IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EIGHT ONE TWO, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:13-CV-2981-K
	§	
PURDUE PHARMA L.P., ET AL.,	§	
	§	
Defendants.	§	

ORDER

Before the court is Defendants' Motion for Change of Venue, filed January 21, 2014. The court has carefully considered the motion, response, reply, the record in this case, and the applicable law. For the reasons that follow, the motion is **granted.**

I. Factual and Procedural Background

This case is a patent infringement dispute. Plaintiff Eight One Two, LLC ("812") has obtained U.S. Patent No. 6,697,812 (the "'812 Patent"), which relates to a method and system for inventory tracking. The '812 patent claims methods and systems for grouping objects using radio frequency identification labels. 812 alleges that Defendants Purdue Pharma L.P. and Purdue Pharmaceuticals, L.P. (collectively "Purdue") are infringing the '812 Patent by designing and using an allegedly infringing method and system in their commercialization of pharmaceutical products.

812 is a Texas company with its principal place of business in Westlake, Texas. Defendant Purdue Pharma, L.P. is a Delaware limited partnership headquartered in Stamford, Connecticut. Defendant Purdue Pharmaceuticals, L.P. is another Delaware limited partnership, which manufactures pharmaceutical products in Wilson, North Carolina. Purdue now contends that for the convenience of the parties and witnesses, and in the interest of justice, this court should transfer this case to the United States District Court for the District of Connecticut.

A venue determination is a largely fact-dependent inquiry. Rather than set forth the remaining facts in detail here and then repeat them in its legal analysis, the court will, in the interest of efficiency and brevity, discuss and apply the pertinent facts presented by the parties in the context of the legal standards set forth below.

III. Motion to Transfer - 28 U.S.C. § 1404(a)

Defendants seek a discretionary transfer of venue under 28 U.S.C. § 1404(a), which permits a court to transfer a case upon a showing that the proposed transferee forum is more convenient, and that such a transfer is in the interest of justice. *In re Radmax, Ltd.,* 720 F.3d 285, 287-88 (5th Cir. 2013).

A. Applicable Legal Standards

Section 1404(a) provides that "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 motion to

transfer venue may be granted upon a showing that the transferee venue is "clearly more convenient" than the venue chosen by the plaintiff. *In re Nintendo Co.,* 589 F.3d 1194,1197 (Fed. Cir. 2009); *In re Genentech, Inc.,* 566 F.3d 1338, 1342 (Fed. Cir. 2009); *In re TS Tech USA Corp.,* 551 F.3d 1315, 1319 (Fed. Cir. 2008); *In re Volkswagen of Am., Inc. (Volkswagen II),* 545 F.3d 304, 315 (5th Cir. 2008) (en banc), *cert. denied,* 555 U.S. 1172 (2009).

The initial question in applying the provisions of section 1404(a) is whether the suit could have been brought in the proposed transferee district. *In re Volkswagen AG (Volkswagen I),* 371 F.3d 201, 203 (5th Cir.2004). If the potential transferee district is a proper venue, then the court must weigh the relative public and private factors of the current venue against the transferee venue. *Id.* In making such a convenience determination, the court considers several "private" and "public" interest factors, none of which are given dispositive weight. *Id.* 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." *Nintendo,* 589 F.3d at 1198; *Genentech,* 566 F.3d at 1342; *TS Tech.,* 551 F.3d at 1319; *Volkswagen II,* 545 F.3d at 315. The "public" interest factors include: "1) the administrative difficulties flowing from court congestion; 2) the local interest in having localized interests decided at home; 3) the familiarity of the forum with the law

that will govern the case; and 4) the avoidance of unnecessary problems of conflict of laws [in] the application of foreign law." *Nintendo,* 589 F.3d at 1198; *Genentech,* 566 F.3d at 1342; *TS Tech.,* 551 F.3d at 1319; *Volkswagen II,* 545 F.3d at 315. "Although the letter of section 1404(a) might suggest otherwise, it is well established that 'the interest of justice' is an important factor in the transfer analysis." *DataTreasury Corp. v. First Data Corp.,* 243 F. Supp.2d 591, 593-94 (N.D. Tex. 2003), *citing In re Medrad, Inc.,* 1999 WL 507359, *2 (Fed. Cir. 1999).

B. Analysis

Before considering the private and public interest factors, as well as the question of whether a transfer is in the interest of justice, the court must determine whether this case could have originally been brought in the District of Connecticut. Any proposed transferee court must have personal jurisdiction over the defendant. Here, Purdue states that this prerequisite is met because it is subject to personal jurisdiction in the District of Connecticut, a contention that 812 does not dispute. Furthermore, in patent cases, venue is proper where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. 28 U.S.C. §1400(b). Therefore, the court must evaluate the potential transfer against the private and public interest factors to determine whether a transfer is appropriate.

