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

FTC SENSORS, LLC,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 2:15-cv-02012-RWS-RSP
v.	§	
	§	Jury Trial Demanded
EMERSON ELECTRIC CO.,	§	
	§	
Defendant.	§	

DEFENDANT EMERSON ELECTRIC CO.'S REPLY TO PLAINTIFF FTC SENSORS, LLC RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION AND MEMORANDUM TO DISMISS FOR IMPROPER VENUE PURSUANT TO FED. R. CIV. P. 12(b)(3), OR IN THE ALTERNATIVE, TO TRANSFER PURSUANT TO 28 U.S.C. §1404(a)

Respectfully submitted,

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I. VENUE UNDER SECTION 1400(B) IS NOT PROPER IN THIS DISTRICT

As FTC concedes, Emerson's venue challenge is dependent on the outcome of an argument pending before the Federal Circuit in *In re TC Heartland LLC*, No. 16-105 (Fed. Cir.) (Argued Mar. 11, 2016). The issue is fully briefed in this case, and Emerson will not address it further herein.

II. TRANSFER UNDER SECTION 1404(A) IS STRONGLY SUPPORTED GIVEN CONCESSIONS BY FTC

This case should, in the alternative, be transferred to the Eastern District of Missouri under 28 U.S.C. §1404(a) for the convenience of the parties and witnesses and in the interest of justice. Emerson's factual demonstration is compelling and largely unrebutted by FTC.

A. The Private Factors of Convenience and Efficiency Overwhelmingly Support Transfer and There Is No Material Evidence in, Or Other Connection to, this District

FTC's Response confirms that all significant witnesses with any knowledge relevant to the claims of infringement reside in the Eastern District of Missouri or far from the Eastern District of Texas. With respect to witnesses, Emerson's Initial Disclosures identified a multitude of witnesses who live in the Eastern District of Missouri and work at Emerson's facilities in St. Louis, Missouri. *See*, Holtshouser Declaration, ¶2 and Ex. 18. Investigation is continuing and Emerson will disclose even more witnesses in St. Louis with particular knowledge pertinent to both non-infringement and invalidity. *Id*. From FTC, other than the three (3) inventors who reside on the coasts, for whom trial location is not very relevant, FTC identified only two (2) witnesses in its Initial Disclosures[1]: David Pridham and Guy Fielder. *See*, Ex. 19. Neither resides in this district–Mr. Pridham resides in the Northern District of Texas and Mr. Fielder resides in

[1] Emerson did not have the benefit of these at the time its Motion for Transfer was filed.

the Western District of Texas. Allegedly, both have knowledge of "FTC's business operations and activities." *Id*.

Even though Mr. Pridham submitted a declaration, there is no disclosure, in either FTC's Initial Disclosures or FTC's Response, Dkt. 18, of his specific knowledge, how he acquired it or its relevance to liability and damages. The title he has been given at FTC is "CEO", but even his declaration does not disclose his background or expertise. There is no claim in FTC's Response that it makes and sells any product so that, at best, FTC is simply now the repository of whatever evidence the inventors generated. The *location* of that evidence is a contrivance of FTC. Dkt. 18 at 7. There is no disclosure that FTC has actually licensed any of the patents-in-suit outside of litigation settlements. Therefore, FTC requests this Court to speculate[2] about what relevance Mr. Pridham and Mr. Fielder have to this case.

With respect to documents, FTC has produced a total of 27 documents totaling 519 pages. Holtshouser Declaration, ¶4. Most of these are public record patent and technical documents having nothing to do with FTC specifically. Emerson, on the other hand, has only begun to make production of documents on a rolling basis as it continues to investigate and process documents. To date, it has produced approximately 9,000 pages, but expects the total to easily top 150,000 pages. Holtshouser Declaration, ¶5.

FTC concedes that in a patent infringement case, the *accused infringer's* evidence comprises the bulk of the relevant evidence. Dkt. 18 at 6-7. This is because what is relevant to infringement is the accused infringer's commercial product and all associated technical information derived from the *accused infringer's* documents and witnesses. Dkt. 14 at 10 (cases

[2] FTC coyly represents that it has earned revenue of "less than one million dollars." Dkt. 18-1 at ¶7. This is uninformative; the lack of specificity leaves a wide range of possibilities as to the extent of FTC's actual business activities.

cited). Even as to damages, it is Emerson's financial information, including witnesses, that are relevant to the reasonable royalty FTC seeks.

What is astounding about FTC's Response is its complete failure to deny or rebut the facts asserted by Emerson regarding FTC's lack of any connection to this District. *See*, Dkt. 14 at 14; Declaration of Michael Collins, Dkt. 14-2. Despite ample evidence that the address claimed by FTC as its principal place of business, 1400 Preston Road, Suite 475, Plano, Texas, is a sham, FTC still submits Mr. Pridham's Declaration asserting it as FTC's address. Dkt. 18-1, ¶4. He completely ignores Mr. Collins's investigative results and offers *no* explanation or rebuttal. As such, FTC concedes the shame nature of its alleged nexus. Tacitly, FTC admits that the address claimed in both its complaint and in Mr. Pridham's declaration is false. Thus, FTC is merely a shell and has *no* principal place of business and satisfies the Federal Circuit's standard for disregarding the plaintiff's location as "recent and ephemeral." *In re Microsoft Corp.*, 630 F.3d 1361, 1364-65 (Fed. Cir. 2011); *see also, In re Zimmer Holdings, Inc*., 609 F.3d 1378, 1381 (Fed. Cir. 2010) (office staffed no employees).

The only known connection of a human to the address in question is the report of an attendant for the leasing agent who stated that Conner Mowles, CFO of Dominion Harbor[3], comes by occasionally to get mail. Collins Declaration, Dkt. 14-2 at ¶8. Mr. Collins's investigation uncovered no evidence that Mr. Pridham has any presence at the Suite 475[4] location.

[3] For some reason, FTC's Response provides information about FTC's parent, Monument Patent Holdings, LLC, but it has no known relevant information or witnesses. It is inexplicable why this information is included in the response to the motion to transfer.

[4] What is even more curious is that in its Initial Disclosures, the address disclosed for contacting Mr. Pridham is 1400 Preston Road, *Suite 487*, Plano, Texas 75093, Dkt. 18-13, even though Mr. Pridham's Declaration claims that he works at *Suite 475*–the suite at which there is no signage or presence of FTC personnel. Collins Declaration, Dkt. 14-2, ¶¶5-7.

However, no thanks to FTC, Emerson independently determined who David Pridham actually is: CEO of Dominion Harbor, the entity on whose behalf a settlement presentation and demand was made in this case in approximately January 19, 2016.[5] Holtshouser Declaration, ¶6 and Ex. 20. Exhibits 21-22 are Internet references for Mr. Pridham. Mr. Pridham actually works at 300 Crescent Ct #1650, Dallas, TX 75201, not 1400 Preston Road. *See*, Ex. 21. It is clear that Dominion Harbor is a company of substantial means and it is disingenuous for FTC to suggest that Emerson should bear the burden and expense of defending this suit in this district due to FTC's lower income. Dkt. 18 at 10. Dominion Harbor appears to be a large, well-funded IP assertion and licensing company. *See*, Ex. 23. Dominion Harbor Group apparently owns a bank and is a leader in the IP venture capital world. *Id.* Regardless, FTC cites no authority for the proposition that a party with resources must bear a clearly inconvenient venue if the party that chose the forum has fewer resources. FTC has more than sufficient resources to try this case in St. Louis, Missouri.

While purporting only to be the CEO of FTC, Dkt. 18-1 at ¶3, Mr. Pridham provides no explanation of what he does there, if anything. FTC does not deny that its business model is not technology; it is suing companies who are actually engaged in technology development. The convenience of witnesses with knowledge of relevant facts certainly should carry more weight than those of administrative personnel for parties whose activities are limited to instituting/maintaining litigation.

Presumably, outside patent litigation counsel, whose offices lie outside this district, perform the tasks associated with the business. The only specific knowledge Mr. Pridham claims

[5] This is why Emerson's letter requesting dismissal of this case, Exhibit C to FTC's Response to Emerson's Motion to Dismiss For Failure to State a Claim, was addressed to a representative of Dominion Harbor. *See*, Dkt. 88-2.

to have is "the acquisition and perceived value of Forward Threat Control patents, and FTC's licensing of them." Dkt. 18-1 at ¶6. This means that one of Dominion's companies, likely Monument Patent Holdings, bought the patents, assigned them and settled at least two lawsuits to date.[6] The "value"[7] of FTC's patents (i.e., the purchase price) is not immediately relevant to any royalty issue in this case, which would be informed, under the *Georgia-Pacific* factors, by their hypothetical value to Emerson if infringement and validity are found.

But Mr. Pridham is not a damages expert and cannot testify to the "perceived value" of the patents. He does not claim to have any knowledge about the technology or issues in this case, nor would this be expected because he is merely an attorney and investor in a patent litigation company. By education he is not a sensor network specialist–he is a philosopher and political scientist. *See,* Ex. 22. Notably, Mr. Pridham does not claim to perform any work for FTC in this district. Dkt. 18-1 at ¶9. A sham, virtual rent-a-mailbox address is the only connection to this district. That is indisputably insufficient, under well-established Federal Circuit case law, to provide any support for venue in this District in the face of the clear inconvenience to Emerson.

FTC also argues that this case should be kept in this district because it will avoid the inefficiency of having two judicial officers consider the same patents. Not so. Even in this district, given the present posture of the case, Judges Gilstrap and Schroeder will *both* individually consider the patents in this case. Even though the Magistrate Judge will make appropriate recommendations on the patent issues, the respective District Judges will each be required to *independently* determine the issues. And, one may not influence the other because Judge Gilstrap is recused from Emerson's case. Transfer of this case to the Eastern District of Missouri, where it belongs, will serve the judicial and public interest in protecting both FTC and

[6] Both Honeywell and Johnson Controls settled with FTC in these cases.
[7] Presumably, the value to Mr. Pridham is a function of the *litigation value* of the patents.

Emerson from any *appearance* that either district judge *here* might be inclined to follow the other on substantive rulings. Clearly, it would not be appropriate for a recused judicial officer to wield or appear to wield *any* influence, intended or unintended, on the outcome as to a party that is the basis for the recusal.[8]

FTC suggests material evidence and witness are located in this District, but it advances no competent evidence in support. It offers only vague assertions meant to leave an incorrect impression. Still, it tacitly concedes the following abundant facts which heavily favor transfer:

- Emerson documents and witnesses are located in St. Louis, Missouri. Dkt. 18 at 6-7.
- No third-party witness resides in the Eastern District of Texas. Dkt. 18 at 2-3.
- The inventors do not reside in the Eastern District of Texas. Dkt. 18-2.
- The relevant technology was developed only in California and Massachusetts. Dkt. 18 at 2.
- FTC's address is a sham to create the false appearance of a nexus to this district. Dkt. 14 at 8.
- FTC is underfunded, in the sense that its claimed assets are insufficient to satisfy a fee award, and it is a shell that makes nothing except lawsuits.[9] Mr. Pridham does not present an alternative theory of FTC's existence in his Declaration.
- Mr. Pridham lives in the Northern District of Texas in Dallas County, where his real job is serving as CEO of Dominion Harbor. Dkt. 18-1; Ex. 21 and 22.
- Guy Fielder, allegedly the "Chief Technology Officer of FTC," Dkt. 18-1 at ¶10, lives in Austin, Texas, not this district. Notably, Mr. Pridham does not state that he expects Mr. Fielder to be a witness nor what Mr. Fielder's technical expertise is. FTC's Disclosures generically state his relevance as: "FTC's business operations and activities." Dkt. 18-3.

[8] Emerson is not privy to the reasons for recusal.
[9] It is not unreasonable for a litigation business to accept transfer for convenience of witnesses for whom being away from the locus of their work has significant negative consequences.

Internet sources suggest that he formerly worked for Compaq Computers and presently is CEO of Monument Patent Holdings. *See,* Exs. 26 and 27. Emerson has been unable to determine that he has any connection to FTC.

- "[R]elevant" documents are in Dallas, not this district and FTC moved them there.[10] Dkt. 18 at 7.

In sum, there is no material connection to this district and the private interests overwhelming favor transfer.

B. Public Interest Considerations Also Strongly Support Transfer

The technology and inventors in this case are from the East and West Coasts. This district has no connection to the origins of the technology or the company/inventors that developed it. Emerson is a company that employs many people throughout the world but has a most substantial presence, and its' World Headquarters, in St. Louis, Missouri, thus giving the Eastern District of Missouri a very strong connection to this litigation. This District has no greater connection than anywhere else Emerson's thermostats are sold. Such a tenuous connection does not overcome the abundant evidence favoring a convenience transfer. All factors point to the propriety and wisdom of transfer and FTC will get just as timely and fair of a hearing in St. Louis as it would here.

FTC attempts to paint Emerson as a company that is *per se* against non-practicing entities. Dkt. 18 at 13. That is not the case. But, FTC sued here for nuisance value patent settlements to make a quick buck and two companies have already caved in–Emerson will not

[10] Neither Mr. Pridham, Dkt. 18-1 at ¶11, nor Mr. Zajac, Dkt. 18-2 at ¶10, explain with any specificity what was transferred. As indicated *supra*, the quantity is tiny by patent litigation standards. Mr. Pridham claims that after "process[ing]" they will be sent to FTC's "primary place of business." Dkt. 18-1 at ¶11. In the case of *In re Hoffman-LaRoche, Inc*., 587 F.3d 1333, 1337 (Fed. Cir. 2008), the Federal Circuit specifically prohibited considering the location of documents that were transferred to the Eastern District of Texas as a venue factor.

because the patents-in-suit, even if Emerson infringes, are invalid and worthless to Emerson. There is nothing unfair about making FTC play by the rules by litigating this type of case in the Eastern District of Missouri, where the bulk of the documents and witnesses are located. St. Louis, Missouri is a location that is clearly more convenient. If it were to be tried here, it would be a substantial, expensive disruption to Emerson's business to have its witnesses ready and waiting to testify in a distant location.

FTC, without legal support, wrongly suggests that size matters under §1404(a). Nowhere in the proper legal analysis is there a balancing of ability to pay. Moreover, FTC's wealth is a fictional choice by its parent entities, such as Dominion Harbor Group, and individuals, such as David Pridham. Presumably the object is to limit the risk of an adverse fee award under Section 285 after the *Octane Fitness* decision. FTC had the chance to tell the Court *how much* the investors and the parent companies possess in funds. It did not. Wealthy venture capitalists and risk-takers dabble in risky patent litigation. Why shouldn't assertion of a patent, covering sensor networks to detect terrorist threats, against a company that makes and sells thermostats for home and office–products not even mentioned in the patents-in-suit–be determined in the forum that is clearly more convenient to the greater weight of witnesses and evidence?

At worst, this case will be tried in St. Louis within a time period only marginally longer than in this district. Or it could be quicker in St. Louis. FTC will not be prejudiced by any marginal delay in the trial date in St. Louis, because FTC does not make a competing product and seeks only money, not injunctive relief. The Eastern District of Missouri has a one-year trial track and has a full complement of judges in one courthouse. The trial will be held just minutes from the St. Louis airport for anyone needing to travel to the trial. If FTC wants a quick trial in St. Louis, Emerson will consent to a fast-track schedule in the Eastern District of Missouri.

As this Court is well-aware, this district has a large number of patent filings and a "short-handed" bench. *See* Ex. 24 and 25. Chief Judge Clark stated, just weeks ago, that he is "worr[ied] about the workload" given the numbers and the fact that three of eight judgeships are vacant. *See*, Ex. 25. He also fears that such conditions threaten to deprive the remaining judges of the "time to think." Another article quotes former Chief Judge Leonard Davis's description of the fact that the heavy patent divisions' judges have had to spend time in Plano to cover vacancies, which as the Court is aware, imposes significant additional burdens due to the travel involved. *See*, Ex. 26. Transferring this case to St. Louis will only lessen these burdens.

C. The Unique Judicial Posture of This Case Also Supports Transfer

Finally, transfer will eliminate the unusual procedural issue in this case based on Judge Gilstrap's recusal from Emerson's case but retention of Carrier's case. Transfer obviates a situation in which two different District Judges *of the same district* will review similar substantive issues recommended by the *same* Magistrate Judge. Moreover, as stated *supra*, regardless of transfer, two different district judges *somewhere* will determine the patent issues herein. Transfer, of course, has an added public interest benefit, unaddressed by FTC like the other points to which it lacks a good answer. Transfer will obviate the *potential for undermining the appearance of impartiality* in this district. Judge Gilstrap or Judge Schroeder can't reach different conclusions about the same substantive issue[11], such as construction of the claims of the same patent, without overcoming the natural disinclination towards local judicial inconsistency. Emerson is the potential bearer of the short stick here. Given recusal, whatever the reason, Judge Gilstrap should not have any role, implicitly or otherwise, in the outcome of an issue that impacts

[11] Emerson has made an *Alice* argument and Carrier has not. If Judge Schroeder grants the *Alice* motion, when Carrier follows up with an inevitable motion under Rule 12(c) or 56, what if Judge Gilstrap disagrees? Transfer would solve this "sticky wicket."

Emerson. Eliminating this factor by transfer of this case to St. Louis adds weight to the already strong showing in favor of granting Emerson's Motion to Transfer.

III. CONCLUSION

This Court should adopt the arguments made by the petitioner in *TC Heartland* and dismiss this case for improper venue, because Emerson does not reside in the Eastern District of Texas. Alternatively, the private and public interest factors strongly show that the Eastern District of Missouri is a *clearly more convenient forum* than the Eastern District of Texas.

Dated: April 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 2016, the foregoing was filed electronically with the Clerk of Court and to be served via the Court's Electronic Filing System upon all counsel of record.

/s/ Rudolph A. Telscher