

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AT&T INTELLECTUAL
PROPERTY I, L.P. and AT&T
INTELLECTUAL PROPERTY II, L.P.,

Plaintiffs,

v.

COX COMMUNICATIONS, INC., et al.,

Defendants.

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C.A. No. 14-1106-GMS

**PLAINTIFFS' ANSWERING BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO TRANSFER**

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Dated: February 12, 2015

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I. INTRODUCTION

This is a nationwide patent case alleging infringement by dozens of regional Cox entities located and operating throughout the country—from Arizona to Rhode Island; from California to Connecticut. While these numerous regional entities now offer the vague assertion that they are all “present” in Georgia, CoxBr.6, in recent pleadings in the federal courts of Delaware and Kansas these same entities repeatedly insisted (and certain of their officers swore under penalty of perjury) that they are all based in their regional homes; that they design, manufacture, advertise, promote, sell, and provide their products and services from their regional homes; and that the *only* venue in which they can all be joined for suit—due to their common state of incorporation—is Delaware. Ex. 1¹ (Dkt. 35) at 10-13; *Id.* (Dkt. 35-4) ¶¶ 4-6; Ex. 2 at 6-8. AT&T reasonably relied on these representations, including the sworn testimony from Cox affiants, in deciding to file this nationwide patent case in this District.

The Cox regional entities were arguing *for* venue in Delaware when they made those representations. Now that they are arguing *against* venue in Delaware, their story has changed. But such gamesmanship does not meet the exacting burden of proof that these entities bear to secure a transfer away from “the only forum where [AT&T] can adjudicate its infringement claims against all of the defendants who engage in the conduct for which [AT&T] is seeking relief.” Ex. 1 (Dkt. 35) at 10. Cox’s motion to transfer should be denied because: (1) the Cox entities have failed to prove, given the regional nature of their businesses, that this case could have been brought in the Northern District of Georgia; and (2) the Cox entities have also failed

¹ References to ‘Ex.’ throughout this brief reference the exhibits to the Declaration of Jared M. Hoggan in Support of Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion to Transfer, filed concurrently herewith.

to prove, given the regional nature of their infringements, that the balance of the relevant convenience factors strongly favors transfer to the Northern District of Georgia.

II. STATEMENT OF FACTS

AT&T brought this suit against thirty-two Cox entities, alleging infringement of eight patents through various cable television, internet, and digital telephone products and services that each of these entities offers to its regional customers around the country. Accused products include digital video recorders (DVRs), set top boxes (STBs), digital telephone systems and equipment such as Voice over Internet Protocol (VoIP) modems and embedded multimedia terminal adapters (eMTA), cable modems, cable modem termination systems (CMTS), radio frequency (RF) gateways, and the “Voice Manager” online subscriber profile management system. While thirty-one of the thirty-two defendant entities are incorporated in Delaware,² only two of those entities—CoxCom, LLC and Cox Communications, Inc. (CCI)—reside in the Northern District of Georgia. According to recent pleadings filed by these same Cox entities in Delaware and Kansas, the many regional entities each design, manufacture, advertise, promote, sell, and provide their products and services principally from their regional headquarters, and thus the *only* venue in which all of these entities be joined for suit—due to their common incorporation in Delaware—is this one. Ex. 1 (Dkt. 35) at 10-13; Ex. 2 at 6-8.

III. ARGUMENT

A. The Cox Entities Bear an Exacting Burden to Prove That Transfer is Proper.

Courts in this Circuit “normally defer to a plaintiff’s choice of forum,” thus “the plaintiff’s choice of venue should not be lightly disturbed.” *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879-80 (3d Cir. 1995) (internal citation omitted). A motion to transfer triggers a two-step inquiry: “The court first asks whether the action could have been brought in the proposed

² Cox Virginia Telecom, LLC is incorporated in Virginia. CoxBr.2n.2.

transferee venue and then determines whether transfer to a different forum would best serve the interests of justice and convenience.” *Smart Audio Techs., L.L.C. v. Apple, Inc.*, 910 F. Supp. 2d 718, 724 (D. Del. 2012). At each step, the defendant has the burden to prove that the conditions for transfer are met. *Jumara*, 55 F.3d at 880; *Mallinckrodt Inc. v. E-Z-Em Inc.*, 670 F. Supp. 2d 349, 356 (D. Del. 2009). This burden is heavy and exacting: “unless the balance of convenience of the parties is *strongly in favor of the defendant*, the plaintiff’s choice of forum should prevail.” *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) (internal citation omitted) (emphasis added). Transfer must therefore be denied if the defendant fails to prove either: (1) that the action could have been brought in its proposed venue; or (2) that the balance of convenience factors *strongly favors* transfer to its proposed venue. *Id.*; see also *Angiodynamics, Inc. v. Vascular Solutions, Inc.*, No. 09-554-JJF, 2010 U.S. Dist. LEXIS 77126, at *6 (D. Del. July 30, 2010) (“transfer will be denied if the factors are evenly balanced or weigh only slightly in favor of the transfer”).

