IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

VENTRONICS SYSTEMS, LLC	§	
	§	
Plaintiff,	§	
	§	**CASE NO. 6:10-CV-582**
vs.	§	**PATENT CASE**
	§	
DRAGER MEDICAL GMBH, ET AL.	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants' Motion to Transfer Venue to either the Central District of California or the District of Delaware (Doc. No. 86, "MOTION"). Having considered the parties' positions, the Court **GRANTS** Defendants' motion.

BACKGROUND

Ventronics Systems, LLC ("Ventronics") sued Drager Medical GmbH, Draeger Medical, Inc., Draeger Medical Systems, Inc.[1], Maquet Critical Care AB, Maquet, Inc.[2], Hamilton Medical AG, Hamilton Medical, Inc.[3], eVent Medical, Ltd. and eVent Medical, Inc.[4] (collectively "Defendants") on October 29, 2010. MOTION at 2. Ventronics alleges that Defendants' ventilator products infringe U.S. Patent No. 5,931,160 (the "'160 patent"). Ventronics also contends that

[1] collectively "Draeger"

[2] collectively "Maquet"

[3] collectively "Hamilton"

[4] collectively "eVent"

Maquet and eVent infringe U.S. Patent No. 6,584,973 (the "'973 patent"). *Id.* at 2–3.

Ventronics maintains its principal place of business in Connecticut and is incorporated in Delaware. *Id.* at 2. The Draeger entities are incorporated in Delaware, Pennsylvania, and Germany and maintain their principal places of businesses in Pennsylvania and Germany. *Id.* at 3. The Maquet entities are incorporated in Delaware and Sweden and maintain their principal places of businesses in New Jersey and Sweden. *Id.* The Hamilton entities are incorporated and maintain their principal places of businesses in Nevada and Switzerland. *Id.* The eVent entities are incorporated in Delaware and Ireland and maintain their principal places of businesses in California and Ireland. *Id.* No party is incorporated in Texas or maintains facilities in this State. *Id.*

Ventronics has identified a number independent care facilities that operate the accused products within this District. OPP. at 3. Ventronics has also obtained declarations and testimony from five medical professionals within the subpoena power of this Court who specialize in the use of the accused products. *Id.* Additionally, Ventronics identified an undisclosed sales representative of Hamilton who resides in San Antonio, Texas. OPP., EX. 1 at 4. There are no other witnesses or documents located within this District or the State of Texas.

APPLICABLE LAW

Defendants argue that they are entitled to transfer to either the Central District of California or the District of Delaware under 28 U.S.C. § 1404(a). Section 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." The first inquiry when analyzing a case's eligibility for 1404(a) transfer is "whether the judicial district to which transfer

is sought would have been a district in which the claim could have been filed." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*In re Volkswagen I*").

Once that threshold inquiry is met, courts analyze both public and private factors relating to the convenience of parties and witnesses as well as the interests of particular venues in hearing the case. *See Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir. 1963); *In re Nintendo Co., Ltd.*, 589 F.3d 1194, 1198 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008). The private 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 I*, 371 F.3d at 203; *In re Nintendo*, 589 F.3d at 1198; *In re TS Tech*, 551 F.3d at 1319. The public 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 203; *In re Nintendo*, 589 F.3d at 1198; *In re TS Tech*, 551 F.3d at 1319.

The plaintiff's choice of venue is not a factor in this analysis. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314–15 (5th Cir. 2008) ("*In re Volkswagen II*"). Rather, the plaintiff's choice of venue contributes to the defendant's burden in proving that the transferee venue is "clearly more convenient" than the transferor venue. *In re Volkswagen II*, 545 F.3d at 315; *In re Nintendo*, 589 F.3d at 1200; *In re TS Tech*, 551 F.3d at 1319. Further, though the private and public factors apply to most transfer cases, "they are not necessarily exhaustive or exclusive," and no single factor is dispositive. *In re Volkswagen II*, 545 F.3d at 314–15.

ANALYSIS

As an initial matter, during the course of briefing, eVent, the only party with a connection to the Central District of California, settled. (Doc. No. 133 at 6, "DEF. SUPP."). As a result, Defendants concede that the Central District of California is "at least as convenient" as this District. *Id.* Thus, Defendants have failed to show that the Central District of California is "clearly more convenient" than this District. *In re Volkswagen II*, 545 F.3d at 315; *In re Nintendo*, 589 F.3d at 1200. Accordingly, the Court will focus its analysis on whether the District of Delaware is clearly more convenient than this District.

Threshold

The parties do not dispute that this case could properly have been filed in the District of Delaware.

The Relative Ease of Access to Sources of Proof

Despite technological advances that certainly lighten the relative inconvenience of transporting large amounts of documents across the country, this factor is still a part of the transfer analysis. *In re Volkswagen II*, 545 F.3d at 316. Courts analyze this factor in light of the distance that documents, or other evidence, must be transported from their existing location to the trial venue. *See id.* This factor will turn upon which party, usually the accused infringer, will most probably have the greater volume of documents relevant to the litigation and their presumed location in relation to the transferee and transferor venues. *See, e.g.*, *In re Volkswagen II*, 545 F.3d at 314–15; *In re Nintendo*, 589 F.3d at 1199; *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009). However, documents that have been moved to a particular venue in anticipation of a venue dispute should not be considered. *In re Hoffman-La Roche Inc.*, 587 F.3d 1333, 1336–37 (Fed. Cir. 2009).

Defendants argue that most of their documents regarding the design, research and development, manufacture, and sales of the accused products are closer to Delaware than to this District. MOTION at 12. Ventronics contends that the bulk of the evidence is not located in or near Delaware, but is dispersed throughout the world, including some sales information found in this District. OPP. at 8–10.

While Defendants' evidence is located throughout the world (OPP. at 8–9), it appears that much of the evidence available in the United States is located along the East Coast. MOTION at 12; OPP. at 8–9. For example, Maquet maintains physical examples of the accused products, as well as evidence related to the research, marketing and sales of the accused products in New Jersey. *Id.* Evidence related to Draeger's accused products is located within 100 miles of the District of Delaware in Telford, Pennsylvania. *Id.*

Ventronics' own evidence is located in Connecticut, Massachusetts, and New Hampshire. *Id.* at 8–9. While some evidence is maintained by one of the inventors of the patents-in-suit in Hawaii, the bulk of Ventronics' evidence is located closer to Delaware than this District. The only evidence available in this District is maintained by non-party's and is related to the purchase or lease and use of the accused products. OPP. at 9.

The Court does not wholly discount Ventronics' argument that Defendants have failed to identify a large volume of evidence located within the District of Delaware. *Id.* at 10. In fact, it does appear that Defendants attempted to create a locus around Delaware while many of the relevant documents may be located in Europe and Asia. *See e.g.* OPP. at 8–9. However, Ventronics has similarly failed to identify a bulk of evidence either closer to or in this District compared with the potential evidence that has been identified as located closer to or in Delaware. Accounting for all

of the above considerations, the Court finds that this factor slightly favors transfer.

The Availability of Compulsory Process to Secure the Attendance of Witnesses

This factor will weigh more heavily in favor of transfer when more third-party witnesses reside within the transferee venue. *See In re Volkswagen II*, 545 F.3d at 316. The factor will weigh the heaviest in favor of transfer when a transferee venue is said to have "absolute subpoena power." *Id.* "Absolute subpoena power" is subpoena power for both depositions and trial. *In re Hoffmann-La Roche Inc.*, 587 F.3d at 1338.

Defendants contend that Draeger is located within 100 miles of the District of Delaware; thus, that Court will have some useable subpoena power. MOTION at 10. However, the proper focus for this factor is on non-party witnesses, not party witnesses. *See In re Volkswagen II*, 545 F.3d at 316; *In re Hoffman-La Roche Inc.*, 587 F.3d at 1338. Ventronics has identified five third-party witnesses subject to this Court's subpoena power. OPP. at 3–4. Ventronics contends that these third-party witnesses are independent medical professionals that are specifically trained and specialize in the administration of respiratory therapy using the accused ventilators. *Id.*

Defendants contend that they have identified similarly situated third-party witnesses in Delaware. (Doc. No. 97 at 3–4 "REPLY"). For example, Defendants contend that Draeger has identified six registered respiratory therapists within the subpoena power of the District of Delaware who have knowledge and experience with Draeger accused products. *Id.* at 4. However, subsequent discovery has revealed that the third-party witnesses identified by Defendants do not have the experience or knowledge to competently testify at trial regarding the subject matter at issue. (Doc. No. 138 at 2–3, "RESPONSE TO DEF. SUPP.").

Nonetheless, based on Ventronics' description of the third-party witnesses in this District,

the Court is inclined to give some weight to Defendants' assertion that there exists similarly situated witnesses in Delaware that could competently testify regarding the operation of the accused products. As such, the Court finds that this factor is neutral.

The Cost of Attendance for Willing Witnesses

This factor is analyzed giving broad "consideration [to] the parties and witnesses in all claims and controversies properly joined in a proceeding." *In re Volkswagen I*, 371 F.3d at 204. All potential material and relevant witnesses must be taken into account for the transfer analysis, irrespective of their centrality to the issues raised in a case or their likelihood of being called to testify at trial. *See In re Genentech*, 566 F.3d 1343 ("Requiring a defendant to show that a potential witness has more than relevant and material information at this point in the litigation or risk facing denial of transfer on that basis is unnecessary.").

The Fifth Circuit has adopted a "100 mile rule" to assist with analysis of this factor. *See In re Volkswagen I*, 371 F.3d at 204–05. "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." *Id.* at 205. When applying the "100 mile rule" the threshold question is whether the transferor and transferee venues are more than 100 miles apart. *See In re Volkswagen II*, 545 F.3d at 317; *In re TS Tech*, 551 F.3d at 1320. If so, then a court determines the respective distances between the residences (or workplaces) of all the identified material and relevant witnesses and the transferor and transferee venues. *See In re Volkswagen II*, 545 F.3d at 317; *In re TS Tech*, 551 F.3d at 1320. The "100 mile rule" favors transfer (with differing degrees) if the transferee venue is a shorter average distance from witnesses than the transferor venue. *See In re Volkswagen II*, 545 F.3d at 317; *In re TS Tech*,

551 F.3d at 1320. Furthermore, the existence or non-existence of direct flights can impact the analysis of travel time. *See In re Volkswagen I*, 371 F.3d at 204, n.3. Thus, regardless of the "straight line" distances calculated for the "100 mile rule," if "travel time" distances favor the transferee venue, then this factor will favor transfer. However, the "100 mile rule" should not be rigidly applied. *See In re Genentech*, 566 F.3d at 1344. When a particular witness will be required to travel "a significant distance no matter where they testify," then that witness is discounted for purposes of the "100 mile rule" analysis. *Id.* (discounting European witnesses and documents transported from Washington D.C. in the convenience analysis when reviewing a denial of transfer from Texas to California).

In cases where no potential witnesses are residents of the court's state, favoring the court's location as central to all of the witnesses is improper. *Id.* at 1344. Finally, this factor favors transfer when a "substantial number of material witnesses reside in the transferee venue" and no witnesses reside in transferor venue regardless of whether the transferor venue would be more convenient for all of the witnesses. *Id.* at 1344–45.

As an initial matter, there are many potential witnesses located in Europe and Asia that may be relevant to this litigation. *See* MOTION at 8–9; OPP., EX. 1 at 4. Given the significant distance that these witnesses would be required to travel regardless of where this case were to be tried, the Court will discount them for purposes of this analysis. *In re Genentech*, 566 F.3d at 1344.