1. Private Interest Factors

The first private interest factor is the 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." *Genentech,* 566 F.3d at 1345, *quoting Neil Bros. Ltd. v. World Wide Lines, Inc.,* 425 F. Supp.2d 325, 330 (E.D.N.Y. 2006). Purdue has presented evidence showing that it anticipates producing thousands of documents that are located in Connecticut, New Jersey, and North Carolina. 812 focuses its argument on the relative costs of shipping and printing out documents in one venue or another, arguing that Purdue would not have to ship any of its documents to trial if it printed them out here in Texas. However, the same would be true for 812, which presumably could also avoid the expense of shipping were it to print out its documents for trial after arriving in Connecticut.

812 also notes that many documents will likely be produced through electronic means. Although the technological convenience of e-discovery may diminish concerns associated with the location of evidence, it does not negate the significance of or eliminate consideration of this factor in a section 1404(a) transfer analysis. *Radmax,* 720 F.3d at 288 (stating that standard is *"relative* ease of access, not *absolute* ease of access" and finding this factor weighed in favor of transfer to division where documents were physically kept) (emphasis in original); *Volkswagen II,* 545 F.3d at 316 (lesser inconvenience of access does not render this factor inconsequential). Because the parties do not dispute that a large number of the documents are located in Connecticut, the

court finds that the proof needed to adjudicate this case is *more* readily accessible there, which favors transfer. *Radmax,* 720 F.3d at 288; *Genentech,* 566 F.3d at 1345.

Next, the court considers the availability of compulsory process or subpoena power to secure the attendance of unwilling witnesses. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09 (1947); *Volkswagen II,* 545 F.3d at 315. Under recently amended Federal Rule of Civil Procedure 45, federal courts may enforce subpoenas issued to any witness for trial, hearing or deposition within 100 miles of the place in which that witness resides, works, or regularly transacts business in person, or for a trial, anywhere within the state in which the witness works, resides, or regularly transacts business in person, provided that witness does not incur substantial expense. Fed. R. Civ. P. 45(c)(1)(A)-(B).

"A venue that has 'absolute subpoena power for both deposition and trial' is favored over one that does not." *Thomas Swan & Co. Ltd. v. Finisar Corp.,* 2014 WL 47343,*3 (E.D.Tex. 2014) (*quoting Volkswagen II,* 545 F.3d at 316). The court gives more weight to specifically identified witnesses, and less weight to vague assertions that witnesses are likely to be found in a particular forum. *U.S. Ethernet Innovations, LLC v. Samsung Electronics Co., Ltd.,* 2013 WL 1363613, *3 (E.D. Tex. 2013). Current employees of a party are considered to be willing witnesses whose testimony can be presented without reliance upon subpoena power, and their locations are not persuasive in the court's analysis of this factor. *Rosemond v. United Airlines, Inc.,* 2014 WL 1338690,

*3 (S.D. Tex. 2014); *Net Navigation Systems, LLC v. Cisco Systems, Inc.,* 2012 WL 7827544, *4 (E.D. Tex. 2012).

Purdue has named 21 non-party witnesses, none of whom are located in Texas. Only one of these witnesses is located in Connecticut, but a number of them are located in the Northeastern United States. The remaining non-party witnesses are scattered throughout the U.S. and Europe. With few exceptions, Purdue's evidence shows that the majority of these witnesses are located somewhat closer to Connecticut than Texas. However, only two of the named witnesses, Challenge, of Clifton, NJ and G. Schmitt, of Guilford, CT, are within the "absolute" subpoena power of the proposed transferee court. *Volkswagen II,* 545 F.3d at 316. Meanwhile, 812 has not identified any non-party witnesses who would be subject to absolute subpoena power in this district. After considering all of the pertinent evidence and the applicable law, the court finds that this factor slightly favors transfer.

The court must also consider the cost of attendance for willing witnesses, which is "probably the single most important factor in a transfer analysis." *Genentech,* 566 F.3d at 1343. The inconvenience to witnesses increases with the additional distance to be traveled, including additional travel time, meal, lodging expenses, and time away from their regular employment. *Volkswagen I,* 371 F.3d at 205. Additionally, the court must consider the personal costs associated with being away from work, family, and community. *In re Acer America Corp.,* 626 F.3d 1252, 1255 (Fed. Cir. 2010), *cert. denied,*

131 S.Ct. 2447 (2011), *citing Volkswagen II,* 545 F.3d at 317.

Purdue has identified six likely employee witnesses. Three are in Stamford, Connecticut, one is in New Jersey, and two are in North Carolina. It is undisputed that all of these witnesses are located either in or closer to the District of Connecticut than the Northern District of Texas. The only witness identified by either party who is located in this district is Peter Martin ("Martin"), the inventor. Therefore, Purdue argues that the cost of attendance for willing witnesses will be much lower if the trial is held in Connecticut. In response, 812 argues that because Purdue's income is greatly exceeds that of Martin, the cost of traveling to the District of Connecticut would be much greater than the cost to Purdue. However, Martin's personal income does not provide a relevant comparison as Martin is not a party. 812 offers no evidence regarding its own financial resources. Furthermore, while the actual out-of-pocket expense of travel is a factor, the court must also take into account the intangible personal costs of lost time away from work, family, and community. *Acer America,* 626 F.3d at 1255. In their aggregate, these costs are likely to be higher for the six witnesses identified by Purdue than for Martin, 812's named witness. This factor favors transfer.

The final private interest factor is "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Volkswagen II,* 545 F.3d at 315. Neither party identifies any concerns in addition to those already considered by the court with regard to the first three private interest factors. Therefore, this factor is neutral.

2. Public Interest Factors

Having evaluated the private interest factors, the court must now apply the public interest factors to the relevant facts. The first public interest factor is administrative difficulties flowing from court congestion. *Nintendo,* 589 F.3d at 1198; *Genentech,* 566 F.3d at 1342. Purdue asserts that this factor is neutral, while 812 provides data showing that the average time for case disposition in the proposed transferee district is approximately 12 months longer than in this district. While it may, on average, take longer for a case to reach trial in the District of Connecticut, the court does not view this factor as a "race between the courts." Each case is unique, and whether or not the case would progress more rapidly here or in that district is largely a matter of speculation. Both courts have an average disposition time of less than three years, meeting the standards of the Administrative Office of the United States Courts. Therefore, the court cannot describe either court's docket as "congested" for purposes of a section 1404(a) venue transfer analysis. *See also Genentech,* 566 F.3d at 1347 (noting speculative nature of this factor and that case disposition statistics may not tell the whole story); *Blue Spike, LLC v. Texas Instruments, Inc.,* 2014 WL 1374045, *4 (E.D. Tex. 2014) (merely comparing number of judges and median time to trial too speculative to establish administrative difficulties from relative court congestion). The court finds that this factor is neutral, or at best, slightly favors transfer.

The court must next evaluate whether there is a local interest in deciding local disputes at home. *Volkswagen II,* 545 F.3d at 315. Purdue contends that this factor strongly supports transfer because the alleged infringement that gave rise to this case occurred in Connecticut, New Jersey, and/or North Carolina, and that no infringement took place in this district. 812 responds that Purdue has infringed the '812 patent here through its alleged sale of infringing goods in this district. Purdue counters that does not sell the accused inventory system, and only uses it outside this district, although others throughout the United States may use the labels. *See id.,* 545 F.3d at 318 (interests that could apply to virtually any district or division in the United States due to nationwide sale of infringing products are disregarded in favor of particularized local interests); *GeoTag, Inc. v. Starbucks Corp.,* 2013 WL 890484, *6 (E.D. Tex. 2013) (where accused products or services are sold nationwide, alleged injury does not create a substantial local interest in any particular district). It further notes that 812 appears to have no business or offices in this district and uses its attorneys' offices as its business address.

812 has provided no proof of any sales of the system in this district or other infringing activities taking place here. Even if others are using the labels produced by the infringing system here, the use of the labels nationwide (including in Texas) does not provide a sufficient basis for local interest in the outcome of this controversy. *Volkswagen II,* 545 F.3d at 318; *GeoTag,* 2013 WL 890484 at *6. Further, although Martin lives and

works in this district, he is a witness, not a party, and his presence here does not impact the analysis of this factor. 812's limited business presence here is not substantial enough for the court to conclude that the citizens of this district would have a substantial interest in the outcome of this case. Therefore, this public interest factor weighs in favor of transfer.

The last two components of the public interest analysis involve the respective court's familiarity with federal patent law, and whether there are any potential conflicts of law that would arise. The parties have not identified any potential conflicts of law between the two districts, and the court is aware of none. Similarly, neither party states that there is a difference in the respective courts' familiarity with federal patent law. The court also does not foresee any conflicts of law between the two districts, and believes either court is capable of adjudicating a federal patent dispute. Accordingly, both the third and fourth public interest factors are neutral.

In summary, the court has considered the private interest factors, and finds that the relative ease of access to sources of proof, availability of compulsory process for non-willing witnesses, and the costs of attendance for willing witnesses all favor transfer. The fourth private interest factor, "all other practical problems that make trial of a case easy, expeditious, and inexpensive," is neutral. *Volkswagen II,* 545 F.3d at 315. Three public interest factors – administrative difficulty flowing from court congestion, the respective courts' familiarity with applicable law, and potential conflicts of law – are all neutral.

The other public interest factor, local interest in deciding local controversies at home, favors a transfer. Having considered all of the private and public interest factors and the relative convenience of the parties and witnesses, the court has determined that viewed in their totality, these factors favor transfer, and further that such a transfer would be in the overall interest of justice.

IV. Conclusion

For the foregoing reasons, Defendants' Motion for Change of Venue is **granted**, and this case is hereby **transferred** to the United States District Court for the District of Connecticut.

SO ORDERED.

Signed May 16th, 2014.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE