematic contacts" to support general jurisdiction, specific jurisdiction may still be established if "(1) the defendant purposely directed its activities toward the forum state or purposefully availed itself of the privileges of conducting activities there; (2) ... the plaintiffs' cause of action arises out of or results from the defendant's forum-related contacts; and (3) ... the exercise of personal jurisdiction is fair and reasonable." *Monkton Ins. Services, Ltd.*, 768 F.3d at 433.

"In cases involving a product sold or manufactured by a [nonresident] defendant," the Fifth Circuit "has consistently followed a 'stream-of-commerce' approach to personal jurisdiction." *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 177 (5th Cir. 2013). Under the stream-of-commerce approach, "the minimum contacts requirement is met so long as the court 'finds that the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state.' " *Id.* (quoting *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987)). The Fifth Circuit "has consistently held that mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce." *Luv N' care, Ltd.*, 438 F.3d at 470. "Where a defendant knowingly benefits from the availability of a particular state's market for its products, it is only

fitting that the defendant be amenable to suit in that state." *Id.* "Generally, parties invoke and courts rely on stream-of-commerce theory where the defendant does not intentionally direct its product to a forum, but rather places the product in the stream of commerce which eventually brings the product to the forum." *Maxum Indem. Co. v. BRW Floors, Inc.*, 5:15–CV–00167–RCL, 2015 WL 5881584, at *5 (W.D. Tex. Oct. 7, 2015) (citing *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 926).

Michelin claims that "Plaintiffs know nothing about the purchase of the tire—they do not know the date the tire was purchased, whether the tire was new or used when purchased, who purchased the tire, or the person or business from whom the tire was purchased." (Docket Entry 32, at 10.) Michelin asserts that without this information, Plaintiffs cannot meet their burden of proving that Michelin purposely directed its activities toward the forum state. (*Id.*) The Court disagrees.

Evidence in the record establishes that Michelin placed the tire into the stream of commerce with the expectation that it would be used by a consumer in the forum state. The Ford Explorer at issue in this case was owned by Francisco Crescencio Eleno Gomez, a Texas resident. (Docket Entry 46–3, at 6.) Mr. Gomez affirmed during his deposition that he purchased the vehicle in 2001 or 2002, while he was living in Miami, Florida. (*Id.*) At some point after purchasing the vehicle, Mr. Gomez purchased four new Michelin brand tires for his Ford Explorer. (*Id.* at 7.) While Mr. Gomez testified that he could not remember whether he purchased the new Michelin tires in Florida or Texas, it is uncontroverted that the tire at issue was marketed and sold nationwide. Michelin, like any manufacturer of tires for a personal vehicle, necessarily foresaw that such tires would be used in states other than the state in which they were purchased. Such foreseeable use meets the stream-of-commerce test.

***5** Plaintiffs allege the left rear Michelin tire on Mr. Gomez's Ford Explorer suffered a tread separation resulting in fatal and serious injuries to the occupants of the vehicle. (Docket Entry 54, at 10.) The accident occurred in Texas; the parties suffered harm in Texas; the vehicle was maintained in Texas; the vehicle and tire were inspected in Texas; the accident was investigated by officials with the Texas Department of Public Safety; witnesses to the accident are located in Texas; and the vehicle's maintenance records are located in Texas. (Docket Entry 46–1 through 46–10.) Considered in its totality, and with conflicts construed in Plaintiffs' favor, the above evidence is sufficient to present a *prima facie* case that this Court has personal jurisdiction over Michelin. It is foreseeable that a personal-vehicle tire, placed in the stream of commerce, may if defective cause injuries while it is used, including in Texas.

It is also foreseeable that Michelin could be haled into a Texas court to respond to such suits:

> [I]if the sale of a product of a manufacturer or distributor ... is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

World–Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980). In this case, it is not unreasonable for a company with extensive marketing and sales of its product in Texas, and whose product is alleged to have committed the injuries giving rise to the lawsuit in Texas, to be called upon to answer suit in this state. For all the reasons addressed above, Michelin's motion to dismiss should be denied.

V. Conclusion.

For the reasons set out above, I recommend that Defendant's Renewed Motion to Dismiss for Lack of Personal Jurisdiction (Docket Entry 32) be **DENIED**.

VI. Instructions for Service and Notice of Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either: (1) electronic transmittal to all parties represented by an attorney registered as a Filing User with the Clerk of Court pursuant to the Court's Procedural Rules for Electronic Filing in Civil and Criminal Cases; or (2) by

certified mail, return receipt requested, to any party not represented by an attorney registered as a Filing User.

As provided in 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), any party who desires to object to this Report must file with the District Clerk and serve on all parties and the Magistrate Judge written Objections to the Report and Recommendation **within fourteen (14) days after being served with a copy,** unless this time period is modified by the District Court. A party filing Objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections.

A party's failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report will bar the party from receiving a de novo determination by the District Court. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, a party's failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report will bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

All Citations

Not Reported in Fed. Supp., 2017 WL 5494087

Footnotes

1 Plaintiffs indicate in their second amended complaint that Mercedes Calvo is now deceased. (Docket Entry 54, at 1.)

2 Michelin argues that, when the parties have conducted jurisdictional discovery, the plaintiff must prove personal jurisdictional under the heightened "preponderance of the evidence" standard. (Docket Entry 32, at 4 (citing *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1334 (Fed. Cir. 2001).) This argument is without merit. Fifth Circuit precedent merely requires Plaintiffs to make a *prima facie* showing of personal jurisdiction when the court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing. *Luv N' care, Ltd.*, 438 F.3d at 469 ("The plaintiff need not ... establish jurisdiction by a preponderance of the evidence; a *prima facie* showing suffices."). Here, the Court did not hold an evidentiary hearing on this matter; therefore the *prima facie* standard applies.

EXHIBIT F

2014 WL 1338690
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas,
Houston Division.

Lynda ROSEMOND, Plaintiff,
v.
UNITED AIRLINES, INC., Defendant.

Civil Action No. H–13–2190.
|
Signed April 2, 2014.

Attorneys and Law Firms

Roy Wallace Smith, Attorney at Law, Houston, TX, for Plaintiff.

Ethel J. Johnson, Shook, Hardy & Bacon LLP, Houston, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

SIM LAKE, District Judge.

***1** Plaintiff Lynda Rosemond brought this Title VII action against defendant United Airlines, Inc., on July 26, 2013. Pending before the court is Defendant's First Amended Opposed Motion to Transfer Venue ("Motion to Transfer") (Docket Entry No. 15). For the reasons explained below, Defendant's Motion to Transfer will be granted and this case will be transferred to the Alexandria Division of the Eastern District of Virginia under 28 U.S.C. § 1404(a).

I. *Background*

Plaintiff is a flight attendant who was based out of Defendant's Washington–Dulles International Airport hub in Dulles, Virginia. [1] In her complaint, filed on July 26, 2013, Plaintiff alleges that she was sexually harassed by a pilot who also worked for Defendant. [2] Plaintiff further alleges that after she complained of the harassment "her supervisor and others at United Airlines retaliated against her by a coordinated campaign to declare her unfit for duty." [3]

Defendant filed its answer on September 18, 2013. [4] Defendant filed the pending Motion to Transfer on January 22, 2014. [5] On March 7, 2014, Plaintiff filed a response. [6]

II. *Applicable Law*

Under § 1404(a), "[f]or 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). "When considering a § 1404 motion to transfer, a district court considers a number of private- and public-interest factors, 'none of which can be said to be of dispositive weight.' " *Wells v. Abe's Boat Rentals Inc.,* No. H–13–1112, 2014 WL 29590, at *1 (S.D.Tex. Jan.3, 2014) (quoting *Action Indus., Inc. v. U.S. Fid. & Guar. Corp.,* 358 F.3d 337, 340 (5th Cir.2004)). 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." *In re Volkswagen AG,* 371 F.3d 201, 203 (5th Cir.2004) [hereinafter *In re Volkswagen I*] (citing *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 258 n. 6, 70 L.Ed.2d 419 (1981)); *see also Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. o f Tex.,* —— U.S. ——, —— n. 6, 134 S.Ct. 568, 581 n. 6, 187 L.Ed.2d 487 (2013). 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 [or in] the application of foreign law." *In re Volkswagen I,* 371 F.3d at 2 03. The court must "weigh the relevant factors and decide whether, on balance, a transfer would serve 'the convenience of parties and witnesses' and otherwise promote 'the interest of justice.' " *Atlantic Marine,* 134 S.Ct. at 581 (quoting 28 U.S.C. § 1404(a)).

***2** "The [c]ourt must also give some weight to the plaintiff['s] choice of forum." *Atlantic Marine,* 134 S.Ct. at 581 n. 6 (citing *Norwood v. Kirkpatrick,* 349 U.S. 29,

75 S.Ct. 544, 546, 99 L.Ed. 789 (1955)). Thus, the party seeking the transfer " 'must show good cause.' " *In re* and material to [Plaintiff's] claims are ... located, maintained and administered in, near or around Dulles, Virginia." [8] In addition, Plaintiff was "based out of [Defendant's] Washington–Dulles International Airport hub in Dulles, Virginia" and although she is not currently working, "[s]he is still based out of [Defendant's] Dulles, Virginia hub, and her leave of absence is managed by her supervisor in the Virginia hub." [9] Because the relevant employment records are maintained and administered in the Eastern District of Virginia, and because that is the district where Plaintiff would have worked but for the alleged unlawful employment practice, this suit could have originally been filed in the Eastern District of Virginia. [10] 42 U.S.C. § 2000e–5(f)(3).

A. The Private–Interest Factors

1. *The Relative Ease of Access to Sources of Proof*

Bode's affidavit states that the records relevant to Plaintiff's claims are "located, maintained and administered in, near or around Dulles, Virginia." [11] Plaintiff argues that "the files Defendant argues make[ ] [venue in the Southern District of Texas] inconvenient are few" and that "[m]ost files today can be faxed or sent by other electronic means." [12] However, whether the files "can be faxed or sent by other electronic means" will not preclude a conclusion that the location of the files weighs in favor of transfer. *Cf. In re Toa Technologies, Inc.,* No. 13–153, 2013 WL 5486763, at *2 (Fed.Cir. Oct.3, 2013) ("[T]he district court assigned substantial weight to the fact that 'the vast majority of the Defendant's documentation is [ ]stored electronically' and that this digital information is 'effectively stored everywhere, including the Eastern District of Texas[.]' However, this does not negate the significance of having trial closer to where [the] physical documents and employee notebooks are located. The critical inquiry 'is relative ease of access, not absolute ease of access.' " (quoting *In re Radmax, Ltd.,* 720 F.3d 285, 288 (5th Cir.2013))). Because the relevant files are located, maintained, and administered in the Eastern District of Virginia, this factor weighs in favor of transfer.

2. *The Availability of Compulsory Process to Secure the Attendance of Witnesses*

"Under Federal Rule of Civil Procedure 45 (as recently amended), this Court may enforce a subpoena issued to any nonparty witness in the State of Texas to appear at trial, provided the party does not incur substantial expense." *Ingeniador, LLC v. Adobe Sys. Inc.,* No. 2:12–CV–00805–JRG, 2014 WL 105106, at *2 (E.D.Tex. Jan.10, 2014) (citing Fed.R.Civ.P. 45(c)(1)(B)). "Avenue that has 'absolute subpoena power for both deposition and trial' is favored over one that does not." *Thomas Swan & Co. Ltd. v. Finisar Corp.,* No. 2:13–CV–178–JRG, 2014 WL 47343, at *3 (E.D.Tex. Jan.6, 2014) (quoting *In re Volkswagen II,* 545 F.3d at 316).

***3** Bode's affidavit states that "[m]ost of the witnesses who are knowledgeable, pertinent and material to the allegations made by [Plaintiff] in this lawsuit reside in, near or around Dulles, Virginia." [13] However, Defendant has not identified any individuals that it intends to call as witnesses. *See U.S. Ethernet Innovations, LLC v. Samsung Electronics Co., Ltd.,* No. 6:12–CV–398 MHS–JDL, 2013 WL 1363613, at *3 (E.D.Tex. Apr.2, 2013) ("The [c]ourt gives more weight to those specifically identified witnesses and affords less weight to, vague assertions that witnesses are likely located in a particular forum."). Furthermore, the testimony of Defendant's current employees can likely be presented in either court without reliance on the subpoena power. *See Wells,* 2014 WL 29590, at *2 ("[T]he testimony of the individuals ... who are current employees of [the defendant] can be presented in Texas without the need to rely on subpoena power .") (citing *Boutte v. Cenac Towing, Inc.,* 346 F.Supp.2d 922, 933 (S.D.Tex.2004)).

Plaintiff's pretrial disclosures identify a number of medical professionals in the Houston area that Plaintiff intends to call as witnesses. [14] The Eastern District of Virginia would lack subpoena power over these witnesses. *See* Fed.R.Civ.P. 45. In light of Defendant's failure to identify any non-party witnesses for whom compulsory process would be necessary, this factor weighs against transfer.

3. *The Cost of Attendance for Willing Witnesses*

As noted above, Defendant alleges that "most of the witnesses who are knowledgeable, pertinent and material to the allegations made by [Plaintiff] in this lawsuit reside in, near, or around Dulles, Virginia." [15] The court takes judicial notice that this courthouse is approximately 1,215 miles from the Alexandria Division of the Eastern District of Virginia. " 'When the distance between an

existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.' " *In re Volkswagen II,* 545 F.3d at 317 (quoting *In re Volkswagen I,* 371 F.3d at 204–05). "[I]t is an 'obvious conclusion' that it is more convenient for witnesses to testify at home." *Id.* (quoting *In re Volkswagen I,* 371 F.3d at 205).

"In considering the convenience of witnesses, however, the relative convenience to key witnesses and key non-party witnesses is accorded greater weight in the venue transfer analysis" and "the convenience of one key witness may outweigh the convenience of numerous less important witnesses." *Mid–Continent Cas. Co. v. Petroleum Solutions, Inc.,* 629 F.Supp.2d 759, 762–63 (S.D.Tex.2009). Because neither party has identified its key witnesses or explained the relevance of their testimony, the court cannot determine whether any key witnesses will be inconvenienced by transfer. *See Cont'l Airlines, Inc. v. Am. Airlines, Inc.,* 805 F.Supp. 1392, 1396 (S.D.Tex.1992) (" '[T]he party seeking transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover.' " (quoting 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3851, at 425 (1986))). The court therefore concludes that this factor weighs against transfer. *See id.; cf. Sivertson v. Clinton,* No. 3:11–CV–0836–D, 2011 WL 4100958, at *6 (N.D.Tex. Sept.14, 2011) (finding this factor to be neutral when it was unclear whether the witnesses identified by the plaintiff would provide any relevant testimony).

4. *All Other Practical Problems That Make Trial of a Case Easy, Expeditious and Inexpensive*

***4** Plaintiff argues that she "cannot afford to pay her attorney to travel to another District to try this case." [16] However, "[t]he factor of 'location of counsel' is irrelevant and improper for consideration in determining the question of transfer of venue." *In re Horseshoe Entm't,* 337 F.3d 429, 434 (5th Cir.2003). Accordingly, the fact that Plaintiff's counsel is located in Houston does not weigh either for or against transfer.

On the other hand, the events giving rise to Plaintiff's claim of retaliation occurred in the Eastern District of Virginia. Plaintiff alleges that "her supervisor and others at United Airlines retaliated against her by a coordinated campaign to declare her unfit for duty." [17] Plaintiff was based out of Defendant's Washington–Dulles International Airport hub in Dulles, Virginia, when the alleged retaliation occurred "and her [current] leave of absence is managed by her supervisor in the Virginia hub." [18] The court takes judicial notice that Dulles is within the Eastern District of Virginia.

Given the nature of Plaintiff's claims, it would likely be more expeditious to resolve this case in the district where the events occurred and the participants are located. *Cf. WHM Mineral Holdings, L.L.C. v. Bocook Eng'g, Inc.,* No. H–09–2817, 2009 WL 5214097, at *6 (S.D.Tex. Dec.22, 2009) ("The court first notes that in general it is probably more expeditious for a court in Kentucky to resolve a dispute about what someone in Kentucky said about a Kentucky coal mine than it would be for a court in Texas to resolve the same dispute."). The court therefore concludes that this factor weighs in favor of transfer.

B. The Public–Interest Factors

1. *The Administrative Difficulties Flowing from Court Congestion*

"[W]hen considering this factor, 'the real issue is not whether [transfer] will reduce a court's congestion but whether a trial may be speedier in another court because of its less crowded docket.' " *Siragusa v. Arnold,* No. 3:12–CV–04497–M, 2013 WL 5462286, at *7 (N.D.Tex. Sept.16, 2013) (quoting *USPG Portfolio Two, LLC v. John Hancock Real Estate Fin., Inc.,* No. 3:10–CV–2466–D, 2011 WL 1103372, at *5 (N.D.Tex. Mar.25, 2011)). Accordingly, courts often consider the median time interval from case filing to disposition in analyzing this factor. *See id.; ExpressJet Airlines, Inc. v. RBC Capital Markets Corp.,* No. H–09–992, 2009 WL 2244468, at *12 (S.D.Tex. July 27, 2009). The median time between filing and disposition in the Southern District of Texas is 7.2 months, while it is 5.1 months in the Eastern District of Virginia. [19] "This difference in disposition time is negligible and does not weigh in favor of or against transfer." *ExpressJet,* 2009 WL 2244468, at *12 (concluding that a difference of 2.2 months between districts did not weigh either in favor of or against transfer). Accordingly, this factor is neutral.

2. *The Local Interest in Having Localized Interests Decided at Home*

***5** "The location of the alleged wrong is of 'primary importance' in this [c]ourt's venue determination." *Boutte,* 346 F.Supp.2d at 933 (S.D.Tex.2004) (quoting *Speed v. Omega Protein, Inc.,* 246 F.Supp.2d 668, 675 (S.D.Tex.2003)); *see also Molina v. Vilsack,* No. V–09–40, 2009 WL 5214098, at *4 (S.D.Tex. Dec.23, 2009) ("The place of the alleged wrong is considered one of the most important factors in determining a motion to transfer venue." (citing *Devon Energy Prod. Co., L.P. v. GlobalSantaFe S. Am.,* No. H–06–2992, 2007 WL 1341451, at *8 (S.D.Tex. May 4, 2007))). Here, the alleged retaliation occurred in the Eastern District of Virginia.

As noted by Defendant, although Plaintiff alleges that she experienced harassment "during flights," [20] she "avoids any allegation that the alleged discrimination or retaliation occurred in the Southern District of Texas or that any United employee involved in decisions relevant to this lawsuit reside[s] in the Southern District of Texas." [21] Plaintiff was assigned to work in Dulles, her supervisor is in Dulles, the events giving rise to her claim of retaliation occurred in Dulles, and Plaintiff would still be working in Dulles but for the alleged unlawful employment practice. The Eastern District of Virginia thus has a strong local interest in deciding this case. Accordingly, this factor weighs heavily in favor of transfer. *Cf. Hutchinson v. Texas Historical Comm'n,* No. 1:11–CV–65, 2011 WL 6181601, at *2 (E.D.Tex. Sept.12, 2011) ("[Plaintiff's sole connection to the current forum is that she moved to Beaumont sometime after she was fired by [her employer]. The Western District of Texas has a substantial interest in this controversy while the Eastern District of Texas has little to no interest in it."); *Murungi v. Touro Infirmary,* No. 6:11–CV–0411, 2011 WL 3206859, at *7 (W.D.La. June 29, 2011) ("The undersigned finds that trial of this action will be more convenient in the Eastern District since the only connection between the Western District and this lawsuit is the fact that the plaintiff now resides here rather than in the Eastern District.").

3. *The Familiarity of the Forum with the Law that Will Govern the Case*

Neither this court nor the Eastern District of Virginia is more or less familiar with the law that will govern this case. Therefore, this factor is neutral.

4. *The Avoidance of Unnecessary Problems of Conflict of Laws or in the Application of Foreign Law*

Because there are no conflict of laws issues that would make this case better suited for either this court or the Eastern District of Virginia, this factor cannot weigh either for or against transfer. Accordingly, this factor is neutral.

C. Conclusion

The court finds that three factors weigh in favor of transfer, one of which strongly favors transfer, two factors weigh against transfer, and three factors are neutral. "The district court has broad discretion in deciding whether to order a transfer." *Balawaider v. Scott,* 160 F.3d 1066, 1067 (5th Cir.1998) (quoting *Caldwell v. Palmetto State Sav. Bank,* 811 F.2d 916, 919 (5th Cir.1987)). Weighing the relevant factors, the court concludes that "on balance, a transfer would serve 'the convenience of parties and witnesses' and otherwise promote 'the interest of justice.' " *Atlantic Marine,* 134 S.Ct. at 581 (quoting 28 U.S.C. § 1404(a)).

IV. *Conclusion and Order*

***6** For the reasons explained above, the court concludes that this case should be transferred to the Eastern District of Virginia. Defendant's First Amended Opposed Motion to Transfer Venue (Docket Entry No. 15) is therefore **GRANTED** and this case is **TRANSFERRED** to the Alexandria Division of the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a).

All Citations

Not Reported in F.Supp.3d, 2014 WL 1338690

Footnotes

1 Affidavit of Lee Ann Bode ("Bode Affidavit"), Exhibit A to Motion to Transfer, Docket Entry No. 15–1, p. 1 ¶ 2; Motion to Transfer, Docket Entry No. 15, p. 6.

2 Plaintiff's Original Complaint, Docket Entry No. 1, p. 2 ¶¶ 7–9.
3 *Id.* at 2–3 ¶ 10.
4 Defendant's Original Answer, Docket Entry No. 4.
5 Motion to Transfer, Docket Entry No. 15.
6 Plaintiff's Memorandum in Response to Defendant's Motion to Transfer Venue ("Response"), Docket Entry No. 17.
8 *Id.* at 1 ¶ 3.
9 *Id.* ¶ 2.
10 Because the special venue statute "displaces the general venue provision set out in 28 U.S.C. § 1391," *Allen v. U.S. Department of Homeland Security,* 514 F. App'x 421, 422 (5th Cir.2013), venue is only proper in the Southern District of Texas if (1) the alleged unlawful employment practice was committed in Texas, (2) the relevant employment records are maintained and administered in the Southern District, (3) Plaintiff would have worked in the Southern District but for the alleged unlawful employment practice, or, (4) Defendant has its principal office in the Southern District, so long as Defendant cannot be found in a district implicated by (1) through (3). *See* 42 U.S.C. § 2000e–5(f)(3); *Allen,* 514 F. App'x at 422; *Tucker v. U.S. Dep't of Army,* 42 F.3d 641, 1994 WL 708661 (5th Cir.1994) (unpublished table decision); *March v. ABM Sec. Servs., Inc.,* No. H–09–2422, 2010 WL 104480 (S.D.Tex. Jan.7, 2010); *Kapche v. Gonzales,* No. V–07–31, 2007 WL 3270393, at *3 (S.D.Tex. Nov.2, 2007). As Defendant points out in its Motion to Transfer, Plaintiff does not allege that any unlawful employment practice was committed in Texas. Motion to Transfer, Docket Entry No. 15, p. 7. Accordingly, on the facts presented in the record, venue is not proper in the Southern District of Texas. However, Defendant waived any objection to venue by failing to raise it in its answer. *See* 28 U.S.C. § 1406(a)-(b); Fed.R.Civ.P. 12(h); *Allen,* 514 F. App'x at 422. "Because a party may seek a § 1404(a) transfer of venue after filing its first responsive pleading," however, the court may consider whether transfer is warranted under § 1404(a). *Allen,* 514 F. App'x at 422; *see also Williamson–Dickie Mfg. Co. v. M/V HEINRICH J,* 762 F.Supp.2d 1023, 1027–30 (S.D.Tex.2011); *Sabre Technologies, L.P. v. TSM Skyline Exhibits, Inc.,* No. H–08–1815, 2008 WL 4330897, at *7 (S.D.Tex. Sept.18, 2008).
11 Bode Affidavit, Exhibit A to Motion to Transfer, Docket Entry No. 15–1, p. 1 ¶ 3.
12 Response, Docket Entry No. 17, p. 2 ¶¶ b, f.
13 Bode Affidavit, Exhibit A to Motion to Transfer, Docket Entry No. 15–1, p. 1 ¶ 3.
14 Plaintiff's Pretrial Disclosures, Docket Entry No. 16, p. 1 ¶ 1.
15 Bode Affidavit, Exhibit A to Motion to Transfer, Docket Entry No. 15–1, p. 1 ¶ 3.
16 Response, Docket Entry No. 17, p. 2 ¶ b.
17 Plaintiff's Original Complaint, Docket Entry No. 1, pp. 3–4 f 10.
18 Bode Affidavit, Exhibit A to Motion to Transfer, Docket Entry No. 15–1, p. 1 ¶ 2.
19 *See* Fed. Court Mgmt. Statistics, United States District Courts–National Judicial Caseload Profile (2013), *available at* http:// www.uscourts.gov/usco urts/Statistics/FederalCourtManagementStatistics /2013/district–ferns–profiles–September–2013.pdf.
20 Plaintiff's Original Complaint, Docket Entry No. 1, p. 2 ¶ 9.
21 Motion to Transfer, Docket Entry No. 15, p. 7.

EXHIBIT G

2005 WL 8160424
Only the Westlaw citation is currently available.
United States District Court,
E.D. Texas, Marshall Division.

TIVO INC., Plaintiff,
v.
ECHOSTAR COMMUNICATIONS CORP., et al., Defendants.

2:04-CV-1-DF
|
Signed 03/09/2005

Attorneys and Law Firms

Andrei Iancu, Brian D. Krechman, Morgan Chu, Pro Hac Vice, Thomas C. Werner, Pro Hac Vice, Irell & Manella, Adam S. Hoffman, C. Jay Chung, Russ August & Kabat, Perry M. Goldberg, Irell & Manella LLP, Los Angeles, CA, Samuel Franklin Baxter, McKool Smith, Marshall, TX, Ben J. Yorks, Pro Hac Vice, Brian Jones, Irell & Manella, Newport Beach, CA, Nicholas H. Patton, Robert William Schroeder, III, Patton Tidwell & Culbertson, LLP, Texarkana, TX, Rachel Krevans, Morrison & Foerster LLP, San Francisco, CA, Randall I. Erickson, Steven P. Rice, Van V. Nguyen, Crowell & Moring, Irvine, CA, Roger Scott Feldmann, Pro Hac Vice, Baker & Hostetler LLP, Costa Mesa, CA, Ronald J. Schutz, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN, Garret Wesley Chambers, McKool Smith, Dallas, TX, for Plaintiff.

Alison M. Tucher, Jason A. Crotty, Rachel Krevans, Harold J. McElhinny, Kristina Paszek, Morrison & Foerster LLP, Robert M. Harkins, Jr., Howrey LLP, San Francisco, CA, Charles S. Barquist, Pro Hac Vice, Morrison & Foerster LLP—Los Angeles, Los Angeles, CA, Deborah J. Race, Otis W. Carroll, Jr., Ireland Carroll & Kelley, Tyler, TX, J. Eric Elliff, Pro Hac Vice, Scott F. Llewellyn, Morrison & Foerster, Denver, CO, Karl J. Kramer, Pro Hac Vice, Emily A. Evans, Morrison & Foerster, Palo Alto, CA, Damon Michael Young, Young Pickett & Lee, John Michael Pickett, Law Offices of John Pickett, Texarkana, TX, for Defendants.

ORDER ON DEFENDANTS' MOTION TO DISMISS AND TRANSFER

DAVID FOLSOM, UNITED STATES DISTRICT JUDGE

***1** Before the court are Defendants' Motions to Dismiss and Transfer (Dkt. No. 19), filed March 1, 2004. A hearing was held on these motions on December 8, 2004. After a review of the briefing, arguments of the parties, and the facts and law of this matter, the court finds Defendants' Motion to Dismiss should be **DENIED** as to defendant Echostar Communications Corp. and **DENIED WITHOUT PREJUDICE** as to defendant Echostar DBS Corp. The court further finds Defendants' Motion to Transfer should be **DENIED.**

BACKGROUND

Plaintiff Tivo, Inc. (hereafter "Tivo") sues defendants, a group of inter-related companies who together operate or support a satellite television service called the Dish Network, including Echostar Communications Corp. (hereafter "ECC") and Echostar DBS Corp. (hereafter "EDBS"), for infringement of U.S. Patent No. 6,233,389 (the "'389 patent"). The '389 patent, entitled "MULTIMEDIA TIME WARPING SYSTEM," is directed to a digital video recorder system that digitally records television signals from analog and digital sources such as cable and satellite television providers.

Tivo alleges that defendants have made, used, sold, or offered to sell digital recording devices, digital video recorders ("DVRs"), and related services, falling within the scope of one or more claims of the '389 patent, and/or have actively induced such conduct. See First Amended Complaint (hereafter "FAC"), ¶¶ 11-12).

EDBS is the parent company of defendants EchoStar Technologies Corp. ("ETC") and Echosphere LLC ("ELLC") (neither of which contest personal jurisdiction), and in turn is owned by ECC. EDBS is also the party authorized to operate one of the satellites through which the Dish Network programming is transmitted. See In re EchoStar Satellite Corp., Directsat Corp., EchoStar DBS

Corp., 1998 WL 201691 (FCC), 13 F.C.C.R. 8595, at ¶ 2 (April 27, 1998). P. Resp. [Dkt. No. 26] at Ex. 4.

Defendants' DVRs are distributed as part of their integrated Dish Network receivers. In other words, the accused DVR is built into the same device that receives defendants' satellite broadcast. These receiver/DVRs can be purchased or rented directly from the Dish Network, or bought at various consumer electronics stores. See P. Resp. [26] at Ex. 22 (EchoStar Communications Corp. Form 10-K, March 4, 2003, at 3-4) (hereafter "EchoStar 10-K"). The receiver/DVRs are allegedly offered for sale and sold throughout the Eastern District of Texas. See P. Resp. [26] at Hoffman Decl. at ¶¶ 25, 34.

Tivo filed suit against defendants on January 5, 2004. Defendants now move the court to dismiss this action for lack of personal jurisdiction or, alternatively, transfer this case to the Northern District of California. Both motions are presented in one document and assigned the same docket number. Accordingly, the court addresses both motions in this Order and now considers defendants' motion to dismiss.

ECC'S AND EDBS'S MOTION TO DISMISS

ECC and EDBS (hereafter referred to as "defendants" for purposes of the motion to dismiss) move the court to dismiss this action under Federal Rule of Civil Procedure 12(b)(2) because the court allegedly does not have specific or general jurisdiction over them. Because this is a suit for patent infringement, the law of the United States Court of Appeals for the Federal Circuit and not the Fifth Circuit binds this court, even on matters concerning personal jurisdiction and the closely related issue of venue. See Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1564-65 (Fed. Cir. 1994) (stating that, although issues of personal jurisdiction are generally procedural in nature, they are sufficiently related to substantive patent law, and thus the law of the Federal Circuit controls). The Federal Circuit, however, defers to the law of the regional circuits to resolve non-substantive patent issues. Amana Refrigeration, Inc. v. Quadlux, Inc., 172 F.3d 852, 856 (Fed. Cir. 1999) (this court is "generally guided by the law of the regional 'circuit to which district court appeals normally lie, unless the issue pertains to or is unique to patent law' ") (citation omitted).

I. PERSONAL JURISDICTION

***2** A non-resident defendant is subject to personal jurisdiction in a federal district court if: (1) the defendant is within the reach of the forum state's long arm statute; and (2) due process is satisfied. See Beverly Hills Fan, 21 F.3d at 1569 (stating that courts must look to the relevant state's long-arm statute even when the cause of action is purely federal). Because the Texas long-arm statute is co-extensive with the limits of due process, see Bearry v. Beech Aircraft Corp., 818 F.2d 370, 372 (5th Cir. 1987), our sole inquiry is whether the court's exercise of personal jurisdiction over defendants comports with due process. See Akro Corp. v. Luker, 45 F.3d 1541, 1544 (Fed. Cir. 1995) (stating federal courts have personal jurisdiction over a nonresident defendant in federal question cases to the extent federal constitutional due process limits allow).

Although Tivo bears the burden of establishing sufficient contacts by defendants to invoke the jurisdiction of this court, the Fifth and Federal Circuit agree it need only prove a prima facie case of jurisdiction when the court does not conduct an evidentiary hearing on the matter. Electronics for Imaging, Inc. v. Coyle, 340 F.3d 1344, 1349 (Fed. Cir. 2003); Wilson v. Belin, 20 F.3d 644, 648 (5th Cir. 1994). In other words, uncontroverted allegations by Tivo must be taken as true and any factual disputes contained in the evidence must be resolved in its favor. Coyle, 340 F.3d at 1349; Beverly Hills Fan, 21 F.3d at 1563; Wilson, 20 F.3d at 646-647. However, following and during an evidentiary hearing, where evidence is proffered and admitted into the record, the plaintiff must show personal jurisdiction by a preponderance of the evidence before the evidence is admitted.

This court in McNamara v. Bre-X Minerals Ltd., 46 F. Supp. 2d 628 (E.D. Tex. 1999), stated:

> When a court makes a personal jurisdiction determination without the benefit of deposition testimony or other evidence **offered at an evidentiary hearing** or at trial, "[p]roof by a preponderance of the evidence is not required." Bullion v. Gillespie, 895 F.2d 213, 217 (5th Cir. 1990). "Eventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial." DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1271 n.12 (5th Cir. 1983) (quoting Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981)). "**The trial court has considerable leeway to**

> **decide at what stage of the proceedings plaintiff's ultimate showing must be made.**" Id. On February 12, 1999, the Court entertained oral arguments on the pending personal jurisdiction motions; however, this was not an evidentiary hearing.

Bre-X, 46 F. Supp. 2d at 632 (emphasis added). Like the Bre-X court, this court entertained oral arguments on defendants' pending personal jurisdiction motion on December 8, 2004; however, it was not an evidentiary hearing. Therefore, at this stage, the court finds Tivo need only make a prima facie showing of personal jurisdiction over defendants.

The exercise of personal jurisdiction over a nonresident defendant comports with the constitutional guarantee of due process if (1) the defendant has purposely availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with the state such that (2) exercising jurisdiction will not offend "traditional notions of fair play and substantial justice." See Beverly Hills Fan, 21 F.3d at 1565 (quoting Int'l Shoe v. Wash., 326 U.S. 310, 316 (1945) & citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)).

II. MINIMUM CONTACTS

The critical issue in determining whether any set of circumstances suffices to establish minimum contacts is whether the nonresident defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Burger King, 471 U.S. at 475. When analyzing whether there exists sufficient minimum contacts with a forum state, the court is to focus on the relationship between the nonresident defendant, the forum state, and the litigation at issue. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

***3** Jurisdiction is not proper when a defendant only has random, fortuitous, or attenuated contacts with the forum state, or due to the unilateral activity of another party or a third person. Burger King, 471 U.S. at 475. This standard helps ensure that non-residents have fair warning that a particular activity may subject them to litigation within the forum. Beverly Hills Fan, 21 F.3d at 1565. "Minimum contacts" can be established through contacts sufficient to assert specific jurisdiction or contacts sufficient to assert general jurisdiction. Wilson, 20 F.3d at 647.

III. SPECIFIC JURISDICTION

A nonresident defendant's contacts with a forum state that arise from, or are directly related to, the cause of action are sufficient to give rise to specific jurisdiction. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984). Specific jurisdiction may arise even where the nonresident defendant has never set foot in the forum state. Bullion v. Gillespie, 895 F.2d 213, 216 (5th Cir. 1990).

When the court exercises specific jurisdiction over a nonresident defendant, the quantity of defendant's contacts need not be great. While a single act can be enough to trigger specific jurisdiction, the court looks at the totality of the circumstances to determine whether the act was substantial, i.e., of such a purposeful nature that exercising personal jurisdiction comports with due process. Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir. 1985); Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026, 1028 (5th Cir. 1983). The Supreme Court has stated: "If the sale of a product of a manufacturer or distributor ... is not simply an isolated occurrence, but arises from the efforts of the [defendant] to serve, directly or indirectly, the market for its product ... it is not unreasonable to subject it to suit." World-Wide Volkswagen, 444 U.S. at 297. This is particularly true when the purposeful act involves the placing of an accused product in an intentionally established distribution channel, i.e., into the "stream of commerce" with the expectation or reasonable foreseeability it will reach the forum state. Id. at 297-98; Beverly Hills Fan, 21 F.3d at 1565-66; Ham, 4 F.3d at 416; Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383, 385-86 (5th Cir. 1989); Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081, 1083-85 (5th Cir. 1984); Oswalt v. Scripto, Inc., 616 F.2d 191, 200 (5th Cir. 1980).

What is important is whether the defendant deliberately engaged in significant activities in the forum or has created continuing obligations between itself and residents of the forum, manifesting an availment of the privilege of conducting business here. Burger King, 471 U.S. at 471-76. Because the nonresident's activities are shielded by the benefits and protections of the forum's laws, it is presumptively not unreasonable to require the defendant to submit to the burdens of litigation in the forum as well. Id. Jurisdiction is proper, therefore, "where the contacts proximately result from actions by the defendant [itself]

that create a substantial connection with the forum State." Id.

In the Federal Circuit, specific jurisdiction exists when the plaintiff satisfies a three-prong test by showing: (1) the defendant purposefully directed its activities at the forum state; (2) the plaintiff's claim arises out of those activities; and (3) assertion of personal jurisdiction over the defendant is "reasonable and fair." Akro, 45 F.3d at 1545-46.

A. DEFENDANTS' ARGUMENTS

***4** Defendants argue the court does not have specific jurisdiction over them because they do not manufacture, sell, or offer to sell the accused products or services in Texas. D. Mot. at McDonnell Decl. at ¶ 12. While defendants admit their subsidiaries market and sell the allegedly infringing products within Texas, the Federal Circuit has repeatedly held that this is not a sufficient basis on which to exercise jurisdiction over a parent. See Manville Sales Corp. v. Paramount Sys., Inc., 917 F.2d 544, 552 (Fed. Cir. 1990) ("The court, however, must 'start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception' ") (citations omitted); see also 3D Sys., Inc. v. Aarotech Labs., Inc., 160 F.3d 1373, 1380 (Fed. Cir. 1998) ("the corporate form is not to be lightly cast aside").

Mere ownership of a subsidiary does not constitute "specific, unusual circumstances." See Genetic Implant Sys, Inc. v. Core-Vent Corp., 123 F.3d 1455, 1459-60 (Fed. Cir. 1997) (100% ownership of company subject to personal jurisdiction did not submit its owner to personal jurisdiction); see also Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1160 (5th Cir. 1983) ("100% stock ownership and commonality of officers and directors are not alone sufficient to establish an alter ego relationship between two corporations.").

The Federal Circuit in 3D Sys. found the exercise of personal jurisdiction over a parent company of patentee's competitor would violate due process. 3D Sys., 160 F.3d at 1380. The parent company did not purposefully direct any activities at California residents, even though the parent's name appeared on letterhead used by the competitor, and the parent maintained a website viewable in California. Id. The court, however, found that price quotation letters sent by patentee's competitor, a subsidiary of parent, to California residents were "offers to sell" for purpose of establishing personal jurisdiction over the competitor. Id. at 1379.

B. TIVO'S ARGUMENTS

Regardless of whether ECC is a parent or holding company, Tivo argues, like the competitor in 3D Sys., that ECC has offered to sell its infringing DVRs to Eastern District of Texas residents. According to Tivo, ECC made a series of offers to sell Dish Network satellite TV, including the accused receiver/DVRs, to Texas residents. P. Resp. [26] at Hoffman Decl. at ¶¶ 25, 34. Direct patent infringement occurs when someone "without authority makes, uses, **offers to sell** or sells any patented invention." 35 U.S.C. 5271(a) (emphasis added). An "offer to sell" in violation of section 271(a) directed to a particular state establishes personal jurisdiction in that state over the offeror. See 3D Sys., 160 F.3d at 1378-80 (finding personal jurisdiction where letters quoting price of infringing products were sent to the state at issue).

An example of these offers is a press release by ECC, distributed to publications nationwide on December 11, 2003, on pages 6-7 of Tivo's Opposition to Motion to Dismiss. See P. Resp. [26] at Ex. 25 (provided in full). Contrary to defendants' arguments, the release describes prices, products, and services in specific detail, and uses the term "offer" no less than five times. In addition, ECC indicates its intent to be bound by its offer by expressly guaranteeing its prices through January 2005. The release is attributed to ECC, which is described as "a leading U.S. provider of advanced digital television services," and is targeted specifically at the residents of Sherman, Texas, in this district.

ECC has also made offers to sell Dish Network programming and equipment to the residents of other Texas localities, including Harlingen, Lufkin, Marshall, San Antonio, Texarkana, and Tyler. P. Resp. [26] at Exs. 25, 26. As with the offer to Sherman residents, these offers include: (1) the attribution of the offer to "EchoStar Communications Corporation"; (2) detailed descriptions of pricing; (3) specific mention that ECC's offer includes DVR technologies; and (4) a description of ECC as the provider of satellite TV services, including the sale of DVRs to millions of customers. Id.

***5** ECC also maintains a website at www.dishnetwork.com that targets Eastern District of

Texas residents when they inquire as to the products and services available to them through Dish Network. "Dish Network" is a trademark of ECC and is not itself a subsidiary of ECC. P. Resp. [26] at Exs. 25, 26. The domain name "dishnetwork.com" is also registered to ECC. Id. at Ex. 29. This web address leads to a website that offers to sell and lease bundled Dish Network services, including DVR technology. The website also represents the company ultimately making these offers is ECC. The homepage for the site has a link labeled "about us." This link leads to a page on the same site titled "DISH NETWORK: EchoStar Communication Corporation." Id. at Hoffman Decl. at ¶ 31, Ex. 30 at 215, 222.

Dishnetwork.com's home page has a link titled, "Get Dish." Selecting this link leads to a page offering various Dish Network packages. This page has two separate buttons leading to pages advertising Dish Network's DVR technology, including detailed descriptions of five separate receiver/DVRs. Id. at ¶ 32, Ex. 30 at 215-22. Following the link to a "Digital Home Advantage" offer takes the user to a page suggesting the user "ORDER YOUR SYSTEM ONLINE!," with two buttons marked "Standard" and "DVR." By following these links, a potential customer can order and pay for Dish Network services and receiver/DVRs. Id. at Ex. 30 at 233-44.

When ordering, the user is directed to type in his or her home address. Typing in an address located in the Eastern District of Texas, e.g., Marshall, Texas, generates a description of subscriber options, tailored to residents of this district, including the option to receive local programming from TV stations in Shreveport, Louisiana, that serve the Marshall area. Id. at ¶ 33, Ex. 30 at 236-40. The home page also has a link marked "locate a retailer," which allows a person to generate a list of retailers of Dish Network receiver/DVRs in this district. Id. at ¶ 34, Ex. 30 at 248-49.

While the Federal Circuit has not addressed the issue in detail, most courts, including the Fifth Circuit, evaluate the effect of a website on personal jurisdiction using a sliding scale based on interactivity. In Mink v. AAA Development LLC, 190 F.3d 333 (5th Cir. 1999), the Fifth Circuit adopted the "sliding scale" test, set forth in Zippo Mfg. Co. v. Zippo.com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). Mink, 190 F.3d at 336. Texas district courts have interpreted Mink's adoption of Zippo to apply in both general jurisdiction and specific jurisdiction cases. Zippo requires a court to look to the "nature and quality of commercial activity that an entity conducts over the Internet." Zippo, 952 F. Supp. at 1124.

The level of activity conducted may be classified into three categories. On one outer limit is the first category, which consists of situations where a defendant does business over the Internet by entering into contracts with residents of other states by knowingly and repeatedly transmitting computer files over the Internet. Id. Jurisdiction is proper in these situations. On the other outer limit is the third category, which consists of situations where a defendant has merely posted information on an Internet website that is accessible to out of state users. Id. Jurisdiction is not proper in these situations. Between these limits is the second category. This category consists of situations where a defendant has a website that allows a user to exchange information with a host computer. Id. Jurisdiction is determined in these types of cases by looking at "the level of interactivity" and "commercial nature" of the exchange of information that occurs on the web site. Id. The more interactive and commercial the website, the more likely it is a court will find the minimum contacts requirement is met. See, e.g., J-L Chieftan, Inc. v. Western Skyways, Inc., 351 F. Supp. 2d 587, 592-93 (E.D. Tex. 2004) ("In the present matter, Western asserts that ASSI's website, i.e., Internet usage, falls into the middle of the spectrum and urges this Court to exercise personal jurisdiction based on the level of interactivity and commercial nature of the information exchanged on said website.").

***6** Contrary to defendants' arguments, Tivo has therefore presented prima facie evidence that ECC's website is interactive, allowing Texas users to receive localized information about purchasing the very products at issue in this infringement action, and to place orders for these products. The website attributes these offers to sell to ECC. Under Mink, the website, like ECC's press releases, contains sufficient minimum contacts and acts of infringement purposefully directed at the residents of the State of Texas and this district. Tivo need not breach the corporate barrier between ECC and Echostar Satellite LLC as argued by defendants because Tivo has presented sufficient prima facie evidence that shows ECC itself may directly infringe the claims of the '389 patent.

Assuming these allegations to be true and resolving the conflicts of evidence in Tivo's favor, Tivo presents prima

facie evidence that the first two Akro tests for specific jurisdiction are met with regard to ECC's advertisements, press releases, and website directed to residents of the Eastern District of Texas.

C. INDUCING INFRINGEMENT

Contrary to their arguments, Tivo also alleges that all defendants are inducing infringement of the '389 patent. See FAC at ¶¶ 11-12. 35 U.S.C. § 271(b) provides that "[w]hoever actively induces infringement of a patent shall be liable as an infringer." In order to succeed on a claim of inducement, the patentee must show both an "underlying instance of direct infringement" and a "requisite showing of intent." Fuji Photo Film Co., Ltd. v. Jazz Photo Corp., 394 F.3d 1368, 1377 (Fed. Cir. 2005) (citing Insituform Techs., Inc. v. Cat Contracting, Inc., 385 F.3d 1360, 1378 (Fed. Cir. 2004) (citing Water Techs. Corp. v. Calco, Ltd., 850 F.2d 660, 668 (Fed. Cir. 1988))). Tivo offers the following prima facie evidence at pages 15-16 of its Response [26] to establish ECC is inducing infringement and has sufficient minimum contacts in Texas and this district for the court to exercise specific jurisdiction over it:

(1) ECC provides Dish Network satellite TV service, without which the accused Dish Network receiver/DVRs would not function and would have no value to retailers or consumers. P. Resp. [26] at Ex. 22 (EchoStar 10-K at 7-8).

(2) ECC provides a Smart Card that enables accused Dish Network receiver/DVRs to decode Dish Network's encrypted signal. Id. at Ex. 5; FAC at ¶ 31.

(3) ECC subsidizes the price of the accused receiver/DVRs to encourage subscription to the Dish Network. P. Resp. [26] at Ex. 22 (EchoStar 10-K at 4).

(4) ECC warrants, in its own name, the accused receiver/DVRs against defect, thus encouraging consumers to buy the infringing products. P. Resp. [26] at Ex. 23 (EchoStar Receiver/DVR User's Guide at 127).

(5) ECC advertises the Dish Network satellite TV, including the accused receiver/DVRs, in press releases and on a website specifically targeting residents of Texas and this district as explained above.

In addition, Tivo offers the following prima facie evidence that EDBS is inducing infringement and has sufficient minimum contacts in Texas and this district for the court to exercise specific jurisdiction over it:

(1) EDBS is the party authorized to operate one of the satellites through which the Dish Network programming is transmitted. P. Resp. [26] at Ex. 4 (In re EchoStar Satellite Corp., Directsat Corp., EchoStar DBS Corp., 1998 WL 201691 (FCC), 13 F.C.C.R. 8595, at ¶ 2 (April 27, 1998)).

(2) Dish Network's satellite programming and the equipment needed to receive it are functionally integrated and commercially interdependent. The programming offered by the Dish Network cannot be received without Dish Network receiver/DVRs, and the Dish Network receiver/DVRs are incompatible with other satellite systems. P. Resp. [26] at Ex. 22 (EchoStar 10-K at 7-8).

***7** (3) ECC, owner of EDBS, advertises the Dish Network satellite programming, including the accused receiver/DVRs, in press releases and on a website specifically targeting residents of Texas and this district as explained above.

The court finds this evidence fails to establish sufficient prima facie facts that EDBS is both directly infringing the '389 patent and possesses a certain level of intent on its part that the patent be infringed. Therefore, assuming these allegations to be true and resolving conflicts of evidence in Tivo's favor, Tivo presents prima facie evidence that the first two Akro tests for specific jurisdiction are met to show ECC is inducing infringement of the '389 patent with its products and services directed to Eastern District of Texas residents, but not EDBS.

IV. WHETHER PERSONAL JURISDICTION IS REASONABLE AND FAIR

The third prong of the Akro test is whether the assertion of personal jurisdiction is reasonable and fair. This prong embodies the due process considerations of personal jurisdiction and places the burden on the party over whom jurisdiction is sought to prove that jurisdiction would be constitutionally unreasonable. See Akro, 45 F.3d at 1545-46 (" '[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.' ") (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985)).

Notwithstanding its comportment with due process, a nonresident defendant may defeat the exercise of personal jurisdiction if it can show that "fair play and substantial justice" militate against such an exercise. Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 121-22 (1987); Burger King, 471 U.S. at 477. "[S]uch defeats of otherwise constitutional personal jurisdiction 'are limited to the rare situation in which the plaintiff's interest and the state's interest in adjudicating the dispute in the forum are so attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum.' " Akro, 45 F.3d at 1549 (quoting Beverly Hills Fan, 21 F.3d at 1568).

The following factors are to be considered in conducting the inquiry of fair play and substantial justice: (1) the burden upon the nonresident defendant; (2) the interests of the forum state; (3) the plaintiff's interests in securing relief; (4) the interstate judicial system's interests in obtaining the most efficient resolution of controversies; and (5) the shared interests of the several states in furthering fundamental substantive social policies. Burger King, 471 U.S. at 476-77.

The fairness factors cannot of themselves invest the court with jurisdiction over a nonresident when the minimum contacts analysis weighs against the exercise of jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980). The defendant's actions must justify the conclusion that it should reasonably anticipate being haled into court in the forum state. Id. at 297. Hence, unilateral activity of the plaintiff is insufficient to establish personal jurisdiction over the defendant. Id.

The exercise of personal jurisdiction over ECC in this forum would be reasonable and fair because: (1) the burden upon ECC in this forum is small given that Tivo has presented prima facie evidence that ECC may be infringing the '389 patent in this district; (2) many citizens of this district potentially subscribe to and use ECC's receiver/DVRs and satellite TV services and would be interested in infringing activities related to these products and services; (3) Tivo has chosen this district to secure relief for ECC's alleged patent infringement; (4) this action may be resolved most efficiently in this district due to the Tivo's prima facie showing; and (5) Texas shares the same interests as other states to preserve the patent rights of inventors.

V. GENERAL JURISDICTION

***8** If the defendant's contacts with the forum state are not directly related to the plaintiff's cause of action, they will still suffice to establish general jurisdiction if they are sufficiently "continuous and systematic" to support a reasonable exercise of jurisdiction. Helicopteros, 466 U.S. at 415-16; Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779-80 (1984); see also Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 777-79 (5th Cir. 1986) (explaining courts are required to examine a nonresident defendant's contacts "in toto to determine whether they constitute the kind of continuous and systematic contacts required to satisfy due process").

Such unrelated contacts must be "substantial" to support general jurisdiction. Wilson, 20 F.3d at 649 (citing Keeton, 465 U.S. at 779 n.11). Contacts noted by the Keeton Court include: (1) "a continuous and systematic supervision" of corporate activities in the forum state; (2) the location of corporate files there; (3) the holding of directors' meetings there; (4) the maintenance of substantial accounts in the forum; and (5) the making of key business decisions there. Id. The Supreme Court also noted the forum in question was the principal, albeit temporary, place of business for the defendant seeking to avoid personal jurisdiction. Id.

Other factors relied upon to uphold general jurisdiction include: (1) the nonresident's ownership of real estate in the forum state; (2) travel to the forum state; and (3) extensive business dealings therein to such an extent the Fifth Circuit found "constant and extensive personal and business connections" with the forum state throughout the nonresident's adult life. Holt, 801 F.2d at 779. Yet other factors include: (1) maintenance of offices in the forum; (2) residence of employees or officers in the forum; (3) ownership of personal property in the forum; (4) maintenance of a telephone listing or mailing address in the forum; and (5) negotiation in the forum by agents or officers of the nonresident defendant. Dominion Gas Ventures, Inc. v. N.L.S., Inc., 889 F. Supp. 265, 268 (N.D. Tex. 1995).

Because the court finds Tivo has established ECC has sufficient minimum contacts with this district for the court to exercise specific jurisdiction over it, the court need not consider whether it also has general jurisdiction over ECC. Helicopteros, 466 U.S. at 414 n.9. Therefore, the court finds it may exercise personal jurisdiction over ECC

because it has purposefully directed its activities at this district, Tivo's claims arise out of those activities, and the assertion of personal jurisdiction over ECC is "reasonable and fair."

Tivo offers the same prima facie evidence noted above to show the court it has general jurisdiction over EDBS. The court finds this evidence fails to establish sufficient prima facie facts that EDBS is subject to the general jurisdiction of this court.

VI. LACK OF VENUE

Because defendants argue this court does not have personal jurisdiction them, they move to dismiss this action because venue allegedly does not properly lie in this district under 28 U.S.C. § 1400(b) (the patent venue statute). For purposes of section 1400(b), a corporation resides in any district in which it is subject to personal jurisdiction. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1580 (Fed. Cir. 1990). Because the court finds it has personal jurisdiction over ECC, it also finds venue is proper in this district as to ECC.

As explained below, the court will allow Tivo to conduct limited discovery to determine EDBS's contacts with this district to resolve any unsettled personal jurisdiction and/or venue issues. The court now turns to defendants' motion to transfer venue.

MOTION TO TRANSFER VENUE

***9** The Federal Circuit defers to the law of the regional circuits to resolve non-substantive patent issues, such as motions to transfer venue that are procedural in nature. Storage Tech. Corp. v. Cisco Sys., Inc., 329 F.3d 823, 836 (Fed. Cir. 2003). Accordingly, this court shall use the law of the Fifth Circuit in its transfer analysis.

Section 1404(a) allows a district court "[f]or the convenience of parties and witnesses, in the interest of justice," to transfer a case to any other district or division in which the case might originally have been brought. 28 U.S.C. § 1404(a) (1996). Section 1404(a) protects litigants, witnesses, and the public against unnecessary inconvenience and expense to avoid needless expenditure of time, energy, and money. Van Dusen v. Barrack, 376 U.S. 612, 616 (1964). It is within the district court's discretion to decide whether to transfer venue, and the moving party bears the burden of showing why the court should transfer a case to a different forum. Hanby v. Shell Oil Co., 144 F. Supp. 2d 673, 676 (E.D. Tex. 2001).

Transfer is proper if the plaintiff could have brought this case initially in the proposed transferee forum and transfer would promote the convenience of the parties, witnesses, and the interests of justice. In re Horseshoe Entertainment, 337 F.3d 429, 433 (5th Cir. 2003). The parties do not dispute that venue is proper in the Eastern District of Texas or that this action "might have been brought" in the Northern District of California. Therefore, the court turns to whether the balance of convenience and justice substantially weighs in favor of transfer.

When deciding whether to transfer venue, the district court balances two types of interests: (1) the convenience of the litigants; and (2) the public interests in the fair and efficient administration of justice. Mohamed v. Mazda Motor Corp., 90 F. Supp. 2d 757, 771 (E.D. Tex. 2000) (citing Int'l Software Sys., Inc. v. Amplicon, Inc., 77 F.3d 112, 115 (5th Cir. 1996)). The first type of interest, the convenience of the litigants, is comprised of the following private factors: (a) plaintiff's choice of forum; (b) convenience and location of witnesses and the parties; (c) cost of obtaining the attendance of witnesses and cost of trial; (d) place of the alleged wrong; (e) accessibility and location of sources of proof; and (f) possibility of delay and prejudice if transfer is granted. Id. at 771 (identifying the origin of the factors from Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)). The second type of interest, the public interest, is comprised of the following factors: (a) administrative difficulty; (b) local interest in resolving localized controversies; (c) jurors; and (d) conflict of laws. Id.

I. PRIVATE INTEREST FACTORS

The first private interest factor is the plaintiff's choice of forum. As the Supreme Court indicated in Gulf Oil, the plaintiff's choice of forum should rarely be disturbed unless the balance of conveniences strongly favors the defendant. Gulf Oil, 330 U.S. at 508. Additionally, the Fifth Circuit has stated, "the plaintiff's privilege of choosing venue places the burden on the defendant to demonstrate why the forum should be changed. Plaintiff's privilege to choose, or not be ousted from, his chosen forum is highly esteemed." Time, Inc. v. Manning, 366

F.2d 690, 698 (5th Cir. 1966) (citation omitted). To prevail on this factor, defendant must demonstrate that the balance of convenience and justice substantially weighs in favor of transfer. Peteet v. Dow Chem. Co., 868 F.2d 1428, 1436 (5th Cir. 1989).

***10** Defendants urge the court to provide this factor minimal deference because plaintiffs do not reside in this district and none of the operative facts relevant to this action allegedly occurred in this district. See Barton v. Young, 144 F. Supp. 2d 685, 688 (E.D. Tex. 2001) ("[A] plaintiff s choice is afforded less deference when the plaintiff does not reside in the chosen forum and when none of the operative facts have occurred in the chosen forum."); Ruth v. KLI, Inc., 143 F. Supp. 2d 696, 698 (E.D. Tex. 2001) (same); Reed v. Fina Oil & Chem. Co., 995 F. Supp. 705, 714 (E.D. Tex. 1998) (any deference given plaintiff s choice of forum "disappears when the lawsuit has no connection whatsoever to the venue chosen"). However, before the court can determine whether defendants have overcome Tivo's choice of forum and whether they have met their burden of proof, the court must consider the other convenience factors.

The second and third private interest factors involve the convenience and location of witnesses and the parties and the cost of obtaining the attendance of witnesses. Proper consideration of this factor requires the party seeking transfer to specify which key witnesses would be substantially inconvenienced by plaintiff's chosen forum. Mohamed, 90 F. Supp. 2d at 776. General allegations of inconvenience will not suffice. Id. It is the convenience of non-party witnesses rather than employee witnesses that is the more important factor and accorded greater weight. In re Triton Ltd. Securities Litigation, 70 F. Supp. 2d 678 (E.D. Tex. 1999).

As the party seeking transfer, defendants must clearly specify the key witnesses to be called and make a general statement of what their testimony will cover. Z-Tel Communications, Inc. v. SBC Communications, Inc., 331 F. Supp. 2d 567, 574 (E.D. Tex. 2004). Defendants plan to call: (1) two non-party prosecution attorneys that procured the '389 patent for Tivo to obtain testimony relevant to their invalidity, inventorship, and inequitable conduct defenses; (2) three non-party inventors in the field of DVR technology to obtain testimony relevant to their invalidity defense; (3) three non-party engineers to support their case of noninfringement of the '389 patent; (4) two non-party individuals to assist with testimony regarding lost profits damages; and (5) the six named Tivo co-inventors of the '389 patent to elicit testimony regarding inventorship, inequitable conduct, and invalidity. All of these persons reside in the Northern District of California.

Even though defendants identify some key witnesses that may be called to testify and make general statements of what their testimony will cover, the list of witnesses is unpersuasive because: (1) the list conveniently identifies only Northern District of California witness and does not identify any Echostar witnesses that may be close to its research and development centers in Colorado; and (2) ECC does not allege or prove that any of the witnesses would be unable or unwilling to travel this district to testify. See Fowler v. Broussard, No. Civ.A.3:00-CV-1878-D, 2001 WL 184237 (N.D. Tex. 2001) ("Although [defendant] asserts in its brief that several of the witnesses are unwilling to testify, it does not identify which ones are unwilling, and does not cite the court to supporting materials that do so. It merely identifies which witnesses are not subject to compulsory process.") (internal citations omitted); see also AMS Staff Leasing v. Starving Students, No. 3-03-CV-0283-BD, 2003 WL 21436476, at *3 (N.D. Tex. 2003) (discussing same). Therefore, the court finds the second and third private interest factors do not weigh in favor of or against transfer.

The fourth private interest factor involves the place of the alleged wrong. Defendants argue the location for patent infringement suits is the "center of gravity" of the accused activity, in this case Northern District of California. See Laitram Corp. v. Morehouse Indus., Inc., 31 U.S.P.Q.2d 1697, 1700 (E.D. La. 1994). "Relevant considerations in determining the center of gravity in a given case include the location of a product's development, testing, research, production, and the place where marketing and sales decisions were made." Laitram Corp. v. Hewlett-Packard Co., 120 F. Supp. 2d 607, 609 (E.D. La. 2001).

***11** Defendants, however, do not seek transfer to the location where they designed or manufactured the accused products. If such a location exists, defendants fail to identify it or place it within the Northern District of California. Thus, defendants cannot argue the transferee venue is the center of gravity. An argument that this district is not the center of gravity, absent an argument

the Northern District of California is the center of gravity, does not assist defendants to carry their heavy burden to show transfer should be granted; nor does such an argument assist this court to determine whether transfer should be granted. As between Texas and California, the accused activity seems more closely related to Texas as ETC, the business unit of defendants that designs and manufactures the accused products, is incorporated in Texas. ETC & ELLC Answer to Am. Coml. at ¶ 4; D. Mot. at Minnick Decl. at ¶ 3.

The center of gravity test, however, is not a mandate, but only a consideration for the courts. The Federal Circuit has not considered this test. "Rather, the center of gravity approach is best regarded as a shorthand reference to the convenience of witness and access to evidence components of the well-settled precepts for applying § 1404(a)." Koh v. Microtek Intern., Inc., 250 F. Supp. 2d 627, 638 (E.D. Va. 2003).

Tivo has presented prima facie evidence that ECC not only sells the accused products throughout Texas and this district, but that ECC also owns an active website, specifically directed to citizens of this district that offers for sale the accused products and services. Given the substantial factual nexus to this district, the court finds the fourth private interest factor does not weigh against plaintiff's choice of forum or in favor of transfer.

The fifth private interest factor involves the accessibility and location of sources of proof. Although this factor is a consideration in the court's transfer analysis, it is of only slight significance due to the increasing ease of storage, communication, copying, and transportation of documents and information. Mohamed, 90 F. Supp. 2d at 778. In addition, the court's mandatory disclosure requirements under Local Rule CV-26 and the additional disclosure requirements of the court's discovery order in this case further diminish the weight given this factor. Therefore, the court finds the fifth private interest factor does not weigh against plaintiff's choice of forum or in favor of transfer.

The sixth private interest factor is the administrative difficulties caused by court congestion. Defendants argue administrative efficiency would be best served by transferring this action to the Northern District of California because Tivo previously filed suit on the '389 patent against a different defendant there. D. Mot. at Ex. 1 (Friedman Decl.). That suit was dismissed due to settlement before the filing of any motions and prior to the case management conference. The court never had any exposure to the facts of the case. The Northern District of California is therefore not more familiar with the present case than this court. Accordingly, the court finds the sixth private interest factor does not weigh against plaintiff's choice of forum or in favor of transfer.

Weighing together all the private interest factors, the court finds defendants have not demonstrated these factors substantially outweigh plaintiff's choice of forum. Therefore, defendant has not overcome its burden to show why, under the private interest factors, the court should transfer this case to the Northern District of California. Nevertheless, the court's analysis of whether defendants have met their burden also requires an analysis of the public interest factors.

II. PUBLIC INTEREST FACTORS

The first public interest factor is the possibility of delay and prejudice if transfer is granted. "[I]n rare and special circumstances a factor of 'delay' or of 'prejudice' might be relevant in deciding the propriety of transfer, but only if such circumstances are established by clear and convincing evidence." In re Horseshoe Entm't, 337 F.3d 429, 434 (5th Cir. 2003). This court in Z-Tel stated: "The requirement of 'clear and convincing evidence' qualifies the 'rare and special circumstances' such that this element is rarely a significant factor in a transfer analysis. The requisite rare and special circumstances would be present if, for example, a party requested transfer on the eve of trial." 331 F. Supp. 2d at 578.

***12** Tivo filed suit against defendants on January 5, 2004, and defendants timely filed their motion to transfer on March 1, 2004. The court has entered a Scheduling Order in this case, setting October 2005 as the trial date. In addition, defendants ECC and EDBS have not yet filed their answers to Tivo's Amended Complaint, filed January 15, 2004. Accordingly, even though the time to trail in this district may be faster than in the Northern District of California, and Tivo would have to restart its litigation there if the court transfers this case, by Horseshoe's clear and convincing standard, the court finds the first public interest factor does not weigh in favor of or against transfer.

The second and third public interest factors involve the local interest in resolving localized controversies and the burdening of citizens in the forum with jury duty. The court finds citizens of this district traditionally have had an interest in patent infringement cases that affect products or services they own or use. They also are not so unfamiliar with these kinds of cases to be burdened by them. Considering these facts and that Tivo has satisfied its prima facie burden of showing the court it has personal jurisdiction over ECC in this district, the court finds the second and third public interest factors do not weigh in favor of transfer.

The fourth and final public interest factor involves any conflict of laws. The parties do not identify nor does the court find any conflict of laws issues that weigh in favor of transfer.

Accordingly, weighing the public interest factors together, the court finds defendants have not met their burden to show why the court should transfer this case to the Northern District of California.

CONCLUSION

For the foregoing reasons, the court finds Tivo has established prima facie evidence that the court may properly exercise personal jurisdiction over ECC, and that such exercise does not offend traditional notions of fair play and substantial justice. However, the court finds Tivo has failed to establish prima facie evidence that the court may exercise personal jurisdiction over EDBS.

In addition, the court finds defendants have failed to overcome their substantial burden of overcoming plaintiff's choice of forum. They have also failed to demonstrate the balance of convenience and justice weighs in favor of transfer.

Because Tivo has failed to present prima facie evidence that the court may exercise either specific or general jurisdiction over EDBS, the court grants Tivo a reasonable amount of time to conduct limited discovery on EDBS's contacts with this district. After such time, defendants, including EDBS, may then, if desired, file a dispositive motion addressing any outstanding personal jurisdiction and/or venue issues regarding EDBS.

Therefore, the court **ORDERS** that Defendants' Motion to Dismiss is **DENIED** as to ECC and **DENIED WITHOUT PREJUDICE** as to EDBS. The court further **ORDERS** that Defendants' Motion to Transfer is **DENIED.**

All Citations

Slip Copy, 2005 WL 8160424

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EXHIBIT H

2013 WL 12133970
Only the Westlaw citation is currently available.
United States District Court,
W.D. Texas, Austin Division.

Transverse, LLC, Plaintiff,
v.
Info Directions, Inc. d/b/a IDI Billing Solutions, Defendant.

Case No. A–13–CA–101–SS
|
Signed 08/30/2013

Attorneys and Law Firms

Blaire Allen Knox, Nelia Robbi, Raymond E. White, McGinnis, Lochridge & Kilgore, L.L.P., Austin, TX, for Plaintiff.

Brian T. Smith, Dunn | Smith LLP, Austin, TX, Edward F. Premo, II, Megan K. Dorritie, Harter Secrest & Emery LLP, Rochester, NY, for Defendant.

ORDER

SAM SPARKS, UNITED STATES DISTRICT JUDGE

***1** BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Defendant Info Directions, Inc. (IDI)'s Motion to Dismiss for Lack of Personal Jurisdiction and, Alternatively, Motion to Transfer Venue [#5], Plaintiff Transverse, LLC's Response [#12] thereto, IDI's Reply [#15], IDI's Brief [#22], Transverse's Brief [#23], the Report and Recommendation of United States Magistrate Judge Andrew W. Austin (R&R) [#26], Transverse's Objections [#26] thereto, and IDI's Response [#28], and Transverse's Supplements [##29, 30] to its Objections.[1] Having considered the documents, the file as a whole, and the governing law, the Court now enters the following opinion and orders, accepting the R&R, and dismissing this suit for lack of personal jurisdiction.

Background

All matters in this case were referred to United States Magistrate Judge Andrew W. Austin for report and recommendation pursuant to 28 U.S.C. § 636(b) and Rule 1(d) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Transverse is entitled to de novo review of the portions of the Magistrate Judge's report to which it has filed specific objections. 28 U.S.C. § 636(b)(1). All other review is for plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc). Nevertheless, this Court has reviewed the entire file de novo, and agrees with the Magistrate Judge's recommendation.

In 2009, Transverse and IDI, who are rival developers of telecommunications billing software, competed for a contract with Iowa-based Iowa Wireless Services, LLC (IWS). Transverse won the contract, known as the "blee(p) contract" based on the name of Transverse's software, but IDI apparently did not give up. The Magistrate Judge ably summarized the what ensued as follows:

> Transverse alleges that in February 2010, IDI engaged in communications with IWS in an attempt to interfere with Transverse's business relationship with IWS and replace Transverse as the supplier of the billing system software. Transverse further contends that IDI requested and was provided access to Transverse's confidential and proprietary trade secret information related to the blee(p) Contract. Transverse contends that IDI's wrongful acquisition of Transverse's confidential and proprietary information gave IDI an improper advantage to develop a billing system for IWS. Transverse further alleges that "(o)nce IDI was armed with Transverse's trade secrets and had gotten up to speed on the project, IWS subsequently wrongfully declared Transverse in default and terminated the blee(p) Contract with Transverse." Plaintiff's Complaint at ¶ l4. Shortly thereafter, IWS replaced Transverse with IDI as the new supplier of its billing system software.
>
> On July 9, 2010, Transverse filed a lawsuit against IWS. *See Transverse, LLC v. Iowa Wireless Services, LLC*, 1:10–CV–517 LY. In the lawsuit against IWS, Transverse alleged breach of contract, quantum meruit, negligent misrepresentation, misappropriation of trade secrets/violation of Texas Theft Liability Act[,] and

conversion. After a jury trial on the breach of contract claim, the jury returned a verdict in favor of Transverse and awarded it $9.3 million in damages for lost value and $10 million for lost profits. *See* Verdict (Dkt. # 267 in A–10–CV–517 LY). Post–Judgment motions are currently pending before U.S. District Judge Lee Yeakel.

***2** On February 6, 2013, Transverse filed the instant lawsuit, this time against IDI, alleging (1) trade secret misappropriation, (2) violation of the Texas Theft Liability Act, (3) conversion, (4) unfair competition by misappropriation, (5) unjust enrichment/constructive trust; and (6) tortious interference with an existing contract.

R&R [#26] at 2–3. Presently before the Court is IDI's Motion to Dismiss for Lack of Personal Jurisdiction. Relevant to the personal jurisdiction analysis, the Court notes the following, undisputed facts regarding IDI: it is a New York corporation, and its offices are located in New York. All of IDI's directors work and live in New York, and its bank accounts are maintained there. IDI has registered to do business in Texas, and currently has one employee who lives in Texas for personal reasons, and works remotely from home; however, IDI had no employees in Texas during the events in question. IDI has transacted some sales to Texas, and made business payments to Texas entities. Finally, IDI has hosted a conference and attended trade shows in Texas.

Regarding the events in question, IWS, the customer whose account Transverse and IDI were competing for, is located in Iowa. IDI obtained Transverse's trade secrets, and induced IWS to cancel its contract with Transverse, in favor of a contract with IDI, through a series of emails sent between North Carolina, New York, and Iowa, not Texas. [2]

Based on the foregoing, the Magistrate Judge easily concluded, without objection, IDI is not subject to general jurisdiction in Texas. After thoughtful and thorough analysis, the Magistrate Judge also concluded IDI is not subject to specific jurisdiction for the events in question, because although some of the effects of IDI's allegedly tortious conduct were felt in Texas—namely, Transverse stopped receiving contract payments, and was no longer carrying out performance in support of the contract in Texas—there were nevertheless no acts by IDI directed at Texas, and no purposeful availment by IDI of the Texas forum. It is this latter conclusion Transverse strenuously objects to, and which the Court reviews below.

Discussion

I. Legal Standard—Rule 12(b)(2)

The Federal Rules of Civil Procedure allow a defendant to assert lack of personal jurisdiction as a defense to suit. FED. R. CIV. P. 12(b)(2).

To determine whether a federal district court has personal jurisdiction over a nonresident defendant, the district court considers first whether exercising jurisdiction over the defendant comports with due process. *Religious Tech. Ctr. v Liebreich*, 339 F.3d 369, 373 (5th Cir. 2003). If the requirements of due process are satisfied, the court then determines whether the exercise of jurisdiction is authorized by the jurisdictional "long-arm" statute of the state in which the court sits. *Id.* Because the Texas long-arm statute has been interpreted as extending to the limit of due process, the two inquiries are the same for district courts in Texas. *Id.*; *see* TEX. CIV. PRAC. & REM. CODEE §§ 17.001–17.093.

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). One requirement of due process is that the nonresident defendant be properly subject to the personal jurisdiction of the court in which the defendant is sued. *Id.*

***3** The Supreme Court has articulated a two-pronged test to determine whether a federal court may properly exercise jurisdiction over a nonresident defendant: (1) the nonresident must have minimum contacts with the forum state, and (2) subjecting the nonresident to jurisdiction must be consistent with "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 343 (5th Cir. 2004).

A defendant's "minimum contacts" may give rise to either specific personal jurisdiction or general personal jurisdiction, depending on the nature of the suit and defendant's relationship to the forum state. *Freudensprung*, 379 F.3d at 343. "A court may exercise specific jurisdiction when (1) the defendant purposely

directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; and (2) the controversy arises out of or is related to the defendant's contacts with the forum state." *Id.* Even when the controversy is not related to the defendant's contacts with the forum state, however, a court may nevertheless exercise general jurisdiction over the defendant if the defendant has engaged in "continuous and systematic contacts" in the forum. *Id.* Of course, if a defendant satisfies neither of these tests, the exercise of personal jurisdiction is not proper. *Int'l Shoe*, 326 U.S. at 316.

Specific jurisdiction over a nonresident defendant exists when the plaintiff's causes of actions arise out of or result from the defendant's forum-related contacts. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). "Specific jurisdiction requires a plaintiff to show that: '(1) there are sufficient (i.e., not "random fortuitous or attenuated") pre-litigation connections between the non-resident defendant and the forum; (2) the connection has been purposefully established by the defendant; and (3) the plaintiff's cause of action arises out of or is related to the defendant's forum contacts. Once [the] plaintiff makes that showing, the defendant can then defeat the exercise of specific jurisdiction by showing (4) that it would fail the fairness test, i.e., that the balance of interest factors show that the exercise of jurisdiction would be unreasonable.' " *Pervasive Software, Inc. v. Lexware GMBH & Co.*, 688 F.3d 214, 221–22 (5th Cir. 2012) (quoting 1 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 2–5, at 144 (3d ed. 1998)).

The plaintiff has the burden of making a prima facie case that a defendant has sufficient "minimum contacts" with the forum state to justify that state's exercise of either specific or general jurisdiction. *Freudensprung*, 379 F.3d at 343. If the plaintiff does so, the burden shifts to the defendant to show that such an exercise offends due process because it is not consistent with traditional notions of fair play and substantial justice. *Id.* In making its ruling, the court may receive and consider "affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery." *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985). Finally, although a court must accept the non-moving party's jurisdictional allegations as true and resolve all factual disputes in its favor when ruling without an evidentiary hearing, *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 625 (5th Cir. 1999), when an evidentiary hearing is held, the plaintiff must demonstrate by a preponderance of the evidence the court has jurisdiction over the defendant, *Irvin v. S. Snow Mfg., Inc.*, No. 11–60767, 2013 WL 1153647, at * 1 (5th Cir. 2013) (unpublished) (citing *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1271 n.12 (5th Cir. 1983)).

II. Application

***4** Transverse argues the Magistrate Judge erred by not applying the effects test set forth by the Supreme Court in *Calder v. Jones*, 465 U.S. 783, 789 (1984). In *Calder*, the Supreme Court decided a California plaintiff could bring suit in California against Florida-resident employees of the Florida-based National Enquirer, for allegedly libelous statements the Enquirer published about her. The Court said that jurisdiction existed over the defendants "because of their intentional conduct in Florida calculated to cause injury to respondent in California." *Id.* at 783. Because the defendants committed an intentional tort, knowing it would have a potentially devastating impact upon the plaintiff, and knowing that the plaintiff would be primarily injured in the state in which she lived and worked, and in which the magazine had its largest circulation, the defendants "must reasonably anticipate being haled in court there to answer for the truth of the statements made in their article." *Id.* at 789 (internal citation and quotations omitted).

However, this Court must apply *Calder* through the lens of Fifth Circuit precedent, and the Fifth Circuit has noted jurisdiction based on effects in the forum state is "rare." *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 486 (5th Cir. 2008), *cert. denied*, 555 U.S. 816 (2008). Accordingly, the Fifth Circuit has held the effects test "is not a substitute for a nonresident's minimum contacts that demonstrate purposeful availment of the benefits of the forum state," and "the key to *Calder* is that the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum." *Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998).

Transverse cites opinions from other circuits which interpret *Calder* more broadly, such as the Tenth Circuit's decision in *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997), but this Court labors under the law of the Fifth Circuit, not the Tenth.

Transverse also attempts to piece together a rule whereby *Calder* has wider applicability to tort cases, as opposed to contract actions, arguing the Fifth Circuit has only limited *Calder* where the parties have pre-existing, contractual relationships. However, as the Magistrate Judge ably explained, this "rule" is unsupported in Fifth Circuit jurisprudence, which has declined to find effects-based jurisdiction in tort cases as well as contract actions. *See, e.g., Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002); *Allred*, 117 F.3d at 387; *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988) (holding plaintiff must not only show the defendant knew that the brunt of the injury would be felt in the forum state, but also that the defendant expressly aimed its allegedly tortious activities at the forum state); *Stroman Realty*, 513 F.3d at 486 ("We have declined to allow jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident.")

Mindful of the foregoing, binding authorities, the Court must conclude IDI is not subject to specific jurisdiction for the events at issue in this case. IDI directed its tortious conduct—emails to IWS employees—from New York or North Carolina to Iowa. The fruits of the tortious conduct—emails back, containing Transverse's trade secrets, and assigning the contract to IDI—came from Iowa to New York or North Carolina. Transverse has failed to demonstrate, by a preponderance of the evidence, any basis for jurisdiction other than harm to itself, which is simply fortuitous, collateral damage, rather than a purposeful act by IDI. [3]

***5** In addition, the Court notes *Calder* is distinguishable from the facts of this case, in a manner which comports with the Fifth Circuit's interpretations of *Calder*. There, the defendant newspapermen worked for the National Enquirer, which published the libelous language in question in California, the forum state. In fact, the Supreme Court noted the National Enquirer's largest circulation was in California. *Calder*, 465 U.S. at 785. As such, even in *Calder*, jurisdiction was not based solely on effects, but also on acts aimed at the forum. *Id.* at 489–90 ("Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation.").

Finally, although Transverse cites some Fifth Circuit cases which have founds effects-based jurisdiction, *see, e.g.*, *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 402 (5th Cir. 2009), [4] the question is not whether the Fifth Circuit ever finds effects-based jurisdiction, but whether such jurisdiction exists here. It does not. [5]

Conclusion

Accordingly,

IT IS FURTHER ORDERED that Plaintiff Transverse, LLC's Objections [## 26, 29, 30] are OVERRULED;

IT IS FURTHER ORDERED that the Report and Recommendation of United States Magistrate Judge Andrew W. Austin [#26] is ACCEPTED;

IT IS FURTHER ORDERED that Defendant Info Directions, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction [#5] is GRANTED;

IT IS FURTHER ORDERED that Defendant Info Directions, Inc.'s Alternative Motion to Transfer Venue [#5] is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that the parties' Joint Motion for Entry of Scheduling Order [#20] is DISMISSED AS MOOT;

IT IS FINALLY ORDERED that Plaintiff Transverse, LLC's Complaint is DISMISSED WITHOUT PREJUDICE to refiling in a court of proper jurisdiction.

All Citations

Not Reported in F.Supp.2d, 2013 WL 12133970

Footnotes

1 Also pending is the parties' Joint Motion for Entry of Scheduling Order [#20], which is DISMISSED AS MOOT.

2 One of the key persons involved in the allegedly tortious acts, IDI's sales directors, lives in North Carolina and works remotely from there, and apparently contacted IWS from North Carolina.

3 Transverse emphasizes it carried out software development in support of the contract in Texas, and payments were made to it in Texas, but those are acts of the customer, IWS, not IDI. Also, this argument amounts to no more than putting a spin on the Texas effects of IDI's alleged conduct.

4 In point of fact, *Mullins* is consistent with the Fifth Circuit's general treatment of effects-based jurisdiction, and is not contrary to the Magistrate Judge's well-reasoned conclusions. There, the Fifth Circuit found contracts the defendant allegedly interfered with were "centered in Texas," in a way the blee(p) contract is not, as it was a contract to deliver software and services to Iowa. *See Mullins*, 546 F.3d at 402 ("Sagaponack allegedly thwarted Faraway's right to payment from TestAmerica as provided under contracts governing the sale of METCO, a Texas company, that were executed by Faraway in Texas, where Faraway resides. Additionally, the Note and Purchase Agreement are expressly governed by Texas law. Thus, the debtor-creditor relationship between TestAmerica and Faraway is centered in Texas.").

5 Alternatively, the Court would have granted the alternate motion to transfer venue to the Western District of New York, where the case could have been brought, and where both public factors (such as the New York court's familiarity with New York law, New York's local interest in suits such as this, and the fact this division has one of the heaviest weighted dockets in the country), and private factors (such as the fact IDI is located there, as are numerous witness and documentary sources of evidence), militate in favor of venue.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Repairify, Inc., d/b/a asTech,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:19-CV-1370**
	§	
AirPro Diagnostics LLC,	§	
	§	
Defendant.	§	

ORDER ON DEFENDANT AIRPRO DIAGNOSTICS, LLC'S MOTION TO DISMISS, AND IN THE ALTERNATIVE, MOTION TO TRANSFER VENUE

Came to be heard this day is Defendant AirPro Diagnostic, LLC's Motion to Dismiss, and in the Alternative, Motion to Transfer Venue. After considering the Motion, the supporting evidence, the responses, and the arguments of Counsel, the Court is of the opinion that the cause should be:

_____ Dismissed for lack of personal jurisdiction in accordance with Rule 12(b)(2)

_____ Dismissed for improper venue in accordance with Rule 12(b)(3)

_____ Transferred to the Middle District of Florida, Jacksonville Division in accordance with 28 U.S.C. § 1404

All relief not expressly granted is denied.

SO ORDERED.

SIGNED: The ____ day of _____, 2019.

_____
UNITED STATES DISTRICT JUDGE

Approved and Entry Requested:

/s/ Brett M. Chisum
Brett M. Chisum
Attorney-in-Charge
State Bar No. 24082816
Southern District of Texas Bar No. 2099500
bchisum@mccathernlaw.com
Doni Mazaheri
State Bar No. 24110864
Southern District of Texas Bar No. 3380638
dmazaheri@mccathernlaw.com
McCathern, PLLC
Regency Plaza
3710 Rawlins, Suite 1600
Dallas, Texas 75219
214-741-2662 Telephone
214-741-4717 Facsimile
Attorneys for Defendant AirPro Diagnostics, LLC