Defendants contend that there are no non-party witnesses in Texas, and that all but one of the inventors and prosecuting attorneys of the patents-in-suit are located in the Northeast United States. MOTION at 10. Regarding party witnesses, Defendants identify three Draeger employees located in or near Delaware. *Id.* at 7–8. Defendants also contend that most Defendants, and

Ventronics itself, maintain principal places of business, and therefore most potential witnesses, closer to Delaware than Texas. *Id.* Plaintiff identifies five medical professionals located in this District, two inventors of the patents-in-suit located in the Northeast, one inventor located in Hawaii and three prosecuting attorneys located in Boston as non-party witnesses. OPP., EX. 1 at 1–2. Regarding party witnesses, Ventronics identifies one party, Hamilton Medical, Inc., that is closer to this District than Delaware.[5] *Id.* at 3.

As explained earlier, the Court gives some credence to Defendants' contention that the third-party medical professionals in this District identified by Ventronics are not sufficiently "unique" to warrant consideration in the analysis. While the Court will not, as Defendants urge, wholly discount the witnesses identified as residing or working within this District, the Court will not place an inordinate amount of weight on these witnesses because it is highly likely, *on these facts*, that there will be similarly situated witnesses in Delaware or close to Delaware. Otherwise, all of the other parties to this litigation, including Ventronics itself, are located closer to the District of Delaware. *Id.* at 3–4.

Accordingly, given that most of the inventors, the prosecuting attorneys, and the party witnesses—including Ventronics itself—are located closer to the District of Delaware, the Court finds that this factor favors transfer.

Other Practical Problems

Practical problems include those that are rationally based on judicial economy. Particularly,

[5] Via facilities in Reno, Nevada and Atlanta, Georgia. The Court recognizes that the Hamilton Medical facility in Georgia is equidistant from this District and the District of Delaware; thus, is essentially a wash in the analysis. *Id.* at 2–3. Ventronics has also identified an undisclosed sales representative from Hamilton Medical, Inc. located in San Antonio, Texas with scant explanation of why this witness will be relevant or unique to this case.

the existence of duplicative suits involving the same or similar issues may create practical difficulties that will weigh heavily in favor or against transfer. *In re Volkswagen of Am., Inc.*, 566 F.3d 1349, 1351 (Fed. Cir. 2009) ("*In re Volkswagen III*"). Two of the Defendants in the current suit contend that they recently squared-off against each other in a patent suit in Delaware regarding a subset of the currently accused products; therefore, demonstrating both the relative convenience of the District of Delaware for these particular parties, and the District of Delaware's experience with the accused technology. MOTION at 13–1. The mere existence of this prior suit is unlikely to provide any gains in efficiency in the current suit regarding separate parties and different patents. Likewise, given that this Court has no experience with the patents-in-suit or accused products, the Court finds that this factor is neutral.

Public Interest Factors

Defendants contend that three of the five U.S.-based Defendants are incorporated in Delaware, and this should be taken into account as a relevant factor in the §1404(a) analysis. MOTION at 15. However, mere incorporation—absent some other connection to the state—is not enough to warrant consideration in the transfer analysis. *See In re Microsoft Corp.*, 630 F.3d at 1365. Accordingly, the public interest factors are neutral.

CONCLUSION

Based on the foregoing, the Court finds that the District of Delaware is more convenient than this District for trial. All but one of the U.S.-based Defendants and Ventronics itself are located closer to the District of Delaware than to this District. On these facts, any connection to this District via third-party witnesses appears tenuous given that it is highly likely that similarly situated third-party witnesses will be present in the District of Delaware. Accordingly, the Court **GRANTS**

Defendants motion for transfer to the District of Delaware.

So ORDERED and SIGNED this 20th day of October, 2011.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE