

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

D3D TECHNOLOGIES, INC.,

Plaintiff,

v.

Case No: 6:20-cv-1699-Orl-31DCI

MICROSOFT CORPORATION,

Defendant.

ORDER

This matter comes before the Court without a hearing on Defendant’s Motion to Change Venue (Doc. 33).

I. Background

Plaintiff D3D Technologies, Inc., (“D3D”) is a Florida corporation with its principal place of business in Orlando, Florida. Defendant Microsoft Corporation (“Microsoft”) is a Washington corporation with its principal place of business in Redmond, Washington. D3D is a technology company focused on developing display technology that takes two-dimensional imaging data, such as that generated by medical scans, and presents it in a three-dimensional format. D3D owns several patents covering this technology. Microsoft is a large information technology company with many products. Microsoft’s “Mixed Reality” Organization developed HoloLens 1 & 2 and the Integrated Visual Augmentation System (IVAS), which are all three-dimensional, holographic display headsets.

D3D filed this lawsuit against Microsoft on September 16, 2020 (Doc. 1), and an Amended Complaint on November 20, 2020 (Doc. 28). D3D asserts patent infringement claims, alleging that Microsoft’s HoloLens and IVAS products infringe on D3D’s patents. On December 11, 2020,

Microsoft filed a Motion to Change Venue (Doc. 33) to the Western District of Washington where Microsoft has its headquarters. In ruling on this motion, the Court has considered D3D's Response in Opposition. (Doc. 44).

II. Legal Standard

District courts have broad discretion in deciding whether to transfer an action to a more convenient forum. *Omega Patents, LLC v. Lear Corp.*, No. 6:07-cv-1422-Orl-35DAB, 2009 WL 1513392, at *2 (M.D. Fla. May 27, 2009) (citing *England v. ITT Thompson Indus., Inc.*, 856 F.2d 1518, 1520 (11th Cir. 1988)). The governing statutory provision, 28 U.S.C. § 1404(a), provides that “[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 or to any district or division to which all parties have consented.” The party seeking transfer bears the burden of establishing that this case should be transferred. *See In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (per curiam) (“[I]n the usual motion for transfer under § 1404(a), the burden is on the movant to establish that the suggested forum is more convenient.”). The threshold question in deciding a motion to transfer pursuant to § 1404(a) is whether the action could originally have been brought in the proposed transferee court. *See Kelling v. Hartford Life & Accident Ins. Co.*, 961 F. Supp. 2d 1216, 1219 (M.D. Fla. 2013) (“Transfer is inappropriate if the case could not have been filed in the proposed transferee district.”). If the action could originally have been brought in the proposed transferee court, the next issue is “whether a balancing of the convenience of the parties and the interest of justice favors transfer.” *See Omega Patents, LLC*, 2009 WL 1513392, at *2 (quoting *First Fin. Bank v. CS Assets, LLC*, No. 08-0731-WS-M, 2009 WL 1211360, at *2 (S.D. Ala. May 4, 2009)).

III. Analysis

Microsoft argues that the Western District of Washington is the appropriate forum to litigate this case. The threshold issue here is easily satisfied because Microsoft's principal place of business is in the Western District of Washington. *See* 28 U.S.C. § 1391(b)(1). As for the convenience issue, when considering whether a transfer is appropriate, courts traditionally consider such factors as: (1) the convenience of the witnesses; (2) the location of the relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances. *Kelling*, 961 F. Supp. 2d at 1218 (quoting *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n.1 (11th Cir. 2005)).

Microsoft contends that many of these factors support transfer. However, a defendant bears a heavy burden when seeking to disrupt a plaintiff's chosen venue. *See Eye Care Int'l, Inc. v. Underhill*, 119 F. Supp. 2d 1313, 1317–19 (M.D. Fla. 2000); *Mason v. Smithkline Beecham Clinical Lab'y*, 146 F. Supp. 2d 1355, 1359 (S.D. Fla. 2001).

1. Plaintiff's Choice of Forum

When deciding a motion to transfer under Section 1404, the Court employs a “strong presumption against disturbing plaintiff's initial forum choice.” *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1100 (11th Cir. 2004) (quoting *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983)).¹ “The plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations.” *Robinson v. Giarmarco*

¹ Although *SME* involved a *forum non conveniens* motion, § 1404(a) is Congress's codification of that doctrine and *SME*'s reasoning applies here. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 1184, 1190–91 (2007).

& *Bill, P.C.*, 74 F.3d 253, 260 (11th Cir. 1996) (quoting *Howell v. Tanner*, 650 F.2d 610, 616 (5th Cir. 1981) (internal quotation marks omitted). D3D chose to litigate this case in the Middle District of Florida. Therefore, this factor weighs heavily against transfer.

2. Convenience of the Witnesses

In addition to the plaintiff's choice of forum, an "important factor under § 1404(a) is the convenience of witnesses, and the moving party must make a specific showing of inconvenience to witnesses." *Elec. Transaction Network v. Katz*, 734 F. Supp. 492, 501–02 (N.D. Ga. 1989) (citing *J.I. Kislak Mortg. Corp. v. Conn. Bank & Tr. Co.*, 604 F. Supp. 346, 347 (S.D. Fla. 1985)). "[A] general allegation that witnesses will be necessary, without identifying those necessary witnesses and indicating what their testimony at trial will be," does not warrant transfer under § 1404(a). *J.I. Kislak*, 604 F. Supp. at 347. In this respect, "a party seeking a transfer of venue must demonstrate that the witnesses identified are key witnesses." *Homes v. Freightliner, LLC*, 237 F. Supp. 2d 690, 694 (M.D. Ala. 2002) (citing *Mason*, 146 F. Supp. 2d at 1362). Further, because the main concern here is "the possibility of having [witnesses'] testimony at the trial . . . transfer may be denied when the witnesses, although in another district, are employees of a party and their presence can be obtained by that party." *Mason*, 146 F. Supp. 2d at 1361 (citations omitted).

Microsoft identifies current Microsoft employees and employee teams involved with HoloLens and IVAS who are based in Washington and have been referenced in the complaint. Although it would be more convenient for these employees to travel within Washington, the Court gives this point little weight. First, Microsoft can easily ensure that its own employees can travel to this district to testify if necessary. And second, Microsoft does not argue that any of these individuals are "key witnesses" and expressly disclaims that it is arguing that these individuals are relevant in this case. (*See* Doc. 33 at 10 n.6).

Microsoft also states that it is unclear whether the inventors on D3D's patents, David Douglas and Robert Douglas, and D3D's CEO, Buddy Beck, have any connection to Florida. But D3D has demonstrated that all the inventors on its patents reside in Florida and that it would be more convenient for them if the case remained in Florida. (*See* Docs. 44-1, 44-2, & 44-3).² Although Beck is a Virginia resident, it will not be significantly more convenient for him to travel to Florida rather than Washington.

Microsoft argues that it should receive great weight on this factor because "it is well established that the majority of the witnesses in a patent infringement case likely originate with the defendant." *Brandywine Commc 'ns Tech., LLC v. AT&T Corp.*, No. 6:12-CV-283-ORL-36DAB, 2012 WL 1658810, at *3 (M.D. Fla. Apr. 25, 2012), *report and recommendation adopted*, No. 6:12-CV-283-ORL-36DAB, 2012 WL 1658533 (M.D. Fla. May 11, 2012) (citing *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009)). However, the case law on the issue does not suggest that the weight is given solely because a complaint alleges patent infringement. In cases where venue was transferred to an alleged infringer's home district, the courts made specific findings that more witnesses had ties to the destination district. *See id.* at *3-4 (venue transferred from Florida to California where vast majority of potential witnesses were in California and plaintiff had minimal ties to Florida and did not establish any witnesses lived there); *Motorola Mobility, Inc. v. Microsoft Corp.*, 804 F. Supp. 2d 1271, 1276-77 (S.D. Fla. 2011) (venue transferred from Florida to Washington where defendant identified witnesses in its home district and majority of patents at issue had no ties to Florida); *but see Carroll v. Texas Instruments, Inc.*, 910 F. Supp. 2d 1331, 1335-39 (M.D. Ala. 2012) (pointing to a group with potentially relevant

² Microsoft only addresses inventors David Douglas and Robert Douglas in its motion. D3D's response states that Kathleen Douglas is also one of the inventors and resides in Florida.

information without identifying the specific individuals likely to testify did not weigh transfer in favor of defendant in patent case). Accordingly, the Court finds this factor to be neutral.³

3. Location of the Relevant Documents and Relative Ease of Access to Sources of Proof

“In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant’s documents are kept weighs in favor of transfer to that location.” *Caroll*, 910 F. Supp. 2d at 1339 (quoting *Genentech*, 566 F.3d at 1345). Microsoft represents that much of the relevant evidence in this case will be located at its Washington headquarters. The Court notes, however, that Microsoft—a global technology company—can access its documents remotely and that

technology has also reduced the burden that will be imposed by litigating in the current forum; indeed, if needed for trial, many documents can be sent at no burden and be printed, as they would have to be regardless, locally. Still, despite technology, the incremental burden based upon the location of the documents remains cognizable.

Id. (citing *Genentech*, 566 F.3d at 1346). Therefore, while “this factor . . . weighs in favor of transfer and though technology has not made this factor a complete nullity, it changes the analysis ‘only minimally.’” *Id.* (citing *Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 325 (E.D.N.Y. 2006)).

4. Locus of Operative Facts

Microsoft designed and developed the alleged infringing products in Washington. (Doc. 33-5 ¶¶ 6–11; Doc. 33-4 ¶¶ 13–15). Because the “locus of operative facts usually lies where the

³ Microsoft also points to several former employees who are identified in the complaint. These potential third-party witnesses apparently have no connection to Florida. However, Microsoft has not argued or provided any evidence linking these individuals to the Western District of Washington. Therefore, they do not impact the balance on this factor.

allegedly infringing product was designed, developed and produced” this factor weighs in favor of transfer. *Carroll*, 910 F. Supp. 2d at 1339–40 (quoting *Neil Bros*, 425 F. Supp. 2d at 331)).

5. Convenience of the Parties

“Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient.” *Van Dusen v. Barrack*, 376 U.S. 612, 645–46 (1964).

“Where a transfer merely shifts the inconvenience from one party to another, Plaintiff’s choice of forum should remain.” *Eye Care Int’l, Inc. v. Underhill*, 119 F. Supp. 2d 1313, 1319 (M.D. Fla. 2000). “The Court places little weight on the domicile of corporate defendants and their place of incorporation,” *Am. Safety Cas. Ins. Co. v. Bio-Tech Sols., Inc.*, No. 1:05-1cv-3152-JEC, 2007 WL 951529, at *4 (N.D. Ga. Mar. 26, 2007) (quoting *Grey v. Cont’l Mktg. Assocs., Inc.*, 315 F. Supp. 826, 831–32 (N.D. Ga. 1970)), or on an “alleged hardship [that is] unsupported by way of proof or affidavit,” *Grey*, 315 F. Supp. at 831.

Microsoft and D3D are both corporate defendants. There is no dispute that Microsoft is headquartered in Washington and it would generally be more convenient for it to litigate there. Microsoft contends that D3D has no centralized business operation in Florida. In response, however, D3D has demonstrated that it carries out its core business operations in Florida. (*See* Doc. 44-4 ¶¶ 2–5). While D3D’s operation in Florida is small (it is a small company), transferring the case to Washington would merely shift the burden from one party to the other. The Court therefore accords this factor neutral weight.

6. Relative Means of the Parties

Microsoft is a massive technology company with global reach. (*See* Doc. 33 at 3–4).⁴ The parties do not dispute that Microsoft has greater relative means than D3D. Instead, Microsoft

⁴ Microsoft employs over 45,000 people at its Washington headquarters. (Doc. 33 at 3).

argues that this difference is not important because Microsoft would bear a greater logistical burden by having to litigate in Florida and it would cost D3D less to travel to Washington. D3D has shown, however, that it has connections to Florida and the burden of litigating in Washington would not be insignificant. Therefore, this factor weighs against transfer.

7. Trial Efficiency and the Interests of Justice, Based on the Totality of the Circumstances

Microsoft last argues that the factor of trial efficiency and the interests of justice support transfer because the Middle District of Florida is busier than the Western District of Washington and it takes longer for cases to get to trial here than in Washington.⁵ While the median time to trial in Washington is about four months less than in this court (Doc. 33-26 at 3; Doc. 33-27 at 3), this is not a substantial difference.⁶ See *Trinity Christian Ctr. of Santa Ana, Inc. v. New Frontier Media, Inc.*, 761 F. Supp. 2d 1322, 1330 (M.D. Fla. 2010) (noting that with a three month difference in time to trial, “the time involved in a transfer will likely eliminate that difference, if not cause a greater delay.”). Therefore, the Court accords this factor neutral weight.

8. Availability of Process and Forum’s Familiarity with the Governing Law

Neither party contends that any of the remaining factors weigh for or against transfer. The Court agrees and therefore accords those factors neutral weight.

IV. Conclusion

⁵ Microsoft also argues that the risks associated with travel during the ongoing COVID-19 pandemic favor transfer. The Court is aware of these risks and the uncertainties involved with the pandemic and is cognizant of the concerns raised by both parties. Whether the case remains in Florida or is transferred to Washington, one of the parties will necessarily be bearing this burden of travel during the pandemic and that will present a risk to anyone. The Court is reluctant to make generalized assumptions about whether one party would face more risk than the other. Therefore, the Court declines to weigh this fact in favor of or against transfer.

⁶ Although the Middle District of Florida is one of the busiest in the country, it is also one of the most productive districts based upon case terminations per judge.

In sum, Microsoft has failed to meet its burden of persuading the Court that transfer to the Western District of Washington is warranted. Although some factors weigh in favor of transfer, the overall balance requires the Court to honor the strong presumption supporting D3D's choice of forum.

Accordingly, it is **ORDERED** that the Defendant's Motion to Transfer Venue (Doc. 33) is **DENIED**.

DONE and **ORDERED** in Chambers, Orlando, Florida on February 4, 2021.




GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party