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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ECHOLOGICS, LLC, *et al.*,
Plaintiffs,
v.
ORBIS INTELLIGENT SYSTEMS, INC.
Defendant.

Case No. 21-cv-01147-BAS-AHG

**ORDER DENYING DEFENDANT’S
MOTION TO TRANSFER VENUE
(ECF No. 18)**

In this patent infringement action, Plaintiffs Echologics, LLC; Mueller International, LLC; and Mueller Canada, Ltd. (collectively “Plaintiffs”) allege that Defendant Orbis Intelligent Systems, Inc. (“Orbis”) has infringed one of its Echologics’ patents. (ECF No. 1.) Defendant Orbis moves pursuant to 28 U.S.C. § 1404(a) to transfer this action to the District Court of Delaware (ECF No. 18), which Plaintiffs oppose (ECF No. 19). The motion is suitable for determination on the papers submitted and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the reasons herein, the Court **DENIES** Defendant’s motion to transfer.

1 **I. BACKGROUND**

2 “Plaintiffs Echologics, LLC, Mueller International, and Mueller Canada are indirect
3 subsidiaries of Mueller Water Products, Inc., a public company with subsidiaries that are
4 manufacturers of products and services used in the transmission, distribution, and
5 measurement of water.” (Compl. ¶ 10.) “Echologics provides technologies, products, and
6 services that can non-invasively detect underground leaks and assess the condition of water
7 mains.” (*Id.* ¶ 11.) Echologics holds patents covering related water monitoring
8 technologies, including the patent at issue here: U.S. Patent No. 10,881,888 (“the ‘888
9 patent”). (*Id.* ¶¶ 11–12, 14.) Technology covered in the ‘888 patent includes a “nozzle
10 cap” that when attached to a fire hydrant, turns it into a “‘smart’ fire hydrant that can detect
11 leaks early” and notify utility companies efficiently. (*Id.* ¶ 13.) Within the nozzle cap, an
12 attached “antenna cover . . . is used to transmit a signal carrying data gathered by one or
13 more sensors” (*Id.*)

14 Defendant Orbis is a private company incorporated in Delaware and headquartered
15 in San Diego. (Compl. ¶ 6; Def.’s Mem. P & A ISO Mot. to Transfer (“Def.’s Mem.”),
16 ECF No. 18-1 at 16:7.) Orbis has developed and patented “innovative sensors that can be
17 used to detect leaks and defects in water pipes and pipe walls.” (Def.’s Mem., at 2:11–12.)
18 Its product, the Prodigy SmartCap, was designed with “its sensors built into a cap that
19 screws onto fire hydrants[.]” (*Id.* at 2:14–15.) Orbis sent its “first deliveries of the
20 SmartCap product . . . to customers in June 2020.” (*Id.* at 2:15–16.)

21 Prior to this suit, Plaintiffs filed a claim in October 2019 against “Orbis in the District
22 of Delaware for patent infringement of U.S. Patent Nos. 10,305,178 and 10,386,257.” (*Id.*
23 at 2: 18–20.) United States District Court Judge Richard G. Andrews presided over the
24 case. The patents at dispute in Delaware covered similar technology for products with a
25 “nozzle cap configured to mount on a fire hydrant.” (*Id.* at 4:7–8.) Orbis attaches
26 transcripts from the Delaware litigation: the first transcript is from a discovery dispute
27 videoconference on July 29, 2020, and the second transcript is from a joint conference
28 discussing the terms of a potential settlement on February 25, 2021. (*See* Ex. 1 to Geyer

1 Decl. in Supp. (“Disc. Conf.”), ECF No. 18-3 ¶ 2; Ex. 2 to Geyer Decl. in Supp.
2 (“Settlement Conf.”) ECF No. 18-4 ¶ 3.) In the Delaware litigation, Judge Andrews
3 facilitated conversations between the parties to reach a resolution without involving
4 himself with the substantive merits of the case. (*See* Disc. Conf, at 3:13–21; Settlement
5 Conf., at 11–12.) A point of contention relevant to this motion arose during a hearing with
6 Judge Andrews. (*Compare* Def.’s Mem., at 9:24–26, 10:1–5; *with* Opp’n, ECF No. 19 at
7 10:6–16.) Plaintiffs acknowledged that it would be helpful to inspect Orbis’ alleged
8 infringing product not only to determine if the product infringed on their patents in that suit
9 but also to see if other patents not alleged in the complaint might have been violated. (Disc.
10 Conf., at 15: 6–11.) Judge Andrews advised Plaintiffs that using discovery to investigate
11 whether other future claims might be filed was an “abuse of discovery.” (*Id.* at 15:17–21.)

12 Later, the parties agreed to dismiss the action, and Judge Andrews facilitated
13 discussions between the parties regarding the terms of dismissal. (*See* Settlement Conf.)
14 Orbis’ counsel expressed concerns about Judge Andrew’s involvement in the settlement
15 discussions. (*Id.* at 11:25, 12:1–7.) Judge Andrews responded: “if either side thinks some
16 time after today that I’ve involved myself too much in talking about your positions or
17 essentially trying to settle this case . . . just write me a letter, and I’ll get it reassigned to a
18 different judge if you’re going to go forward and litigate.” (*Id.* at 18:16–21.) After a year
19 and a half of litigation, the parties agreed to dismiss the case with prejudice on June 21,
20 2021. (*Id.* at 3:7, 24–25.) The following day, Echologics filed this action in the Southern
21 District of California against Orbis for allegedly infringing Echologics’ ‘888 patent.
22 (Compl. ¶ 1.)

23 II. LEGAL STANDARD

24 “For the convenience of parties and witnesses, in the interest of justice, a district
25 court may transfer any civil action to any other district . . . where it might have been
26 brought[.]” 28 U.S.C. § 1404(a). Section 1404 “place[s] discretion on the district court to
27 adjudicate motions for transfer according to an individualized, case-by-case consideration
28 of convenience and fairness.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988).

1 District courts employ a two-step framework to resolve a transfer motion. A court first
2 asks whether the plaintiff could have originally brought the action in the proposed
3 transferee forum. *Nat'l Prods. v. Wireless Accessory Solutions, LLC*, No. C15-2024JLR,
4 2018 WL 1709494, at *2 (W.D. Wash. Apr. 9, 2018) (citing *Hoffman v. Blaski*, 363 U.S.
5 335, 344 (1960)); *Ironworks Patents LLC v. Samsung Elecs. Co.*, No. 17-cv-01958-HSG,
6 2017 WL 3007066, at *1 (N.D. Cal. July 14, 2017). If the action could have been brought
7 there, then the court considers the propriety of transfer. *Peregrine Semiconductor Corp. v.*
8 *RF Micro Devices, Inc.*, No. 12-cv-911-IEG-WMC, 2012 WL 2068728, at *2 (S.D. Cal.
9 June 8, 2012).

10 **III. ANALYSIS**

11 Defendant moves to transfer this case to the District of Delaware pursuant to
12 28 U.S.C. § 1404(a) on the grounds that litigating this case there would be in the interest
13 of justice to avoid forum shopping and preserve judicial economy. (Mot. to Transfer, at 1–
14 2.) The Court rejects both arguments.

15 **A. The Action Could Have Been Brought in the District of Delaware**

16 No party affirmatively disputes that this action could have been brought in the
17 District of Delaware. However, because a defendant cannot waive Section 1404's "might
18 have been brought" requirement, the Court must address it here. *See In re Bozic*, 888 F.3d
19 1048, 1053 (9th Cir. 2018). "The phrase where an action 'could have been brought' is
20 interpreted to mean that the proposed transferee court would have subject matter
21 jurisdiction, proper venue, and personal jurisdiction." *Peregrine Semiconductor Corp.*,
22 2012 WL 2068728, at *2 (citing *A.J. Indus., Inc. v. U.S. Dist. Ct. for Central Dist. of Cal.*,
23 503 F.2d 384, 386–88 (9th Cir. 1974) and *Shapiro v. Bonanza Hotel Co.*, 185 F.2d 777,
24 779–81 (9th Cir.1950)); *see also Amazon.com v. Cendant Corp.*, 404 F. Supp. 2d 1256,
25 1259 (W.D. Wash. 2005) (concluding there was "no question" action could have been
26 brought in proposed transferee forum by analyzing venue as well as subject matter and
27 personal jurisdiction in the transferee forum). The Court addresses each of these
28 considerations.

1 **1. Subject Matter Jurisdiction**

2 The District of Delaware would have subject matter jurisdiction over Plaintiffs’
3 federal patent infringement claims. *See* 28 U.S.C. § 1338(a); *AstraZeneca Pharms. LP v.*
4 *Apotex Corp.*, 669 F.3d 1370, 1377 (Fed. Cir. 2012) (“The district courts have original
5 jurisdiction over any civil action arising under any Act of Congress relating to patents.”).
6 Thus, this consideration is satisfied.

7 **2. Venue**

8 A district court’s broad discretion to transfer a case is subject to the prohibition that
9 an action cannot be transferred to a district in which venue would have been improper if
10 the action were originally filed there. *See Finjan, Inc. v. Sophos Inc.*, No. 14-cv-01197-
11 WHO, 2014 WL 2854490, at *2 (N.D. Cal. June 20, 2014).

12 The federal patent venue provision establishes that “[a]ny civil action for patent
13 infringement may be brought in the judicial district where the defendant resides, or where
14 the defendant has committed acts of infringement and has a regular and established place
15 of business.” 28 U.S.C. § 1400(b). For the purposes of Section 1400(b), a domestic
16 corporation “resides” only in the state where it is incorporated. *TC Heartland LLC v. Kraft*
17 *Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017); *Columbia Sportswear N. Am., Inc.*
18 *v. Seirus Innovative Accessories, Inc.*, 265 F. Supp. 3d 1196, 1200 (D. Or. 2017) (“*TC*
19 *Heartland* reaffirmed that for venue purposes in patent cases, a domestic corporation
20 ‘resides’ only in its state of incorporation.”). Orbis is incorporated in Delaware,
21 (Compl. ¶ 6), and thus, Section 1400(b)’s first clause is satisfied to establish venue in the
22 District of Delaware. Therefore, venue would have been proper in the District of Delaware.

23 **3. Personal Jurisdiction**

24 Neither party disputes that the District of Delaware could exercise personal
25 jurisdiction. “The question of personal jurisdiction[] goes to the court’s power to exercise
26 control over the parties.” *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979).
27 “Rule 4 is the starting point for any personal jurisdiction analysis in federal court.” *Synthes*
28 *(U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285, 1293 (Fed. Cir.

1 2009). Pursuant to Rule 4(k)(1)(A), “[f]ederal courts apply state law to determine the
2 bounds of the jurisdiction over a party.” *Williams v. Yamaha Motor Co.*, 851 F.3d 1015,
3 1020 (9th Cir. 2017) (citing Fed. R. Civ. P. 4(k)(1)(A)). This “involves two inquiries:
4 whether a forum state’s long-arm statute permits service of process and whether the
5 assertion of personal jurisdiction violates due process.” *Autogenomics, Inc. v. Oxford*
6 *Gene Tech. Ltd.*, 566 F.3d 1012, 1017 (Fed Cir. 2009).

7 Delaware’s long-arm statute permits service of process when the defendant is
8 incorporated in Delaware. *Papendick v. Bosch*, 410 A.2d 148, 152 (1979). To comport
9 with due process, the defendant must have sufficient “minimum contacts” such that the
10 exercise of personal jurisdiction “does not offend traditional notions of fair play and
11 substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The
12 minimum contacts requirement may be sustained when “ownership aris[es] from the
13 purposeful utilization of the benefits and protections of the Delaware Corporation Law in
14 activities related to the underlying cause of action.” *Papendick*, 410 A.2d, at 152.

15 Here, Defendant was incorporated in Delaware, which complies with Delaware’s
16 long-arm statute. (Def.’s Mem., at 7:20.) A Delaware court’s exercise of personal
17 jurisdiction over Defendant also comports with due process considerations because by
18 extension of its incorporation in Delaware, Defendant benefitted from the protections of
19 the Delaware laws as it relates to this patent infringement claim. Thus, the District of
20 Delaware would have personal jurisdiction over Defendant. Accordingly, this case could
21 have been brought in the District of Delaware.

22 **B. Propriety of Transfer**

23 When an action could have been brought in the potential transferee court, a district
24 court must decide whether transfer is appropriate. *Williams v. Bowman*, 157 F. Supp. 2d
25 1103, 1105–06 (N.D. Cal. 2001). Section 1404(a) expressly identifies the following
26 considerations: “convenience of the parties,” “convenience of . . . witnesses,” and “the
27 interest of justice.” 28 U.S.C. § 1404(a). Although the statute identifies only these factors,
28 courts deem “*forum non conveniens* considerations [to be] helpful in deciding a § 1404

1 transfer motion.” *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th
2 Cir. 1986). District courts therefore consider the following factors to decide a transfer
3 motion: (1) the plaintiff’s choice of forum, (2) convenience of the parties, (3) convenience
4 of the witnesses, (4) ease of access to the evidence, (5) familiarity of each forum with the
5 applicable law, (6) feasibility of consolidation of other claims, (7) any local interest in the
6 controversy, and (8) relative court congestion and time to trial in each forum. *Jones v.*
7 *GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000); *Barnes & Noble, Inc.*, 823
8 F. Supp. 2d at 993. “This list is non-exclusive, and courts may consider other factors, or
9 only those factors which are pertinent to the case at hand.” *Martin v. Glob. Tel*Link Corp.*,
10 No. 15-CV-00449-YGR, 2015 WL 2124379, at *2 (N.D. Cal. May 6, 2015).

11 The movant bears the burden to show “by particular circumstances” that the balance
12 of the factors favors transfer. *Commodity Futures Trading Comm’n v. Savage*, 611 F.2d
13 270, 279 (9th Cir. 1979); *Amazon.com*, 404 F. Supp. 2d at 1259; *Saleh v. Titan Corp.*, 361
14 F. Supp. 2d 1152, 1155 (S.D. Cal. 2005). Transfer is not appropriate if it is sought as a
15 matter of a defendant’s mere preference for another forum or if transfer would merely shift
16 inconvenience to another party. *Van Dusen v. Barrack*, 376 U.S. 612, 645–46 (1964).
17 Here, the Court concludes that Defendant has not met its burden to show that transfer to
18 the District of Delaware is warranted.

19 **1. Deference to Plaintiff Echologics’ Choice of Forum is Substantially**
20 **Reduced**

21 A court may afford “great weight” to the plaintiff’s choice of forum, especially
22 “when the plaintiff has chosen to file the lawsuit in its home forum.” *Lou v. Belzberg*, 834
23 F.2d 730, 739 (9th Cir. 1987); *Finjan, Inc.*, 2014 WL 2854490, at *3. But the deference
24 to the plaintiff’s choice is “substantially reduce[d] . . . when the plaintiff does not reside in
25 the forum.” *McGaff v. Aetna*, No. CIV. S–10–1467 LKK/EFB, 2010 WL 5394203, at *2
26 (E.D. Cal. Dec. 21, 2010) (citations omitted); *Saleh*, 361 F. Supp. 2d at 1158; *see also*
27 *Gemini Capital Grp., Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1091 (9th Cir. 1998).
28 Deference to “the plaintiff’s chosen venue is substantially reduced . . . where the forum

1 lacks a significant connection to the activities alleged in the complaint.” *Carolina Cas.*
2 *Co. v. Data Broad. Corp.*, 158 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001) (internal quotation
3 marks and brackets omitted).

4 Plaintiffs do not reside in the Southern District of California. Echologics and
5 Mueller International reside in Delaware with their principal places of business in Georgia,
6 while Mueller Canda resides and has its principal place of business in Canada. (Compl.
7 ¶¶ 3–5.) Accordingly, deference to Echologics’ choice of forum in the Southern District
8 of California is substantially reduced and this factor weighs minimally against transfer.

9 **2. The Convenience of the Parties Favors the Southern District of**
10 **California**

11 **a. The Possible Delay from Transfer is Minimal**

12 Delay is a relevant consideration in assessing the convenience to the parties of
13 transfer. *See Credit Acceptance Corp. v. Drivetime Automotive Grp., Inc.*, No. CV 13-
14 01531 (MRWx), 2013 WL 12124382, at *2 (C.D. Cal. Aug. 5, 2013). “[U]nreasonable
15 delay caused by transfer will necessarily result in injury and inconvenience to the parties
16 and therefore the court must consider the duration of the pendency of the litigation prior
17 to the motion to transfer.” *Id.* (citing *Moore v. Telfon Commc’ns Corp.*, 589 F.2d 959, 968
18 (9th Cir. 1978); *Barnstormers, Inc. v. Wing Walkers LLC*, No. 09-CV-2367, 2010 WL
19 2754249 (S.D. Cal. July 9, 2010)). This case was filed on June 22, 2021. (Compl., at
20 13:23–24) Defendant Orbis moved to transfer venue less than two months after Plaintiffs
21 filed the case. (Def.’s Mem., at 1:22.) The request to transfer has thus arisen in the nascent
22 stages of this litigation.

23 **b. The “Center of Gravity” is in the Southern District of**
24 **California**

25 Typically, “[t]he location of the alleged infringer’s principal place of business . . .
26 is often the critical and controlling consideration in adjudicating a motion to transfer
27 venue.” *Minka Lighting, Inc. v. Trans Globe Imports, Inc.*, No. 3:02-CV-2538, 2003 WL
28 21251684, at *3 (N.D. Tex. May 23, 2003); *see also Shipping & Transit LLC v. Adorama,*

1 *Inc.* 2016 WL 9114146 at *4 (C.D. Cal. Aug. 23, 2016). In a patent infringement case,
2 “the parties’ convenience will be served by facilitated access to the witnesses and
3 documents that disclose the history of [the defendant’s] relevant products and the design
4 and development of the devices that plaintiff accuses of infringement.” *Arete Power, Inc.*
5 *v. Beacon Power Corp.*, No. C 07-5167 WDB, 2008 WL 508477, at *6 (N.D. Cal. Feb. 22,
6 2008) (citing *B&B Hardware, Inc. v. Hargis Indus.*, No. CV 06-4871-PA (SSx), 2006 WL
7 4568798 at *4 (C.D. Cal. Nov. 30, 2006)); *Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425
8 F. Supp. 2d 325, 331 (E.D.N.Y. 2006). Thus, “the district court ought to be as close as
9 possible to the milieu of the infringing device and the hub of activity centered around its
10 production.” *Amazon.com*, 404 F. Supp. 2d at 1260; *see also Credit Acceptance Corp.*,
11 2013 WL 12124382, at *3 (same). This is referred to as the “center of gravity” of the
12 alleged infringing activity. *See Anza Tech., Inc. v. Toshiba Am. Elec. Components, Inc.*,
13 No. 2:17-01688 WBS DB, 2017 WL 6538994, at *4 (E.D. Cal. Dec. 21, 2017) (“In patent
14 cases, ‘the preferred forum is ‘that which is the center of gravity of the accused activity.’”);
15 *see also Synopsis, Inc. v. Mentor Graphics Corp.*, No. C 12-5025 MMC, 2013 WL
16 1365946, at *5 (N.D. Cal. Apr. 3, 2013) (“[T]he center of the accused activity is the district
17 in which the defendant is alleged to have developed, tested, researched, produced,
18 marketed, and made sales decisions concerning the accused product.”) (citation omitted).

19 Defendant’s principal place of business is in San Diego. (Mot. to Transfer, at 7:20.)
20 In their Complaint, Plaintiffs allege Orbis “committed acts of infringement in this
21 [d]istrict.” (Compl. ¶ 8.) Accordingly, Orbis’ conduct and its alleged infringing activity
22 would be centered in the Southern District of California. Thus, this factor weighs against
23 transfer.

24 **3. The Convenience of the Witnesses Weighs Against Transfer**

25 “[T]he convenience of the witnesses is the most important consideration in
26 determining whether to transfer venue.” *Shipping & Transit LLC*, 2016 WL 9114146, at
27 *3; *Secured Mail Solutions, LLC v. Advanced Image Direct, LLC*, No. SACV 12-01090-
28 DOC(MLGx), 2013 WL 8596579, at *5 (C.D. Cal. Jan. 30, 2013); *Bradley-Brown v. Am.*

1 *Home Mortg. Servicing, Inc.*, No. SACV 11-1132 DOC, 2012 WL 254064, at *2 (C.D.
2 Cal. Jan.25, 2012). “To show inconvenience to witnesses, the moving party should state
3 the witnesses’ identities, locations, and content and relevance of their testimony.” *Meyer*
4 *Mfg. Co. Ltd. v. Telebrands Corp.*, No. CIV. S–11–3153 LKK/DAD, 2012 WL 1189765,
5 at *6 (E.D. Cal. Apr. 9, 2012) (citing *Florens Container v. Cho Yang Shipping*, 245 F.
6 Supp. 2d 1086, 1092–93 (N.D. Cal. 2002)); *Cochran v. NYP Holdings, Inc.*, 58 F. Supp.
7 2d 1113, 1119 (C.D. Cal. 1998). In considering the convenience factor, courts should
8 consider “not only the number of witnesses located in the respective districts, but also the
9 nature and quality of their testimony in relationship to the issues in the case.” *Kannar v.*
10 *Alticor, Inc.*, No. 08-5505, 2009 WL 975426, at *2 (N.D. Cal. Apr. 9, 2009). The Court
11 separately discusses party and non-party witnesses.

12 **a. Party Witnesses**

13 “The convenience and cost of attendance for witnesses is an important factor in the
14 transfer calculus” because “additional distance from home means additional travel
15 time . . . [which] increases the probability for meal and lodging expenses” and “additional
16 time with overnight stays increase the time which these fact witnesses must be away from
17 their regular employment.” *In re Nintendo Co., Ltd.*, 589 F.3d 1194, 1199 (Fed. Cir. 2009).
18 “[T]he factor of inconvenience to witnesses increases in direct relationship to the
19 additional distance to be traveled.” *Id.* (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d
20 304, 317 (5th Cir. 2008) (en banc)). Courts generally discount the inconvenience to a
21 party’s employee witnesses—whom a party may compel to testify—in the transfer
22 analysis. *See HollyAnne Corp. v. TFT Inc.*, 199 F.3d 1304, 1307 n.2 (Fed. Cir. 1999)
23 (noting that the location of employee witnesses “is not as important a factor as it would be
24 if they were not under the defendant’s control and it would be forced to subpoena those
25 witnesses and therefore require the court to have jurisdiction over them”); *Getz v. Boeing*
26 *Co.*, 547 F. Supp. 2d 1080, 1084 (N.D. Cal. 2008); *STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp.
27 1551, 1556 (N.D. Cal. 1988) (holding that a party may compel the testimony of its
28 employees at trial).

1 Orbis states that the key witness in this case is the founder and CTO of Orbis, Danny
2 Krywyj. (Def.’s Mem., at 14:6–7.) Orbis states that Mr. Krywyj “will testify to the design,
3 development, and/or manufacture of the accused SmartCap product, sales and offer for
4 sales of the accused SmartCap product, and competitive information relating to the accused
5 SmartCap product.” (*Id.* at 14:7–10.) The parties identify different locations for where
6 they believe Mr. Krywyj resides. (*Compare id.* at 14:14–21, *with* Opp’n at 13:1–18.)
7 Orbis clarifies that while Mr. Krywyj typically resides in San Diego, he is spending most
8 of his time in England during the pandemic. Plaintiffs speculate that the pandemic’s
9 negative influence on travel plans will lessen during this litigation and argue that Mr.
10 Krywyj is likely to return to San Diego permanently during this litigation. (Opp’n, at
11 13:15–18.) Due to Mr. Krywyj’s position and employment at Orbis, the Court finds Orbis
12 is in a better position to identify Mr. Krywyj’s residency. Thus, the Court will consider
13 Mr. Krywyj a resident of England for purposes of deciding witness convenience but notes
14 Mr. Krywyj’s connections to San Diego. Further, Orbis provides that it will likely call
15 “the prosecuting attorneys of the asserted patent, the inventors of the asserted patent, and
16 corporate employees at Mueller” who to the best of Orbis’s knowledge, reside in Georgia
17 and Canada. (Def.’s Mem., at 14:22–25.)

18 In its opposition, Echologics provides that it will seek testimony from Orbis’
19 Director of Engineering, Jeff Prsha; Technical Lead Engineer, Christopher Espinoza; and
20 Senior Electronics Engineer, Jore Acosta. (Opp’n, at 13–14.) Echologics indicates these
21 three witnesses live in San Diego and are employed by Orbis, according to their LinkedIn
22 profiles. (*Id.* at 13:24, 14:1–8; *See* Exs. 11–13 to Nixon Decl. in Opp’n ¶¶ 14–16 ECF 19-
23 1.) Defendant Orbis does not dispute this information in its reply.

24 **b. Non-party Witnesses**

25 “[P]articular consideration is given to the convenience of *non-party* witnesses” in
26 the transfer analysis. *Credit Acceptance Corp.*, 2013 WL 12124382, at *4 (emphasis in
27 original). The central inquiry is whether such witnesses are subject to compulsory process
28 in the judicial forum where the case is being litigated so that their testimony can be

1 compelled for trial if necessary. *See In re Ferrero Litig.*, 768 F. Supp. 2d 1074, 1080 (S.D.
2 Cal. 2011); *Newegg, Inc. v. Telecomm. Sys.*, No. C 09-0982 JL, 2009 WL 1814461, at *7
3 (N.D. Cal. June 23, 2009). Although videotaped deposition testimony is available,
4 “[o]ffering unavailable witnesses’ testimony via videotaped deposition testimony is
5 disfavored[.]” *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183,
6 1194 (S.D. Cal. 2007). Thus, “[i]n assessing the effect of a transfer on the convenience of
7 witnesses, courts consider the effect of a transfer on the availability of certain witnesses,
8 and their live testimony, at trial.” *Los Angeles Memorial Coliseum Comm’n v. Nat’l*
9 *Football League*, 89 F.R.D. 497, 501 (C.D. Cal. 1981). “The aim is to minimize the risk
10 of ‘trial by deposition.’” *Worldwide Financial LLP v. Kopko*, No. 1:03-CV-0428-DFH,
11 2004 WL 771219, *3 (S.D. Ind. Mar. 18, 2004).

12 Pursuant to Federal Rules of Civil Procedure 45(b)(2)(C), a district court may
13 compel attendance through the issuance of a subpoena at any place within the district of
14 the court by which it is issued or at any place within 100 miles of where the deposition,
15 trial, or hearing is being held. Fed. R. Civ. P. 45(b)(2)(C). The presence of a substantial
16 number of witnesses within the subpoena power of a district can weigh in favor of transfer
17 to that district. *See In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009).

18 To oppose transfer, Echologics states that it will likely seek testimony from two past
19 Orbis Sales Directors: Tacy Hernandez and Simon Wick. (Opp’n, at 13–14.) As
20 represented in their LinkedIn profiles, Mr. Wick resides in San Diego; however, Ms.
21 Hernandez resides in Colorado. (Exs. 9–10 to Nixon Decl. in Opp’n.) The Court may rely
22 on counsel’s assertions regarding these two non-party witnesses because the ultimate
23 concern is whether Delaware is more convenient. *See Costco Wholesale Corp.*, 472 F.
24 Supp. 2d at 1194 (overruling hearsay objection on § 1404(a) motion, noting that the “only
25 pertinent consideration” is the unchallenged fact that one forum would put the third-party
26 witnesses outside the court’s subpoena power). Counsel’s representations regarding these
27 witnesses weigh against transfer as at least one non-party witness is within the subpoena
28 power of the Court.

1 In sum, according to the parties, four potential witnesses—including a non-party
2 witness—reside in San Diego, while an unspecified number of witnesses reside out of the
3 state or country. However, none of the witnesses reside in Delaware. Therefore, any
4 weight given to the few witnesses who live closer to Delaware is minimal when compared
5 to the number of witnesses residing in this district. Thus, the Court finds the convenience
6 of witnesses weighs against transfer.

7 **4. There is Relatively Greater Ease of Access to Sources of Proof in**
8 **the Southern District of California**

9 Orbis argues “[t]his factor is neutral [because] [t]he evidence in this case involves
10 mainly electronic records.” (Def.’s Mem., at 17: 21–22.) Further, Orbis argues that an
11 inspection of the accused, infringing product was completed in Georgia during the
12 previous Delaware litigation so it should be assumed Georgia is where the product would
13 be inspected again in this case. (*Id.* at 18:4–7.) “In patent infringement cases, the bulk of
14 the relevant evidence usually comes from the accused infringer. Consequently, the place
15 where the defendant’s documents are kept weighs in favor of transfer to that location.” *In*
16 *re Genentech, Inc.*, 566 F.3d at 1346; *Neil Bros. Ltd.*, 425 F. Supp. 2d at 330.

17 Orbis does not state where its electronic records are kept nor where its alleged
18 infringing product is manufactured. Orbis is headquartered in San Diego where the
19 electronic records are likely contained. (Def.’s Mem., at 7:20.) Additionally, while the
20 alleged infringing product may have been inspected in Georgia in the previous litigation,
21 an inspection at Orbis’ San Diego facility is not only a viable option for this litigation but
22 would also provide easier access to the product at its originating source. (*See* Ex. 2-B to
23 Nixon Decl. in Opp’n ¶ 5.) Thus, there is greater ease of access to sources of proof in the
24 Southern District of California.

25 **5. Each Forum is Familiar with the Applicable Law**

26 Echologics only raises a federal patent infringement claim. Federal courts are
27 equally familiar with federal patent law. *Peregrine Semiconductor Corp.*, 2012 WL
28 2068728, at *8 (“[W]here federal law governs all claims raised, either forum is equally

1 capable of hearing and deciding those questions.” (citations omitted); *Pac. Scientific*
2 *Energetic Materials Co. (Arizona) LLC v. Ensign-Bickford Aerospace & Def. Co.*, No.
3 CV-10-02252-PHX-JRG, 2011 WL 4434039 at *8 (D. Ariz. Sept. 23, 2011); *Amini*
4 *Innovation Corp. v. JS Imps., Inc.*, 497 F. Supp. 2d 1093, 1112 (C.D. Cal. 2007).

5 Orbis argues that this factor should favor transfer because the Delaware court that
6 adjudicated the previous patent infringement claims “[is] not only familiar with the
7 applicable law but many of the applicable facts.” (Def.’s Mem., at 17:14–16.) However,
8 in the transcripts provided to this Court by Orbis, Judge Andrews acknowledges that he
9 did not look closely at the merits of the case. (*See* Disc. Conf, at 3:13–18.) Additionally,
10 the docket report indicates that the matter was dismissed before the Delaware court was
11 asked to resolve any dispositive motions. (*See* Ex. 7 to Nixon Decl. in Opp’n ¶ 10.)
12 Instead, the parties’ discussions with the court revolved around the terms of a potential
13 settlement and dismissal. (*See* Settlement Conf, at 5:1–13.) Further, due to his
14 involvement in settlement discussions, Judge Andrews offered to recuse himself in the
15 future should either party request him to do so. (*See id.* at 18:14–21.) Thus, the Court is
16 not persuaded that Judge Andrews is more familiar with the applicable facts in this case,
17 nor that he would adjudicate further litigation between the parties on a similar patent
18 infringement claim. Accordingly, this factor is neutral.

19 **6. The Southern District of California Has a Stronger Local Interest**

20 Orbis briefly argues that the sixth factor—forum’s local interest—is neutral as Orbis
21 is “not aware of any particular local interest in the controversy”
22 (Def.’s Mem., at 8:27–28.) The Court disagrees.

23 “[T]his factor takes into account the current and transferee forum’s interest ‘in
24 having localized controversies decided at home[.]’” *Hangzhou Chic Intelligent Tech. Co.*
25 *v. Swagway, LLC*, No. 16-cv-04804, 2017 WL 1425915, at *4 (N.D. Cal. Apr. 21, 2017)
26 (quoting *Decker Coal Co.*, 805 F.2d at 843)); *Perez*, 2017 WL 66874, at *11. “[I]f there
27 are significant connections between a particular venue and the events that gave rise to a
28 suit, this factor should be weighed in that venue’s favor.” *In re Hoffmann-La Roche Inc.*,

1 587 F.3d 1333, 1338 (Fed. Cir. 2009).

2 Echologics alleges “Orbis is engaged in the design, manufacture, testing, use,
3 importation, sale and/or offering for sale in the United States.” (Compl. ¶ 27.) Indeed,
4 “the sale of an accused product offered nationwide does not give rise to a *substantial*
5 interest in any single venue[.]” *In re Hoffmann-La Roche Inc.*, 587 F.3d at 1338 (emphasis
6 added); *eDigital Corp. v. Dropcam, Inc.*, No. 14-cv-1579-BEN-DHB, ECF No. 34-1 at 4
7 (S.D. Cal. Nov. 4, 2014) (citing *In re RS Tech USA Corp.*, 551 F.3d 1315, 1321 (Fed. Cir.
8 2008)); *Adaptix, Inc. v. HTC Corp.*, 937 F. Supp. 2d 867, 878 (E.D. Tex. 2013) (“When
9 the accused products or services are sold nationwide, the alleged injury does not create a
10 substantial local interest in any particular district.”). But the lack of a substantial interest
11 does not mean there is no interest, only that the local interest on this basis is minimal.

12 Here, the Southern District of California—where the alleged, infringing activities
13 took place—has a stronger local interest than the District of Delaware. A strong local
14 interest exists in the forum where the defendant designed and developed the accused
15 products because allegations of patent infringement “call[] into question the work and
16 reputation of several individuals residing in order or near that district and who presumably
17 conduct business in that community.” *In re Hoffmann-La Roche Inc.*, 587 F.3d at 1336;
18 *Ironworks Patents LLC*, 2017 WL 3007066, at *3; *Reflex Packaging, Inc.*, 2013 WL
19 5568345, at *5. Orbis is headquartered in San Diego where it presumably designed and
20 developed the accused product. (Def.’s Mem., at 16:7.) The Court has an interest in
21 adjudicating a dispute that involves the reputation of a company conducting its business in
22 this district. Thus, the Southern District of California has a stronger local interest.

23 The District of Delaware does not otherwise have a countervailing, localized interest
24 that would rival the strong local interest of the Southern District of California. A strong
25 local interest will exist in the forum where the plaintiff designed and developed the patents
26 at issue. *See Plexxikon, Inc. v. Novartis Pharms. Corp.*, No. 17-cv-04405-HSG, 2017 WL
27 6389674, at *3–4 (N.D. Cal. Dec. 7, 2017). But Echologics does not allege, nor contend
28 that it developed the patents-in-suit in the District of Delaware. (*See, e.g.*, Compl. ¶¶ 10–

1 14 (background about Echologics.)) While Echologics is incorporated in the District of
2 Delaware, its headquarters are in Georgia. (*Id.* ¶ 3.) Accordingly, the Court concludes
3 that this factor weighs in favor of the Southern District of California.

4 **7. Relative Court Congestion and Time to Trial is Neutral**

5 Administrative considerations such as docket congestion are given little weight in
6 assessing the propriety of a Section 1404(a) transfer. *See Amini Innovation Corp.*, 497 F.
7 Supp. 2d at 1112 (citing *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1335 (9th Cir.
8 1984) (*forum non conveniens* case)). And “this factor appears to be the most speculative”
9 of the transfer analysis, undermining its role. *In re Genentech, Inc.*, 566 F.3d at 1347.
10 Orbis briefly mentions that court congestion is a relevant factor in considering venue
11 transfer but furthers a forum shopping argument to argue the Southern District of
12 California should not be a “victim to forum shopping.” (Reply, at 8:5–10, ECF No. 20.)
13 Forum shopping will be considered separately below. *See infra* Part III.B.8.b. Regarding
14 relative court congestion, all courts are experiencing some degree of congestion due to the
15 ongoing pandemic. Thus, this factor is neutral.

16 **8. The Interests of Justice Contravene Transfer**

17 Finally, the Court addresses any other considerations raised by the parties under the
18 interests of justice factor, a “catchall factor, which includes considerations of judicial
19 economy and any other concerns that weigh on the decision to transfer.” *Secured Mail*
20 *Solutions, LLC*, 2013 WL 8596579, at *6 (citing *Regents of the Univ. of Cal. v. Eli Lilly &*
21 *Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997)); *Credit Acceptance Corp.*, 2013 WL 12124382,
22 at *4 (“The interest of justice factor test focuses primarily on the judicial system’s interest
23 in the efficient and speedy resolution of litigation disputes[.]”); *Bryant v. ITT Corp.*, 48 F.
24 Supp. 2d 829, 834 (N.D. Ill. 1999). Judicial efficiency includes “trying related litigation
25 together.” *Avritt v. Reliastar Life Ins. Co.*, No. C06-1435RSM, 2007 WL 666606, at *3
26 (W.D. Wash. Feb. 27, 2007). “Consideration of the interest of justice, which includes
27 judicial economy, may be determinative to a particular transfer motion, even if the
28

1 convenience of the parties and witnesses might call for a different result.” *Regents of the*
2 *Univ. of California*, 119 F.3d at 1565.

3 In a patent case, judicial economy may be served by keeping cases involving
4 overlapping or related patents before the same court. “[A] district court’s experience with
5 a patent in prior litigation and the co-pendency of cases involving the same patent are
6 permissible considerations in ruling on a motion to transfer venue.” *In re EMC Corp.*, 501
7 Fed. App’x 973, 976 (Fed. Cir. 2013). But it is not the case that “judicial economy of
8 having the same judge handle multiple suits involving the same patents should dominate
9 the transfer inquiry[.]” *Id.* A district court must only consider “any judicial economy
10 benefits which would have been apparent *at the time the suit was filed*[.]” *Id.* (emphasis
11 added); *Round Rock Research LLC v. Asustek Computer Inc.*, 967 F. Supp. 2d 969, 981–
12 82 (D. Del. 2013) (discounting knowledge about overlapping patents and technology in
13 other pending cases gained after the case was filed); *see also Hoffman v. Blaski*, 363 U.S.
14 335, 343 (1960) (motions to transfer venue are to be decided based on “the situation which
15 existed when suit was instituted.”).

16 **a. Previous Patent Claims in the District of Delaware**

17 Another patent infringement lawsuit commenced by Echologics in the District of
18 Delaware was dismissed the day before this suit was filed in the Southern District of
19 California. (Def.’s Mem., at 1:17–19.) Orbis argues that judicial economy favors transfer
20 because Judge Andrews and Magistrate Judge Thyngne have already spent “considerable
21 time” adjudicating a similar dispute for related patents.” (*Id.* at 11:23–26.) However, as
22 previously discussed herein, the Court does not find Orbis’ arguments persuasive because
23 the transcripts indicate Judge Andrews was more involved in the procedural aspects of the
24 case rather than the merits. (*See*, Disc. Conf., at 3:13–21; Settlement Conf., at 11–12.)
25 Additionally, Judge Andrews candidly acknowledged he would recuse himself should
26 either party write him a letter requesting him to do so. (Settlement Conf., at 18:16–22.)
27 Thus, the previous claims filed in Delaware do not provide a strong basis for transfer.
28

1 **b. Forum Shopping**

2 Orbis argues that Echologics is engaged in forum shopping because it recently
3 litigated related patent infringement claims against Orbis in the District of Delaware. (*Id.*
4 at 1:2–4.) Orbis cites to transcripts where the court in Delaware explained to Echologics
5 that it would be an abuse of discovery to look at the alleged infringing product to identify
6 whether other potential infringement claims could be brought against Orbis. (Disc. Conf.,
7 at 15:17–21.) Orbis contends that Echologics filed this claim in the Southern District of
8 California to avoid ‘unfavorable admissions’ in the District of Delaware. (*Id.* at 6:2–4.)
9 Echologics counters that it does not have motivations to avoid Judge Andrews in Delaware
10 because he already offered to recuse himself from future litigation. (Opp’n, at 16:4–6,
11 17:11–14.) While this Court shares the defendant’s concern that the Plaintiffs may in some
12 degree be engaged in forum shopping—choosing to file a similarly related patent claim in
13 a different district where Plaintiffs do not reside—Defendant has not met its burden in
14 providing the Court with substantial evidence to conclude Plaintiffs’ engaged in blatant
15 forum shopping.

16 “[C]oncerns of forum-shopping are potentially present when a plaintiff pursues
17 litigation outside his home district.” *LegalForce, Inc. v. Legalzoom.com, Inc.*, 2018 WL
18 6179319, at *3 (C.D. Cal. Nov. 27, 2018) (quoting *Mitchell v. Deutsche Bank Nat’l Tr.*
19 *Cov.*, 2015 WL 12867746, at *3 (C.D. Cal. Oct 29, 2015). “Forum shopping could
20 reasonably be inferred if the plaintiff files the same or similar case represented by the same
21 law firm in a different district after receiving unfavorable rulings there.” *LegalForce, Inc.*
22 2018 WL 6179319, at *3 (citing *Carrera v. First Am. Home Buyers Prot. Co.*, 2014 WL
23 13012698, at *6 (S.D. Cal. July 23, 2014); *Alexander v. Franklin Resources, Inc.*, 2007
24 WL 518859, at *4 (N.D. Cal. Feb 14, 2007). “[T]he more it appears that the plaintiff’s
25 choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to
26 win a tactical advantage resulting from local laws that favor the plaintiff’s case, the habitual
27 generosity of juries in the United States or in the forum district, the plaintiff’s popularity
28 or the defendant’s unpopularity in the region, or the inconvenience and expense to the

1 defendant resulting from litigation in that forum—the less deference the plaintiff’s choice
2 commands.” *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001).

3 Although Echologics chose to pursue litigation outside its home district, the
4 Southern District of California is Defendant Orbis’ home district, where it is headquartered.
5 (Def.’s Mem., at 7:20.) Therefore, the Southern District is more convenient and less
6 expensive for Orbis to litigate here. Further, the previous claims in Delaware did not
7 receive unfavorable rulings since both parties agreed to voluntarily dismiss the case with
8 prejudice. (*Id.* at 3: 7, 24–25.) Finally, patent law is applied consistently across federal
9 courts, thus eliminating concerns that Echologics sought a tactical advantage in its choice
10 of forum.


11 Orbis argues that the Delaware transcript of discussions with Judge Andrews is a
12 matter of public record and therefore would not be grounds for recusal if Judge Andrews
13 were assigned to this case on transfer. (*Id.* at 13:23–26.) However, even if the Court
14 assumes Judge Andrews would not recuse himself, Orbis still has not met its burden to
15 show that Echologics is engaged in blatant forum shopping for the same reasons already
16 discussed herein. Thus, the interests of justice favor keeping this suit in the Southern
17 District of California.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Defendant has not met its burden to show the balance of
20 factors favors transfer pursuant to 28 U.S.C. § 1404(a). Accordingly, the Court **DENIES**
21 Defendant’s Motion to Transfer Venue.

22 **IT IS SO ORDERED.**

23
24 **DATED: November 9, 2021**


Hon. Cynthia Bashant
United States District Judge