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-RSP-RWS
v.	§	
	§	Jury Trial Demanded
EMERSON ELECTRIC CO.,	§	
	§	
Defendant.	§	

DEFENDANT EMERSON ELECTRIC CO.'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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STATEMENT OF THE ISSUES

1. Whether 28 U.S.C. Section 1400(b)'s definition of corporate residence controls in patent infringement cases?

2. Whether the convenience of the parties and witnesses and the interest of justice warrant a transfer of this case to the Eastern District of Missouri?

I. INTRODUCTION

Defendant Emerson Electric Co. ("Emerson") respectfully requests this Court to dismiss the Complaint in this case pursuant to 12(b)(3) of the Federal Rules of Civil Procedure because venue is not proper under 28 U.S.C. § 1400(b), the statute that governs venue in patent cases. Emerson is a Missouri corporation with its principal, regular and established place of business at 8000 W. Florissant Rd., in St. Louis, Missouri. See, Holtshouser Declaration, Ex. 8. It does not have any regular and established place of business in the Eastern District of Texas. Therefore, it does not reside in Texas or the Eastern District of Texas for the purpose of venue in patent infringement actions. Pursuant to Section 1400(b), it must be sued in St. Louis, Missouri. This issue is currently being decided by the Court of Appeals for the Federal Circuit.

Alternatively, Emerson seeks transfer of this case from the Eastern District of Texas to the Eastern District of Missouri pursuant to 28 U.S.C. §1404(a) for the convenience of the parties and witnesses and in the interest of justice. All of the witnesses and documents that will form the primary basis of proof for both plaintiff FTC Sensors, LLC ("FTC") and Emerson are located in St. Louis. There is no other location in the U.S. that is even close to having the substantial connections to the issues regarding the conception, design, engineering, manufacture, marketing, sales and accounting for results for the accused Sensi Thermostat than St. Louis, Missouri. FTC has no real connection to the Eastern District of Texas. The face of the patents list Mountain View, California as the home of the original assignee, presumably where the so-called "technology" was developed. As the facts herein prove, FTC's claimed address in the Eastern District of Texas is a sham, and FTC is nothing more than a shell created to own the Asserted Patents in this case. It might be different if FTC went to the trouble of opening a real office, employed people, including someone to answer phones, and perhaps put up a website that gave some appearance of a real company. But, FTC has not put forth any effort to even give the

appearance that it is a real company established in the Eastern District of Texas. It's simply gaming the system and hoping that Emerson would not spend the money to investigate it. Further, the inventors, while not part of FTC, are also not located anywhere near Texas to Emerson's knowledge. Given the foregoing, Emerson does not anticipate any material witnesses residing within this district.

As the Court is aware, the Eastern District of Texas is the busiest patent infringement trial court in the United States. Hundreds of cases were filed in the Eastern District of Texas in the days immediately prior to November 30, 2015 alone. New filings continue. The Eastern District of Missouri has extensive experience with patent infringement cases[1] and is well able to preside over this dispute. FTC would not be prejudiced by a transfer to the Eastern District of Missouri. The vast majority of the infringement-related depositions will have to be conducted in St. Louis, the company witnesses are located in St. Louis and the documents and things are located in St. Louis. The evidence of conception, design, manufacture, marketing and sales, financial results and damages and even prior art will all be St. Louis-focused. The relevant witnesses and evidence can reach the federal courthouse by automobile within 15 minutes of their place of employment and location. Anyone needing to travel to St. Louis can reach the courthouse within 15 minutes of the airport. It would be costly and unjust to Emerson and inefficient for this case to

[1] Data for the twelve month period ending June 30, 2015 shows that 48 intellectual property cases were filed in the Eastern District of Missouri. http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2015. Holtshouser Declaration, Ex. 9. The district has 11 District Judges and 7 Magistrate Judges. http://www.moep.uscourts.gov/judges-court. One of the Magistrates is an Electrical Engineer and former practicing patent attorney, U. S. Magistrate John M. Bodenhausen. Holtshouser Declaration, Ex. 10. By contrast, there were 1,668 IP cases filed in the Eastern District of Texas for the twelve month period ending March 31, 2015. http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015-tables. Holtshouser Declaration, Ex. 11. The Eastern District of Texas has a total of 5 active District Judges and and 8 Magistrate Judges. http://www.txed.uscourts.gov/page1.shtml?location=info

be tried in the Eastern District of Texas. Accordingly, Emerson requests that this case be transferred to the Eastern District of Missouri. This case epitomizes why 28 U.S.C. § 1404(a) is in place.

II. BACKGROUND

In this action, FTC's Complaint alleges that Emerson's Sensi Thermostat infringes three Asserted Patents. Dkt. 1. The inventors on the Asserted Patents, Exhibits 1-3 to the Complaint, are from California, New Hampshire and Massachusetts. It is easier for all of them to reach St. Louis, if needed, than Texas. FTC claims that it is a Texas limited liability company "with its principal place of business located at 1400 Preston Road, Suite 475, Plano, Texas 75093-5186." Dkt. 1, ¶1. The complaint claims venue is proper under 28 U.S.C. §§1391(c) and 1400(b), but the only venue allegation is that "Emerson has engaged in acts of infringement in the State of Texas…" *Id.*at ¶6. Similarly, FTC admits that Emerson is a Missouri corporation with its principal place of business in St. Louis, Missouri. *Id*. at ¶2. See also, Holtshouser Declaration, Exhibit 8. The only alleged connection between Texas and any conduct by Emerson is that it is selling Sensi thermostats in Texas, places them into the stream of commerce with awareness that they will end up in Texas and operates an interactive website that is accessible by Texas residents. *Id*. ¶5. The latter is true for any state in the United States and therefore provides no support for a connection to Texas. There is no allegation of any specific infringing conduct or act in the Eastern District of Texas. Upon information and belief, FTC does not make or sell anything of which Emerson is aware. It was apparently created for the purpose of purchasing the Asserted Patents from FTC-Forward Threat Control, LLC, on August 28, 2015, approximately ninety days before the Complaint herein was filed. Dkt. 1. *See also*, PTO Assignment, Holtshouser Declaration, Ex. 12.

Emerson was founded in 1890 as an electric motor company, but over the years expanded into fans, arc welders, electric motors, compressors for refrigeration and air conditioning, power conversion and industrial process control products. *See*, Holtshouser Declaration, Ex. 13. Emerson holds numerous subsidiaries, but is an operating company as to development, manufacture and sales of environmental control equipment, including the Accused Product "Sensi" Thermostat. http://www.emerson.com/en-us/AboutUs/Pages/history.aspx. *Id.*

In its Complaint, FTC alleges that Emerson's Sensi Thermostat, a "smart"[2] thermostat, infringes the Asserted Patents. FTC alleges that the Sensi infringes the Asserted Patents because it comprises "a sensor module coupled to a configurable programmable interface module that executes instructions in response to a threshold signal and generates alerts, that comprise a sensor module coupled to a configurable programmable interface module that executes instructions in response to a threshold signal and generates alerts or that sense environmental conditions in two power modes and signal an alert. .." Dkt. 1 at ¶11.

III. ARGUMENT: THE COMPLAINT SHOULD BE DISMISSED FOR IMPROPER VENUE OR THE CASE SHOULD BE TRANSFERRED

A. Because Section 1400 Controls Venue Determinations In Patent Infringement Cases, Venue Is Improper The Complaint Against Emerson Should Be Dismissed

Under 28 U.S.C. § 1400(b), the controlling patent venue statute, the Court should dismiss or, in the alternative, transfer this action to the Eastern District of Missouri pursuant to 28 U.S.C.

[2] What makes products like the Sensi thermostat "smart" is their ability to monitor, be controlled and connected wirelessly through a network to a remote control, the "Cloud", or a cellular telephone. Smart products are abundant and thrive in the market in a variety of products and applications and enable users to control the functions of the products, receive information about the operation of the product, and store data on usage. In some cases they also enable the product to "learn" the user's preferences and adapt to the preferences and enable the manufacturer to learn how the user uses it. https://hbr.org/2014/11/how-smart-connected-products-are-transforming-competition/ar/1/ , Holtshouser Declaration, Exhibit 14 at 11.

§ 1404(a).[3] Emerson is headquartered in Missouri and organized and existing under the laws of Missouri. Holtshouser Declaration, Ex. 8. Emerson does not have any regular or established place of business in the Eastern District of Texas. The Federal Circuit has held that exercising jurisdiction when venue is barred by statute is a species of "usurpation of judicial power." *See, e.g., In re EMC Corp*., 677 F.3d 1351, 1354 (Fed. Cir. 2012); *In re Link_A_Media Devices Corp*., 662 F.3d 1221, 1222 (Fed. Cir. 2011).

1. Venue Is Improper Because Emerson Electric Co. Does Not "Reside" in the Eastern District of Texas for Purposes of Venue Under 28 U.S.C. § 1400(b)

28 U.S.C. § 1400(b)[4] ("§ 1400(b)") is the "sole and exclusive provision controlling venue in patent infringement actions. . . ." *Fourco Glass Co. v. Transmirra Prods. Corp*., 353 U.S. 222, 229 (1957). "[T]he residence of a corporation for purposes of § 1400(b) is its place of incorporation." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc*., 406 U.S. 706, 707 n.2 (1972). Under controlling Supreme Court precedent, the terms of 28 U.S.C. § 1400(b) are not to be supplemented by 28 U.S.C. § 1391. The case governing venue in patent litigation, *VE Holding Corp. v. Johnson Gas Appliance Co*., 917 F.2d 1574 (Fed. Cir. 1990) (holding term "resides" in § 1400(b) was supplemented by 1988 revision to 28 U.S.C. § 1391(c)), was wrongly decided. Alternatively, 2011 revisions to 28 U.S.C. § 1391 ("§ 1391") effectively repealed the statutory text on which *VE Holding* relied to find that *Fourco* was overruled. Because § 1400(b) governs this case, and Emerson does not reside in this district for purposes of venue, this court should dismiss the case.

[3] This Court also has the power, pursuant to 28 U.S.C. §1406(a), to transfer the case to St. Louis, Missouri, in the interest of justice.

[4] 28 U.S.C. § l400(b) provides: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, *or* where the defendant has committed acts of infringement *and* has a regular and established place of business." (emphasis added) There is no allegation that Emerson has a regular and established place of business in this District.

In *Fourco*, the Supreme Court held that "§ 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions." *Fourco*, 353 U.S. at 229; *accord Schnell v. Peter Eckrich & Sons, Inc*., 365 U.S. 260, 262 (1961). The *Fourco* court specifically declined to supplement § 1400(b) with the provisions of 28 U.S.C. § 1391(c). *Fourco*, 353 U.S. at 229. Subsequently, in 1988, Congress revised § 1391 such that § 1391(c) included the phrase: "For purposes of venue under *this chapter*..." *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1013, 102 Stat. 4642, 4669 (1988); 28 U.S.C. § 1391(c) (2000) (emphasis added). Both § 1391 and § 1400(b) belong to Part IV, *Chapter* 87 of Title 28 of the United States Code. Based on the revision, the *VE Holding* court concluded that:

> Section 1391(c) as it was in *Fourco* is no longer. We now have exact and classic language of incorporation: "For purposes of venue under this chapter…." Congress could readily have added "except for section 1400(b)," if that exception, which we can presume was well known to the Congress, was intended to be maintained.

VE Holding, 917 F.2d at 1579. Although this Court is presently bound by the decision in *VE Holding*, Emerson respectfully suggests that it was wrongly decided. The Federal Circuit is hearing argument on this very issue on March 11, 2016, and will determine whether *VE Holding* was wrongly decided. The case before the Federal Circuit is *In re TC Heartland LLC*, No. 16-105. Holtshouser Decl., Ex. 15 is a copy of the "Petition for Writ of Mandamus" and Ex. 16 is the "Reply in Further Support of Petition For Writ of Mandamus" in the *TC Heartland* case.

VE Holding was in fact wrongly decided, because the 1988 change in the language of Section 1391(c) from "for venue purposes" to "[f]or purposes of venue under this chapter" was not intended to statutorily overrule *Fourco* nor to modify the special patent venue statute in Section 1400(b) to read in conjunction with the definition of corporate residence in the more general Section 1391. In addition, the approach taken by the *VE Holding* panel, to read the 1988 change as language of incorporation, had been rejected by the Supreme Court in *Fourco*. Finally,

VE Holding's reasoning was in conflict with the cannon of *in pari materia* and the requirement to interpret Section 1400(b) consistently with Section 1694 (both were originally part of Section 48 of the Judicial Code interpreted in *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 1942), which *Fourco* reaffirmed, 353 U.S. at 227. Congress has never altered Section 1694 and Section 1400(b) should be construed *in pari materia* with Section 1694 as to the definition of corporate residence. Thus, *VE Holding* was wrong in deciding that the 1988 amendment to Section 1391 incorporated its definition of corporate residence into Section 1400(b).

Regardless of the correctness of *VE Holding*, the "Federal Courts Jurisdiction and Clarification Act of 2011", Pub. L. No. 112-63, § 202, 125 Stat. 758, 763 (2011) (the "2011 Act"), repealed the statutory text that the *VE Holding* court used to override *Fourco*. *VE Holding* held that the term "resides" in § 1400(b) was supplemented by 28 U.S.C. § 1391(c) due to the "[f]or purposes of venue under this chapter" language. The 2011 Act not only removed this language, but also introduced a new subparagraph (a) headed "Applicability of Section" that states in part: "Except as otherwise provided by law...(1) this section shall govern the venue of all civil actions brought in district courts of the United States..." 28 U.S.C. § 1391(a). The plain language of these revisions to the statute compel the conclusion that § 1391(c) now applies in all civil cases "except as otherwise provided by law." 28 U.S.C. § 1391(a). This newly added "otherwise provided" language mirrors the language the *VE Holding* court suggested Congress could have included if it wanted §1400(b)'s specific provisions to control over § 1391(c). Supreme Court precedent establishes that the specific venue statute § 1400(b) is not subject to a general default definition of corporate residence (*see Fourco* 353 U.S. at 229 and *Brunette* 406 U.S. at 707 n.2).

After the 2011 Act, 1400(b) is the exclusive source of venue in patent infringement cases. Its definition of "resides" means the state of incorporation. The legislative history indicates that "resides" carries the meaning of "domiciled," which for corporations means the state of incorporation. *In re Cordis Corp.*, 769 F.2d 733, 735 (Fed. Cir. 1985); *see also Fourco*, 353 U.S. at 226. The complaint in this case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3), because venue is improper in the Eastern District of Texas. Emerson is a Missouri corporation. Even if it sold infringing products in that district, it lacks any regular and established place of business such that it is "at home" there. Declaration of John Sartain, ¶12.

B. Alternatively, Emerson Requests That This Court Transfer This Action To The Eastern District Of Missouri Pursuant To 28 U.S.C. Section 1404(a) For The Convenience Of The Parties And In The Interest Of Justice

Title 28 United States Code, § 1404(a) provides:

> [f]or the convenience of the 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). This Court recently granted a motion to transfer in *Chrimar Systems, Inc v. Rucckus Wireless, Inc.*, No. 6:15-CV-638 JRG-JDL (E.D. Tex. Dec. 9, 2015). Holtshouser Declaration, Ex. 17 (Slip Op.). "The goals of § 1404(a) are to prevent waste of time, energy, and money, and also to protect litigants, witnesses, and the public against unnecessary inconvenience and expense." *Chrimar Systems, slip op.* at 3 (citing *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964)). If the movant can show that the transferee venue is clearly more convenient, good cause supports a transfer. *Id*. (citing *In re Volkswagen of America, Inc.*, 545 F.3d 304, 315 (5th Cir. 2008)(*en banc*)). Accordingly, under § 1404(a), this Court may, in its discretion, transfer the case to another District Court where the action "might have been brought." Here, convenience considerations are clear and the lawsuit is jurisdictionally proper in St. Louis, Missouri.

In *Hoffman v. Blaski*, 363 U.S. 335 (1960), the Supreme Court interpreted this statute to require that the proposed transferee district be one in which the plaintiff could have filed the action initially. *Id.* at 342-43. Thus, before transfer to the Eastern District of Missouri is proper under § 1404(a), this Court must determine that (1) subject matter jurisdiction over the action, (2) personal jurisdiction over the defendants, and (3) proper venue all existed in the Eastern District of Missouri as of the time the Complaint was filed in this case. *Id. See also, Chrimar Systems*, *slip op*. at 3*; In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004). Here, as of November 30, 2015, each of these elements was clearly present in the Eastern District of Missouri as to Emerson. The Eastern District of Missouri would have had subject matter jurisdiction over this patent infringement suit by virtue of 28 U.S.C. § 1338(a). The Eastern District of Missouri would have had personal jurisdiction over Emerson because Emerson's principal place of business is in St. Louis, Missouri. Dkt. 1 at ¶2; Declaration of John Sartain, ¶¶2-5. For the same reason, venue in the Eastern District of Missouri would have been proper under 28 U.S.C. § 1400(b) ("Any civil action for patent infringement may be brought in the judicial district where the defendant resides…"). It would even have been proper under 28 U.S.C. § 1391(c) and the decision in *VE Holding*, 917 F.2d at 1580.

Under 28 U.S.C. § 1404(a), once the threshold issue is resolved, there are private and public factors that are balanced "in the fair and efficient administration of justice." *Chrimar Systems*, slip op. at 3. 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." *Id*. (citing *In re Volkswagen AG*, 371 F.3d at 203). The public interest 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 of the application of foreign law." *Id.* Here, the factual record before the Court shows that the Eastern District of Missouri is clearly more convenient for the parties and known specific witnesses, provides easier access to known specific evidence, and has a stronger interest in this case than this District. Balancing the various factors strongly favors transfer of this action to the Eastern District of Missouri. Therefore, Emerson's alternative motion to transfer should be granted.

1. The Private Interest Factors Favor Transfer to the Eastern District of Missouri

a. Sources Of Proof Are More Easily Accessed in St. Louis, Missouri

In patent infringement cases, "the bulk of the relevant evidence usually comes from the accused infringer." *In re Genentech Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009). As a result, "the place where the defendant's documents are kept weighs in favor of transfer to that location." *Chrimar Systems*, slip op. at 4 (quoting *Neil Bros. Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 330 (E.D.N.Y. 2006)). Emerson has more than met its burden of showing "with some specificity" that all of the evidence related to the issue of infringement and potential damages, human and documentary, are located in the Eastern District of Missouri. *See*, Declaration of John Sartain ¶ 11. Emerson even named the relevant witnesses. Emerson's witnesses, documents and accused products, which it intends to physically demonstrate at trial, are in St. Louis, Missouri. Third-party witnesses, such as the inventors, are not located in St. Louis, but they are closer to St. Louis than Texas. If third-party evidence is obtained from parties outside the subpoena power of either district, such evidence will likely be obtained and preserved for trial by deposition and third-party subpoena. As to the choice of forums, the location of third-party evidence is, at best,

neutral to this factor. This factor weighs heavily in favor of transfer because the alternative will mean that all of the parties will be inconvenienced by having to travel to and conduct litigation in a district that has no real connection to the facts relevant to liability. This is precisely the situation that Section 1404(a) was created to remedy.

b. The Availability Of Compulsory Process To Secure The Attendance Of Witnesses Favors Transfer or Is Neutral

"The Court gives more weight to those specifically identified witnesses and affords less weight to vague assertions that witnesses are likely located in a particular forum." *Chrimar Systems*, slip op. at 7 *(*citing *Novelpoint Learning v. Leapfrog Enter.*, No 6:10-cv-229, 2010 WL 5068146, at *6 (E.D.Tex Dec. 6, 2010) (stating that the Court will not base its conclusion on unidentified witnesses)). *See also West Coast Trends, Inc. v. Ogio Int'l, Inc.*, No. 6:10-cv-688, 2011 WL 5117850, at *3 (E.D. Tex. Oct. 27, 2011). Compulsory process will be available in the Eastern District of Missouri for all witnesses having any connection to Emerson. Pursuant to Rule 45(c), Emerson is not aware of, nor has Plaintiff identified any relevant witness or document that is within 100 miles of the Eastern District of Texas. FTC has a single known representative, Conner Mowles, but it is unknown what relevant information he has to offer. Because he merely purchased the patents to assert in litigation, he is unlikely to have any material information pertaining to the patented technology, infringement or what a reasonable royalty should be (the subject of expert testimony). This factor weighs in favor of transfer.

c. Willing Witnesses Can Attend Trial in St. Louis For Far Less Cost Than in the Eastern District of Texas

The Federal Circuit has recognized that **c**onvenience of witnesses is the single most important factor. *In re Genentech*, 566 F.3d at 1345. *See also*, 17 James Wm. Moore et al., Moore's Federal Practice § 111.13[1][f][i] (3d ed. 1997) ("the most powerful factor governing the decision to transfer a case."). "'Because it generally becomes more inconvenient and costly

for witnesses to attend trial the further they are away from home, the Fifth Circuit established in *Volkswagen I* a '100-mile' rule, which requires that '[w]hen 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.'" *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320 (Fed. Cir. 2008) (citations omitted)." *Chrimar Systems,* slip op. at 9. The convenience to the Emerson witnesses is self-evident, Declaration of John Sartain ¶¶ 7-11. Emerson is not presently aware of the need for any out-of-town witness to attend trial in St. Louis, Missouri. It is unfair and unnecessary for FTC, a non-practicing entity with no material employee witnesses, to force Emerson to disrupt its business operations and schedules of its important employees by traveling to Texas for the extended period necessary to try a case. The convenience of such witnesses is typically given more weight than the convenience of party witnesses. *See, e.g., State Street Capital Corp. v. Dente*, 855 F. Supp. 192, 198 (S.D. Tex. 1994). Given the fact that almost all relevant witnesses already live and work in St. Louis and the documents and things they would bring to trial are located in St. Louis, it follows that this factor weighs strongly in favor of transfer. Even the few witnesses who might attend the trial from outside St. Louis would find it convenient and less costly to make the 15 minute trip from the airport to the federal courthouse.

d. Other Practical Problems That Make Trial of the Case In St. Louis Judicially Efficient

Judicial economy is often a consideration in transfer motion." *Chrimar Systems*, slip op. at 10. An important practical consideration is that little judicial activity has occurred in this case with respect to Emerson since it was filed. Emerson is only consolidated with Carrier for pretrial matters, but review of Magistrate Payne's ruling will be made by two different judges (Judge

Gilstrap recused himself and transferred the case to Judge Schroeder) already.[5] Thus, there is little efficiency in keeping this case in this District. Transferring this case now, at a time when Emerson has not even answered the complaint and at a time when this Court does not have familiarity with the Asserted Patents or the technology, would be efficient and avoid unnecessary expenditure of judicial resources. Emerson has not delayed in bringing the motion. This factor weighs strongly in favor of transfer.

2. The Public Interest Factors Favor Transfer To The Eastern District Of Missouri

a. The Administrative Difficulties Flowing From Court Congestion Warrant Transfer to St. Louis, Missouri

"This factor is the most speculative, and cannot alone outweigh other factors." *Chrimar Systems*, slip op. at 12 (citing *Genentech*, 566 F.3d at 1347). Court congestion favors transfer. The Eastern District of Missouri has far fewer pending patent infringement cases than this District. There is no appreciable difference in the time to trial between the two districts. This factor weighs in favor of transfer.

b. The Local Interest In Having Localized Interests Decided At Home Weighs Heavily In Favor of Transfer to St. Louis, Missouri

In the *Chrimar Systems* case, the Court granted transfer even though the plaintiff was a "Texas company that has been based in Longview, Texas for several years and maintains one full-time employee." Slip op. at 13. Here, this is a particularly interesting factor. As the

[5] It is also not clear how the process will work given the unique procedural facts present. Judge Gilstrap recused himself from the Emerson case. The FTC v. Carrier case has been retained by Judge Gilstrap, but assigned to Magistrate Payne for all pretrial matters. The FTC v. Emerson case has been transferred to Judge Schroeder, but similarly assigned to Magistrate Payne. When Magistrate Payne issues an order, e.g., *Markman*, if Judge Gilstrap reviews the order to affirm or modify it in some way, it is unclear how the concern for judicial consistency between a recused and unrecused judge might impact the process. This local concern would also be mooted by a transfer.

Declaration of Michael Collins makes clear, FTC has no "home". Declaration of Michael Collins at ¶¶ 5, 7-9.The address that it claims within the Eastern District of Texas is a "virtual" office, but it appears to be nothing more than a mail drop for Conner Mowles (*Id.* at ¶¶8-9), whose real job is CFO of Dominion Harbor, a large NPE. There is no known lease, signage, personnel, office, door or even a telephone for a company that purports to represent the interests of advancing technology. There is, in fact, no evidence before the Court to substantiate FTC's representation that is a business existing at the address claimed in the complaint. Respectfully, FTC is not at "home" in this district. FTC's home is a sham and legal fiction which derogates companies that actually are "at home" in the Eastern District. To allow FTC to have its choice of forums denigrates the many legitimate plaintiffs who present patent disputes in this district and are legitimately at home in the Eastern District of Texas. Unlike the plaintiff in *Chrimar Systems*, FTC did not even exist on paper until weeks before the complaint was filed. It has no known employee (Conner Mowles has a job already) and no home. Just as in *In re Microsoft Corp.*, 630 F.3d 1361, 1364-65 (Fed. Cir. 2011), where the Court granted mandamus and ordered the case transferred from this district to another, FTC's contacts with this district are "recent, ephemeral, and a construct for litigation and appeared to exist for no other purpose than to manipulate venue." *See also, In re Zimmer Holdings, Inc*., 609 F.3d 1378, 1381 (Fed. Cir. 2010) (office staffed no employees).

In addition, this District has no more interest in this dispute than any other district in which Sensi products are sold. The operative facts of infringement or inducement to infringe did not occur in Texas; if true, they occurred in St. Louis, Missouri. The Eastern District has no particular interest in the parties or the subject matter. This district is not the residence of

Emerson and FTC is a "company" that has no home. Even the subject matter of the litigation does not have a substantial connection to this district.

The Eastern District of Missouri, on the other hand, has a strong venue interest in having the dispute resolved there. The outcome of the litigation can impact a real company with real employees that all reside in St. Louis. The Eastern District of Missouri has an interest in the work and reputation an employer within its borders. *See, In re Hoffman-La Roche Inc.*, 587 F.3d 1333, 1336 (Fed. Cir. 2009) ("[L]ocal interest in this case remains strong because the cause of action calls into question the work and reputation of several individuals residing in or near that district and who presumably conduct business in that community."); *Eon Corp. IP Holdings, LLC v. Sensus, USA Inc.*, No. 2:10-cv-448, 2012 WL 122562, at *5 (E.D. Tex. Jan. 9, 2012). The accused products were conceived, designed and engineered in St. Louis. The team of people who market and oversee sales of the Sensi and account for Sensi financial results reside in St. Louis and derive their livelihood from the Sensi thermostat. This factor strongly favors transfer to a district with a *legitimate* interest in the allegations in the Complaint.

c. The Familiarity Of The Forum With The Law That Will Govern The Case Is A Neutral Factor

This factor, of course, is neutral.

d. The Avoidance Of Unnecessary Problems With Conflict Of Laws Or The Application Of Foreign Law is Not A Factor

This factor is also neutral as there are no known problems of conflict of laws or in the application of foreign law.

3. As a Whole These Factors Warrant Transfer to the Eastern District of Missouri

Here, the location of sources of proof, the convenience of willing witnesses, and the local interest, judicial economy, and administrative difficulties arising from court congestion weigh in

favor of transfer. No factor weighs in favor of keeping this case in this district and numerous factors weigh strongly in favor of transfer to the Eastern District of Missouri. In addition, the sham nature of FTC's claimed connection to the Eastern District of Texas is a factor that weighs against giving its choice of forum any deference and in favor of transfer. In fact, FTC would not be prejudiced by a transfer to St. Louis, Missouri. Strong public interests and the convenience of all parties would be served by granting the request for transfer.

IV. CONCLUSION

For the reasons stated above, Emerson Electric Co., respectfully requests that this Motion to Dismiss for improper venue be granted and requests an order dismissing the complaint for improper venue pursuant to Fed. R. Civ. P. 12(b)(3). Alternatively, Emerson requests that this case be transferred to the Eastern District of Missouri pursuant to Section 1404(a).

Dated: March 11, 2016

Respectfully submitted,

By: /s/ Rudolph A. Telscher, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March 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

CERTIFICATE OF CONFERENCE

Defendant Emerson Electric Co. certifies that its counsel, Steven E. Holtshouser, and Plaintiff's counsel, Kenneth Kula, Buether Joe & Carpenter, LLC, conferred by telephone on March 11, 2016, regarding Defendant's Combined Motion and Memorandum to Dismiss The Complaint for Lack of Personal Jurisdiction Pursuant to Matter Under Fed. R. Civ. P. 12(B)(2) and 12(B)(3). As a result of the communications, Plaintiff authorized the undersigned to represent that Plaintiff does oppose the present motion.

DATED: March 11, 2016

Respectfully submitted,

By: /s/ Rudolph A. Telscher
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