B. The Cox Entities Fail to Prove That This Action Could Have Been Brought in the Northern District of Georgia.

The Cox entities acknowledge that an action may be brought in: “(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; [or] (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.” CoxBr.6; 28 U.S.C. § 1391(b). But they fail to carry their burden to prove that either of these necessary conditions is met for the Northern District of Georgia.

First, the Cox entities fail to prove that all thirty-two defendants are residents of Georgia. They address this requirement in a single, conclusory sentence in their brief: “all of the Cox defendants are present in the Northern District of Georgia, where Cox’s Atlanta headquarters are located, satisfying 28 U.S.C. § 1391([b])(1).” CoxBr.6. But of course the statutory standard is

not “present” in Georgia; it is “resident” in Georgia. The Cox entities do not even attempt to prove that they are each “residents of the State in which the [Northern District of Georgia] is located.” 28 U.S.C. § 1391(b)(1). They may intend to imply, without expressly stating, that each of the regional entities is subject to personal jurisdiction in Georgia, and thus can be “deemed to reside” there under 28 U.S.C. § 1391(c)(2). CoxBr.6. But they make no such showing. And in 2012, they expressly asserted just the opposite in pleadings to a district court in Kansas. As they explained in much greater detail there, citing the sworn testimony of a CCI Vice President,

Cox Enterprises owns CCI, which owns CoxCom LLC, which owns the [regional subsidiaries]. Within this architecture, CCI provides back-office functionality—accounting, legal support, and so on—and also handles system-wide technical issues. ... Each entity higher up the corporate chain owns (and thus at some basic level has the right to control) the companies below it. But each operating entity has independent management and employees. ... The [regional] subsidiaries pay their own taxes and own the assets needed to run their business. ... They separately manage the marketing and sale of their products, and they independently purchase and maintain their own equipment. ... *That type of relationship does not confer jurisdiction up and down the entire Cox enterprise.*

Ex. 2 at 6 (emphasis added).³

The Cox entities thus expressly rejected the proposition that the residence of CCI and CoxCom LLC in Atlanta made the regional entities subject to personal jurisdiction there. To the contrary, citing sworn testimony they asserted that each of the regional entities resided in only two districts—the entity’s regional home, and the District of Delaware. Ex. 2 at 6-8. The Cox entities therefore sought transfer *to* Delaware: “Since the *only place where consolidation can happen is Delaware*, that is where the case should be litigated.” Ex. 1 (Dkt. 35) at 13; *see also Id.* at 10 (identifying Delaware as “the only forum where [the plaintiff] can adjudicate its

³ Although the focus of the transfer motion and subsequent discovery in Kansas was on CCI, CoxCom was also a defendant in the Kansas suit and Cox’s statements and actions in that matter and Cox’s subsequent Delaware complaint suggest that CoxCom and CCI should be treated similarly for purposes of venue. For example, both CoxCom and CCI were parties to the Kansas suit and were plaintiffs in the Delaware complaint, and Cox stated in both venues that the only venue where the case could have been brought is Delaware.

infringement claims against all of the defendants who engage in the conduct for which [the plaintiff] is seeking relief”). The pleadings in Kansas were confirmed by related pleadings in the District of Delaware, where the same thirty-two Cox entities accused in this case filed a declaratory judgment complaint identifying each regional entity’s state of incorporation as Delaware and its principal place of business as its regional home—e.g., “Cox Arkansas Telecom, L.L.C. is a Delaware corporation with a principal place of business in Arkansas” Ex. 3 at 3. Judge Robinson cited these statements in denying Sprint’s subsequent motion to transfer venue. Ex. 4 ¶ 4.

These pleadings in Kansas and Delaware (and the associated sworn testimony) flatly contradict the vague declaration of Stephanie Allen-Wang offered here, to the effect that the “principal place of business of all of the Cox defendants is Cox’s headquarters in Atlanta.” Allen-Wang Decl. ¶ 6. In truth, only CCI and CoxCom LLC are headquartered in Atlanta. The other regional Cox entities (as they explained to the district court in Kansas), “have their own management, marketing, and technical executives and personnel; they make their own purchasing, marketing, and pricing decisions; they execute all internet purchase orders; [and] they own all of the personal and real property associated with the accused businesses”—and all of this activity is centered in the respective regional offices. Ex. 2 at 7-8; *see also* Ex. 1 (Dkt. 35) at 11-12 (noting that “all of [the] regional entities” operate in the same manner). In short, the regional Cox entities have failed to prove that they are all residents of Georgia, sharing a headquarters in Atlanta. To the contrary, they have expressly asserted that the “one commonality” between the two Atlanta-based entities and the regional entities “is that they are all incorporated in Delaware.” Ex. 1 (Dkt. 35-3) ¶ 7. There is thus no showing that the conditions of 28 U.S.C. § 1391(b)(1) are satisfied.

Second, the Cox entities fail to prove that “a substantial part of the events or omissions giving rise to the claim[s]” of patent infringement occurred in the Northern District of Georgia. 28 U.S.C. § 1391(b)(2). They also address this requirement with a conclusory sentence in their brief: “AT&T’s allegations of infringement focus on services, systems, and components that were implemented and provided from Cox’s Atlanta headquarters—and in some cases were designed and developed there—thus meeting the requirement of 28 U.S.C. § 1391(b)(2).” CoxBr.6-7. Of the numerous products and services accused of infringement in this case, Allen-Wang’s declaration addresses two: “Cox’s DOCSIS 3.0 network was designed and developed in Atlanta, and is controlled and maintained by technicians based in Atlanta. Similarly, updates to Cox’s set-top box are deployed from Atlanta to user equipment across the country.” Allen-Wang Decl. ¶ 8. The fact that Allen-Wang could only identify one product and certain “updates” to another confirms that the vast majority of the infringement claims—those regarding DVRs, VoIP modems, eMTA, CMTS, RF gateways, and the underlying STBs, among others—have little to do with Atlanta, and everything to do with the regional entities engaging in infringement in their respective regions. Again, this is confirmed by the sworn testimony of a CCI Vice President:

CCI has never provided, designed, manufactured, advertised, promoted, offered, or sold broadband or packet-based telephone products or services, nor any other products or services in Kansas. Rather, CCI provides general administrative services to its subsidiaries [The regional] operating entities ... deal with customers, provide goods and services, and receive revenues. In contrast, CCI does not conduct these types of day-to-day activities.

Ex. 1 (Dkt. 35-4) ¶¶ 4, 6. With respect to digital telephone services in particular—also at issue here—the Cox entities noted that “Cox’s Digital Telephone services are independently sold and offered for sale by the Kansas Entities CCI has no role in those activities or in making or using the accused products.” Ex. 2 at 9; *see also* Ex. 3 at 16-17 (“[C]ommunications services are provided only by those Cox entities licensed to do so, [there are] several dozen such entities

across the country. ... [T]he equipment used in the provision of such services [is] housed in a variety of Cox entities, including several dozen local entities”).

The Kansas district court credited these representations, finding that “Cox Communications Kansas employs a regional Vice President of Field Operations, who along with a 100-person team, is responsible for installing, maintaining, and servicing equipment in the region.” Ex. 6 at 8. The court also acknowledged the “local marketing efforts that are required based on the different competitors in the various local markets. These efforts include customer care centers, retail solution stores, call center phone numbers, door to door sales, and e-commerce marketing strategies.” *Id.* at 8-9. The Kansas court agreed with the Cox entities that the “national support that CCI provides to its local affiliates amounts to network support, rather than any direct contact with the local fora.” *Id.* at 15-16.

All of this evidence confirms that the Atlanta-based Cox entities provide “back-office functionality—accounting, legal support, and so on”—but they do not set pricing, do not decide which products or equipment to purchase, do not engage in local marketing strategies or sales, do not engage in on-site installations, do not provide customer care or support, do not own the personal and real property related to the infringing goods and services, and do not own or maintain any of the accused infringing equipment. Ex. 2 at 6-8. This evidence demonstrates that the vast majority of the infringing activities identified in AT&T’s complaint—marketing, purchasing, selling, installing, maintaining, supporting, and providing instruction on the use of the accused products and services—is centered at the regional level, and undertaken by the regional Cox entities located throughout the country. The Cox entities have failed to prove that a

substantial part of the events giving rise to these nationwide infringement claims occurred in Atlanta. There is thus no showing that the conditions of 28 U.S.C. § 1391(b)(2) are satisfied.⁴

The Cox entities fail to prove that this case could have been brought in the Northern District of Georgia. Instead, as they told this Court in their earlier declaratory judgment complaint, the only forum that offers “the opportunity to obtain complete relief” is “Delaware, where all of the Cox Entities that engage in the accused activity are incorporated and available for joinder.” Ex. 3 at 16-17. They left no doubt as to their position on this issue, further clarifying that “the point is not just that all the parties are incorporated in Delaware, but that, by virtue of their common state of incorporation, *there is no other single venue that can hear this entire controversy*” Ex. 1 (Dkt. 25) at 14n.2 (emphasis added). According to their own pleadings submitted in this district and the district court in Kansas, therefore, this case could only have been brought in Delaware, and the motion to transfer should be denied on that basis alone. *Jumara*, 55 F.3d at 879-80; *Mallinckrodt*, 670 F. Supp. 2d at 356.

C. The Cox Entities Fail to Prove that the Balance of Convenience Strongly Favors Transfer to the Northern District of Georgia.

The motion not only fails at the first step of the required transfer analysis; it also fails at the second step of that analysis. *Smart Audio*, 910 F. Supp. 2d at 724. That is, the Cox entities also fail to prove that the balance of convenience of the parties *strongly favors* transfer to the Northern District of Georgia. In the Third Circuit, this second-step analysis requires an individualized determination in which the various *Jumara* factors are considered on a case-by-case basis. *Id.*; *Jumara*, 55 F.3d at 897. These include “private interest” factors:

⁴ The Cox entities also note that certain licensing meetings took place “between Cox and AT&T in Atlanta.” CoxBr.7. But of course that does not prove that a substantial part of the infringing activities took place in Atlanta. It also ignores that at least one such meeting took place in New Jersey, less than 100 miles from Wilmington. Huelster Decl. ¶ 9.

[1] plaintiff's forum preference ... ; [2] the defendant's preference; [3] whether the claim arose elsewhere; [4] the convenience of the parties as indicated by their relative physical and financial condition; [5] the convenience of the witnesses—but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and [6] the location of books and records

Id. (citation omitted). They also include “public interest” factors, such as:

[1] practical considerations that could make trial easy, expeditious, or inexpensive; [2] the relative administrative difficulty ... resulting from court congestion; [3] the local interest in deciding local controversies at home; [and 4] the public policies of the fora

Id. at 879-80 (citations omitted). None of these factors is dispositive, and the analysis need not be limited to consideration of these factors. *Id.* at 879. Again, the Cox entities recognize the rules governing this step-two analysis, but fail to carry their burden to show that balancing these factors strongly favors transfer away from Delaware. In fact, when properly considered in light of the nationwide character of this patent-infringement action, not a single one of the relevant *Jumara* factors favors transfer to the Northern District of Georgia.

1. The *Jumara* private interest factors do not favor transfer.

a. AT&T's choice of forum does not favor transfer.

When analyzing the choice of forum, the court “should not consider simply the fact of that choice, but the reasons behind the choice.” *Good Tech. Corp. v. Airwatch, LLC*, C.A. No. 14-1092-LPS-CJB, 2015 U.S. Dist. LEXIS 6841 at *11 (D. Del. Jan. 21, 2015), *report and recommendation adopted*, 2013 WL 174499 (D. Del. Jan. 16, 2015). If the reasons are “are rational and legitimate, then they will weigh against transfer.” *Id.* As long as the plaintiff “has selected the forum for some legitimate reasons,” that is, “the deference afforded plaintiff's choice of forum will apply.” *Intellectual Ventures I, LLC v. Altera Corp.*, 842 F. Supp. 2d 744, 753 (D. Del. 2012).

AT&T had rational and legitimate reasons for choosing venue in Delaware: as recounted above, the thirty-two Cox defendants have repeatedly stated that Delaware is the *only* venue in which they can all be joined in a single patent-infringement suit. Furthermore, they have made these assertions in pleadings and declarations seeking to lodge venue *in*, and transfer venue *to*, the District of Delaware—for both *jurisdictional* and *convenience* reasons. Ex. 3 at 16-17; Ex. 1 (Dkt. 35) at 14 (arguing that the “convenience of the [Cox] corporate entities, thus, clearly favors the venue where they have consented to be sued as a matter of law: Delaware”). The deference normally afforded the plaintiff’s choice of forum is thus in full effect here.

The Cox entities cite *Segan* and *Link_A_Media* for the proposition that AT&T’s choice of forum should be “accorded lesser consideration” because the AT&T plaintiffs “have operations ... in Atlanta.” CoxBr.7; *Segan LLC v. Zynga Inc.*, No. 11-670-GMS, 2014 U.S. Dist. LEXIS 35685 (D. Del. Mar. 19, 2014); *In re Link_A_Media*, 662 F.3d 1221, 1223 (Fed. Cir. 2011). But those cases are inapposite to the situation here, where the Cox entities themselves have previously pointed to AT&T’s chosen forum, Delaware, as not only the most convenient forum, but as the *only* forum in which nationwide claims against all of the many Cox regional entities can be brought. Furthermore, the Cox entities dismissed this same line of reasoning when they argued to the Kansas court that transfer to Delaware was appropriate because “there is no other single venue that can hear this entire controversy and, hence, no other forum that can avoid the multijurisdictional fiasco that would ensue if [the plaintiff] were to pursue its claims piecemeal against the Cox entities.” Ex. 1 (Dkt. 35) at 14n.2 (citing and distinguishing *Link_A_Media*, 62 F.3d at 1223).

AT&T reasonably relied on these consistent and repeated assertions (and the sworn testimony supporting them) when choosing Delaware as the venue for this case. The Cox entities

should not be allowed to change their tune now—some six months after filing suit—simply because they have decided that venue in Delaware no longer suits their strategic purposes. This *Jumara* factor does not favor transfer.

b. The Cox entities’ choice of forum does not favor transfer.

The Cox entities suggest that “Cox has chosen the Northern District of Georgia—a ‘traditional and legitimate venue’ because that is its principal place of business.” CoxBr.8. But as demonstrated above, the Northern District of Georgia is the principal place of business for only two of the thirty-two Cox defendants—CoxCom LLC and CCI—and those parent entities are *not* the entities responsible for designing, manufacturing, advertising, promoting, selling, and providing the vast majority of the products and services accused of infringement in this case.

The Cox entities also suggest that, because AT&T has alleged induced infringement, “the state of mind of the Cox employees in Atlanta will be important.” CoxBr.8. But again, this fails to acknowledge that the Cox employees in Atlanta have minimal customer interaction. Ex. 1 (Dkt. 35-4) ¶ 6. The Cox employees with the relevant states of mind will instead be found among the thirty regional entities that actually provide the accused products and services to customers throughout the country. The regional entities, that is, with “their own management, marketing, and technical executives and personnel” who “make their own purchasing, marketing, and pricing decisions” (Ex. 2 at 7-8), and that sell the products and services in their jurisdictions, provide customer care, door-to-door sales, retail solution stores, and e-commerce marketing strategies (Ex. 6 at 8-9). Employees for these regional entities should have knowledge far more relevant to the inducement issues than Atlanta-based personnel who “ha[ve] no role in those activities or in making or using the accused services.” Ex. 2 at 9.

The claim that the Cox entities are now proposing their “traditional and legitimate venue” *away from* Delaware is further undermined by reference to their earlier assertions in urging

transfer *to* Delaware. As they told the Kansas court, “Delaware is ... more convenient” for “CCI and the 28 unnamed Cox entities” because they “are incorporated in Delaware ... and thus have a reasonable expectation of being sued there.” Ex. 1 (Dkt. 35) at 14. Had they “been unwilling to be a party to litigation in Delaware, they would have incorporated elsewhere. ... The convenience of the corporate entities, thus, clearly favors the venue where they have consented to be sued as a matter of law: Delaware.” *Id.* at 14. Thus, while AT&T plainly has legitimate reasons for choosing Delaware, the Cox entities’ reasons for seeking transfer away from Delaware appear to be driven largely by gamesmanship and strategic machinations. This *Jumara* factor also does not favor transfer to the Northern District of Georgia.

c. Where the claims arose does not favor transfer.

The Cox defendants acknowledge that this action concerns nationwide patent infringement. CoxBr.8. And as discussed above, the design, selection, purchasing, marketing, strategy, sales, installation, and support of the accused products and services are principally accomplished by the regional Cox entities, each with their own management, employees, engineering and technical specialists, property, and equipment. The regional entities develop and run their own websites, set their own pricing and strategies, sell and install the accused products to customers, and provide technical and customer support. Each of these actions, completed at the regional level, is an individual act of infringement or inducement. “[A]s a matter of law, a claim for patent infringement arises whenever someone has committed acts of infringement, to wit, ‘makes, uses, offers to sell, or sells any patented invention’ without authority.” *Collectis S.A. v. Precision Biosciences, Inc.*, 858 F. Supp. 2d 276, 281 (D. Del. 2012) (quoting 35 U.S.C. § 271(a)). These acts occur across the country in various locations by each of the thirty regional Cox defendants—the vast majority of them outside of the Northern District of Georgia.

The Cox entities briefly argue, citing the Allen-Wang declaration, that “all of the accused components and services are implemented and offered by Cox from its headquarters in Atlanta.” CoxBr.8. This statement subtly expands Cox’s argument beyond what is actually supported by the sworn testimony. As discussed above, the Allen-Wang declaration identifies only the “DOCSIS 3.0 system” and certain “updates to Cox’s set-top box software” as having an Atlanta connection. Allen-Wang Decl. ¶ 8. This falls far short of proving that the many nationwide patent infringement claims arose in Atlanta—and is further undermined by the previous sworn testimony of a CCI Vice President to the effect that the regional “operating entities ... deal with customers, provide goods and services, and receive revenues. In contrast, CCI does not conduct these types of day-to-day activities.” Ex. 1 (Dkt. 35-4) ¶ 6. This *Jumara* factor also does not favor transfer.

d. The convenience of the parties does not favor transfer.

The Cox entities assert that their own convenience favors transfer because “all of the defendants are present in the Northern District of Georgia.” CoxBr. But as shown above, the available non-conclusory evidence contradicts that assertion. Ex. 2 at 6. As those entities previously acknowledged, their “documents and witnesses are spread across the country,” including locations far closer to Delaware than Georgia such as Connecticut, Maryland, Massachusetts, Rhode Island, and Virginia. Ex. 1 (Dkt. 35) at 6. Tellingly, the Cox entities fail to identify a *single* employee of *any* of the thirty regional Cox defendants who resides or is otherwise located in the Northern District of Georgia. These regional defendants own or lease their own physical facilities in their various regions—an important fact that the Cox entities completely ignore. The regional defendants further have their own “independent management and employees” and “separately manage the marketing and sale of their products, and they independently purchase and maintain their own equipment.” Ex. 2 at 6. Again, these are critical

facts that the Cox entities completely ignore. When these facts are considered, rather than ignored, the most reasonable conclusion is the one that the Cox entities offered to the Kansas court: “Delaware is ... more convenient” for “CCI and the 28 [regional] entities” because they “are incorporated in Delaware ... and thus have a reasonable expectation of being sued there.” Ex. 1 (Dkt. 35) at 14; *Id.* (Dkt. 35-3) ¶ 7 (asserting that the “one commonality” between the Cox entities “is that they are all incorporated in Delaware”).

The AT&T plaintiffs (AT&T IP I and II), on the other hand, are Nevada corporations, with operations in New Jersey (Bedminster) and Georgia (Atlanta) through their general partner, AT&T Intellectual Property, Inc., a Delaware corporation. Huelster Decl. ¶ 7. Most patent licensing operations are managed out of the Bedminster location, which is less than 100 miles from Wilmington. Huelster Decl. ¶ 8; Ex. 7. Indeed, most of the likely witnesses for AT&T regarding patent licensing reside and work in the Bedminster area, less than 100 miles from this Court. Huelster Decl. ¶ 8. Possible witnesses include, for example, Joe Sommer, Glenn Del Grosso, and Pam Huelster. Each of these individuals was involved in some manner with the relevant licensing discussions. Delaware is thus more convenient for AT&T than the Northern District of Georgia. This conclusion harmonizes with the case law: “the best indicator of a plaintiff’s own convenience is the plaintiff’s own choice of forum.” *Tessera, Inc. v. Sony Elecs., Inc.*, No. 10-cv-838, 2012 U.S. Dist. LEXIS 46324, at *12-13 (D. Del. Mar. 30, 2012).

Each party’s ability to bear the costs of litigating in the respective districts should have little impact on the analysis—there is no dispute that both AT&T and the Cox entities have sufficient resources to litigate in either location. CoxBr.10. But it is worth noting that the Cox defendants are no stranger to litigating in this district; one or more of the Cox entities is currently a party in at least five other pending cases in Delaware. Exs. 8-12. Given the nationwide scope of

this patent-infringement suit, and the demonstrated preference of all of the parties for Delaware as a “more convenient” venue (Ex. 1 (Dkt. 35) at 14), this *Jumara* factor does not favor transfer.

e. **The convenience of the witnesses does not favor transfer.**

This *Jumara* factor “is only given weight when there is some reason to believe that a witness actually will refuse to testify absent a subpoena.” *Smart Audio*, 901 F. Supp. 2d at 732; *Jumara*, 55 F.3d at 879 (“the convenience of the witnesses—but only to the extent that the witnesses may actually be unavailable for trial in one of the fora”). “It is the defendant’s burden to show both the unavailability of a particular witness and that witness’ importance to the defendant’s case.” *Tessera, Inc.*, 2012 U.S. Dist. LEXIS 46324, at *19-20 (D. Del. Mar. 30, 2012). The Cox entities again fail to carry their burden with respect to this factor.

The Cox defendants suggest that “at least two” inventors “formerly employed by AT&T” are “located in Georgia,” but they provide no substantial reason to believe that either of those former employee witnesses (or any others) would refuse to testify absent a subpoena. CoxBr.12. And in fact, two of the former employee inventors identified by the Cox entities as residing in Georgia—Sidney Elliot and Thomas Evans (CoxBr.4)—have submitted declarations confirming that they would find trial in Delaware convenient. Elliot Decl. ¶ 4; Evans Decl. ¶ 4. In any event, while the Cox entities highlight “at least two” former employee inventors residing relatively near Atlanta, there are at least four former employee inventors residing relatively near Wilmington—Alexander Fraser, Bhavesh Desai, David Shur, and Sheryl Woodward each reside within 100 miles of this Court, based on last known addresses. Ex. 5; Exs. 13-16. On balance, therefore, venue in Delaware is more convenient for the former employee inventors than venue in the Northern District of Georgia.

The Cox entities also suggest that Cisco and Arris—two of the “third-party manufacturers and suppliers of components at issue in this case”—are located in the Northern District of

Georgia. CoxBr.9, 12. But they identify no relevant potential witnesses or documents for either of these companies that are located in Georgia. Further, Cisco is a California corporation, and would be served in that state. Ex. 17 p.2. And Cisco's "careers" webpage indicates that engineering and development for its CMTS products (at issue here) occurs in San Jose, California. Ex. 18. Arris, on the other hand, is a Delaware corporation and would be served in this state. Ex. 19. The vague identification of Cisco and Arris as potentially relevant third-party suppliers thus does not help the Cox entities carry their burden on this factor. In any event, while two third-party suppliers might be subject to subpoena in the Northern District of Georgia, others should be subject to subpoena in this District. Broadsoft, for example—identified as a third-party supplier in the Cox entities' initial disclosures—is a Delaware corporation with headquarters in Gaithersburg, Maryland. Ex. 20; Ex. 21. Broadsoft has no locations in Georgia. Ex. 21. Similarly, Rovi Corporation—another identified third-party supplier—is a Delaware corporation with locations in New York and Massachusetts but none in or near Georgia. Ex. 22; Ex. 23.

The "convenience of the witnesses" *Jumara* factor—whether considering former employee inventors or third-party suppliers—also does not favor transfer.

f. The location of books and records does not favor transfer

"Regarding the location of books and records," this *Jumara* factor "is relevant and weighs in favor of transfer only to the degree that these books and records cannot be produced in Delaware." *Cornerstone Therapeutics Inc. v. Exela Pharma Sciences, LLC*, Case No. 13-cv-01275, Slip Op. at *2 (D. Del. June 16, 2014). The Cox entities make no showing that their books and records cannot be produced in Delaware, nor that they will "experience[] any difficulty in conducting electronic discovery" in this District. *Cradle IP, LLC v. Texas Instruments*, No. 11-1254-SLR, 2013 U.S. Dist. LEXIS 19245, at *10-11 (D. Del. Feb. 13, 2013). Nor do they carry their burden to prove that the relevant books and records are principally

located in the Northern District of Georgia. They point out that “the bulk of the relevant evidence usually comes from the accused infringer” (CoxBr.12), but then ignore the fact that *thirty of the thirty-two* accused infringers in this case are *not* located in the Northern District of Georgia.

While they again point to a conclusory declaration that most of their relevant documents will be in Atlanta (CoxBr.13), that declaration is flatly contradicted by their prior (and more credible) assertions that “most of the Cox entities are located in other jurisdictions” and “the Cox documents and witnesses are spread across the country.” Ex. 1 (Dkt. 35) at 16. Given that the thirty regional Cox entities have their own management, marketing, sales, webmasters, engineering, training, and customer support, it is highly probable that the relevant documents relating to those regional activities will be found in the regional offices.

The majority of AT&T’s relevant documents, on the other hand, are located in Bedminster, New Jersey—less than 100 miles from this Court. Huelster Decl. ¶ 8. The PTO is located in Alexandria, Virginia—130 miles from Wilmington and over 630 miles to Atlanta. Ex. 24. The documents of third-party inventors and Cox suppliers are spread across the country, as shown in Exhibits 5, 17, 18, 21, and 23. This *Jumara* factor also does not favor transfer.

2. The *Jumara* public interest factors do not favor transfer.

a. Practical considerations do not favor transfer.

For all of the reasons discussed above, “practical considerations that could make the trial easy, expeditious, or inexpensive” do not point to Georgia. *Jumara*, 55 F.3d at 879. The relevant records, witnesses, and non-party witnesses are “spread across the country,” (Ex. 1 (Dkt. 35) at 16), and are just as likely to be near Wilmington as to be near Atlanta. “The convenience of the corporate entities, thus, clearly favors the venue where they have consented to be sued as a matter of law: Delaware.” *Id.* at 14. This *Jumara* factor does not favor transfer.

b. Court congestion issues do not favor transfer.

The Cox defendants acknowledge that the median time to trial in Delaware and the Northern District of Georgia is similar, with Delaware showing a shorter time to trial by one month. CoxBr.14. But the Cox defendants fail to acknowledge that, given their over-four-month delay in filing this motion, this case is already in its *sixth month*. An agreed scheduling order is in place, with a trial date in October 2016—less than 21 months from now. The median time to trial in Georgia, in contrast, is almost 30 months. CoxBr.14. Transfer to Georgia would reset the clock at zero, unnecessarily delaying this case by an additional six to nine months and adding significant costs to the litigation for all the parties. The Cox defendants also point out that a greater number of patent cases are filed in this District. CoxBr.14. But that simply demonstrates that this Court is significantly more experienced in handling complex patent cases than courts in the Northern District of Georgia, making a firm trial date more likely and reducing the possibility of expensive delays. *See Cornerstone Therapeutics Inc.*, Slip Op. at *4 (noting that “it is undisputed that Delaware judges have much greater familiarity with patent cases by virtue of their patent-heavy dockets,” and acknowledging that this can “result in administrative efficiencies”) (internal citation omitted). This *Jumara* factor also does not favor transfer.

c. Local interest considerations do not favor transfer.

This action concerns the nationwide infringement of AT&T’s patents. CoxBr.8. The thirty-two named defendants are spread across the country, and as discussed above, the most relevant evidence confirms that the alleged acts of infringement are likewise spread across the country. The Northern District of Georgia has no greater interest in deciding such nationwide infringement than any other venue, including Delaware. *TriStrata Tech., Inc. v. Emulgen Labs, Inc.*, 537 F. Supp. 2d 635, 643 (D. Del. 2008) (stating that “patent issues do not give rise to a local controversy or implicate local interests”); *Helicos Biosciences Corp. v. Illumina, Inc.*, 858

F. Supp. 2d 367, 375 (D. Del. 2012) (“[P]atent litigation does not constitute a local controversy in most cases. Patent cases implicate constitutionally protected property rights. The resolution of patent cases is governed by federal law reviewed by a court of appeals of national (as opposed to regional) stature. Moreover, to characterize patent litigation as ‘local’ undermines the appearance of neutrality that federal courts were established to provide and flies in the face of the national (if not global) markets that are affected by the outcome of these cases.”); *see also* Ex. 2 at 9 (“[T]he evidence is that Cox’s Digital Telephone services are independently sold and offered for sale by the Kansas Entities, and that CCI [in Atlanta] has no role in those activities or in making or using the accused services.”). This *Jumara* factor does not favor transfer.

d. **Public policy considerations do not favor transfer.**

AT&T agrees with the Cox defendants that this *Jumara* factor does not favor transfer.

IV. CONCLUSION

Given the nationwide character of the claims at issue, the nationwide locations of the thirty-two accused defendants, and the nationwide occurrences of the alleged acts of infringement, transfer to the Northern District of Georgia is not appropriate. The defendants’ recent pleadings in the courts of Delaware and Kansas further confirm not only that Delaware is the *more convenient forum* for this suit, but that it is the *only forum* in which this suit could have been brought. The Cox defendants thus fail to carry their burden, and the motion to transfer should be denied. Alternatively, and in light of the defendants’ inconsistent statements regarding the factual underpinnings of their motion, plaintiffs respectfully request that limited discovery be granted for purposes of establishing facts sufficient to grant or deny transfer.

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Dated: February 12, 2015