IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VARIAN MEDICAL SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-871-LPS-CJB
	)	
ELEKTA AB, ELEKTA HOLDINGS U.S., INC., ELEKTA INSTRUMENT AB, and ELEKTA INC.	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

Presently pending before the Court in this patent infringement suit is Defendants Elekta Holdings U.S., Inc. ("Elekta Holdings") and Elekta Inc.'s (collectively, "Defendants")[1] "Motion to Transfer," which seeks to transfer venue to the United States District Court for the Northern District of Georgia ("Northern District of Georgia") pursuant to 28 U.S.C. § 1404(a) (the "Motion"). (D.I. 19) For the reasons set forth below, Defendants' Motion is DENIED.

I. BACKGROUND

A. The Parties

Plaintiff Varian Medical Systems, Inc. ("Plaintiff") is a Delaware corporation with its principal place of business in Palo Alto, California. (D.I. 1 at ¶ 3) Plaintiff designs and manufactures medical devices and software for treating cancer and other medical conditions with radiotherapy, radiosurgery, proton surgery and brachytherapy. (*Id.* at ¶ 4) It is the owner by

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[1] Plaintiff also names Elekta AB and Elekta Instrument AB, two Swedish entities, as Defendants. (D.I. 1 ¶¶ 5, 7) As neither of these two Defendants had been served at the time of the filing of the instant Motion, (D.I. 39, 40), neither joined in that Motion. In this Memorandum Order, when referring to "Defendants" the Court is referring to Elekta Holdings and Elekta Inc., unless otherwise noted.

assignment of United States Patent No. 6,888,919 (the "'919 patent"), which is the subject of Plaintiff's infringement claims. (*Id.* at ¶ 2)

Defendant Elekta Holdings is a Delaware corporation with its principal place of business in Atlanta, Georgia. (*Id.* at ¶ 6) Elekta Inc., a wholly-owned subsidiary of Elekta Holdings, is a Georgia corporation and also has its principal place of business in Atlanta. (*Id.* at ¶ 8)

In this case, Plaintiff accuses all four Defendants of directly and indirectly infringing the '919 patent by "advertising, distributing, making, using, selling and/or offering for sale within the United States and/or importing into the United States medical devices, related software, and related services, including but not limited to the [accused] Gamma Knife Icon." (*Id.* at ¶ 35; *see also id.* at ¶ 9) The Gamma Knife Icon is a radiation treatment device with an integrated "imager" that helps doctors identify the position, size and shape of a brain tumor; it was launched in April 2015. (*Id.* at ¶ 30)

B. Procedural Background

Plaintiff filed its Complaint on September 25, 2015. (*Id.*) Chief Judge Leonard P. Stark thereafter referred the case to the Court to resolve any maters relating to scheduling, as well as any motions to dismiss, stay or transfer venue. (D.I. 7)

In lieu of answering the Complaint, Defendants filed a motion to dismiss on November 19, 2015. (D.I. 11) On December 30, 2015, Defendants filed the instant Motion seeking transfer, (D.I. 19), and the parties completed briefing on that Motion on January 21, 2016, (D.I.

26). The Court held a Case Management Conference on January 25, 2016, and a Scheduling Order was entered on February 1, 2016. (D.I. 28)[2]

II. DISCUSSION

A. Legal Standard

1. Motion to Transfer Venue

Section 1404(a) of Title 28 provides the statutory basis for a transfer inquiry. It provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a).

The party seeking a transfer has the burden "to establish that a balancing of proper interests weigh[s] in favor of the transfer[.]" *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) (citation omitted); *see also Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995).[3] That burden is a heavy one: "unless the balance of convenience of the parties is *strongly in favor* of [the] defendant, the plaintiff's choice of forum should prevail." *Shutte*, 431 F.2d at 25 (emphasis added) (internal quotation marks and citation omitted); *see also CNH Am. LLC v. Kinzenbaw*, C.A. No. 08-945(GMS), 2009 WL 3737653, at *2 (D. Del. Nov. 9, 2009).

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[2] The parties completed briefing on Defendants' motion to dismiss on December 17, 2015. (D.I. 15) At the Case Management Conference, the Court indicated that it would address the instant Motion before addressing Defendants' motion to dismiss (if necessary). (D.I. 33 at 16) Thereafter, Elekta AB and Elekta Instrument AB were served, (D.I. 39, 40), and those entities have recently filed a motion to dismiss in lieu of filing an Answer, (D.I. 41).

[3] In analyzing a motion to transfer venue in a patent case, it is the law of the regional circuit that applies. *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.*, 797 F. Supp. 2d 472, 487 n.7 (D. Del. 2011) (citing *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1331 (Fed. Cir. 2011)).

The United States Court of Appeals for the Third Circuit has observed that courts must analyze "all relevant factors" to determine whether "on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." *Jumara*, 55 F.3d at 879 (internal quotation marks and citation omitted). Nevertheless, it has identified a set of private interest and public interest factors that are appropriate to account for in this analysis (the "*Jumara* factors"). The private interest factors to consider include:

> [1] [The] plaintiff's forum preference as manifested in the original choice, [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 (similarly limited to the extent that the files could not be produced in the alternative forum)[.]

Id. (citations omitted). The public interest factors to consider include:

> [1] [T]he enforceability of the judgment, [2] practical considerations that could make the trial easy, expeditious, or inexpensive, [3] the relative administrative difficulty in the two fora resulting from court congestion, [4] the local interest in deciding local controversies at home, [5] the public policies of the fora, . . . and [6] the familiarity of the trial judge with the applicable state law in diversity cases[.]

Id. at 879-80 (citations omitted).

B. Appropriateness of Transferee Venue

The first step in the transfer analysis is to determine whether this action could have been brought in the proposed transferee venue. *Mallinckrodt Inc. v. E-Z-Em Inc.*, 670 F. Supp. 2d 349, 356 (D. Del. 2009). In the parties' briefing, there was no dispute that Plaintiff could have properly brought this infringement action in the Northern District of Georgia, where Defendants

have their principal places of business. *See* 28 U.S.C. § 1400(b); *see also* (D.I. 20 at 7-8; D.I. 26 at 2).

C. Application of the *Jumara* Factors

The Court will proceed to analyze the *Jumara* factors and their impact on whether transfer should be granted.

1. Private Interest Factors

a. Plaintiff's choice of forum

When analyzing the first *Jumara* private interest factor—the "plaintiff's forum preference as manifested in the original choice"—the court should not consider simply the fact of that choice, but the reasons behind the choice. *Pragmatus AV, LLC v. Yahoo! Inc.*, Civil Action No. 11-902-LPS-CJB, 2012 WL 4889438, at *4 (D. Del. Oct. 15, 2012) ("*Pragmatus I*") (citation omitted), *adopted by* 2013 WL 174499 (D. Del. Jan. 16, 2013); *Affymetrix, Inc. v. Synteni, Inc.*, 28 F. Supp. 2d 192, 200 (D. Del. 1998). "If those reasons are rational and legitimate[,] then they will weigh against transfer, as they are likely to support a determination that the instant case is properly venued in this jurisdiction." *Pragmatus I*, 2012 WL 4889438, at *4 (internal quotation marks, brackets and citations omitted); *see also Intellectual Ventures I LLC v. Altera Corp.*, 842 F. Supp. 2d 744, 753-54 (D. Del. 2012) ("*Altera*"). On the other hand, where a plaintiff's choice of forum was made for an improper reason—such as where the choice is arbitrary, irrational or selected to impede the efficient and convenient progress of a case—it should not be afforded substantial weight. *Pragmatus I*, 2012 WL 4889438, at *4; *Affymetrix*, 28 F. Supp. 2d at 200 (noting that if a plaintiff had no good reason, or an improper reason, for filing suit in this District, this would likely weigh in favor of transfer).

Plaintiff states that it brought the action in this District because, *inter alia*, it is incorporated in Delaware. (D.I. 24 at 6) This Court has repeatedly found a plaintiff's incorporation in Delaware to be a legitimate reason for filing suit in this District. In such circumstances, a plaintiff has availed itself of the benefits and consequences of this State's laws, and it makes sense that it would thus wish to utilize courts located within that State when pursuing a litigation matter. *See, e.g.*, *Wireless Media Innovations, LLC v. LeapFrog Enters., Inc.*, C.A. No. 13-1545-SLR-SRF, 2014 WL 1203035, at *2 (D. Del. Mar. 20, 2014); *McRo, Inc. v. Activision Blizzard, Inc.*, Civil Action No. 12-1508-LPS-CJB, 2013 WL 6571618, at *4 (D. Del. Dec. 13, 2013) (citing cases), *adopted by* 2013 WL 6869866 (D. Del. Dec. 30, 2013). Additionally, Plaintiff explains that this District is a "reasonably convenient forum for all parties," in that "relevant acts constituting or contributing to [Defendants'] alleged infringement took place in or near the Mid-Atlantic region." (D.I. 24 at 6) As will be further set out below, that assertion also has some merit, in light of the location of certain potential third-party witnesses (as well as the varied locations of the principal places of business of the respective parties to this action).[4]

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[4] Plaintiff additionally notes that Defendant Elekta Holdings is a Delaware corporation, and explains that this was another reason why it filed suit here. (D.I. 24 at 7-9) Our Court, of course, has held that it is plainly rational and legitimate for a plaintiff to choose to sue a defendant in that defendant's state of incorporation—a district where a plaintiff can have some certainty that there will be personal jurisdiction over the defendant. *See, e.g.*, *TSMC Tech., Inc. v. Zond, LLC*, Civil Action No. 14-721-LPS-CJB, 2014 WL 7251188, at *15 (D. Del. Dec. 19, 2014) (citing cases). Defendants counter, however, that Elekta Holdings is merely a holding company and "clearly does not engage in" any of the infringement activities alleged in Plaintiff's Complaint, such that its incorporation in Delaware should not be credited as a legitimate reason for Plaintiff's choice of forum. (D.I. 20 at 9) The Court has limited information about Elekta Holdings, (*see, e.g.*, D.I. 13 at 11-12), and is not in a position to conclude that the company was added to the suit in an attempt to manipulate venue. And so, in light of the fact that there are other clear, legitimate reasons for suit being brought in this District, Defendants' charge

In disputing that this factor should redound in Plaintiff's favor, Defendants suggest that Plaintiff has done something untoward by filing the instant suit in this District. The argument goes as follows: (1) beginning in September 2015, Plaintiff and a related entity sued numerous Elekta entities (including three of the Defendant entities in this case) in the International Trade Commission ("ITC"), alleging infringement of six patents; (2) in that same month, Plaintiff and a related entity sued eight Elekta entities (including three of the Defendant entities in this case) in the United States District Court for the Northern District of California ("the Northern District of California"), alleging patent infringement as to three of the six patents at issue in the ITC proceeding ("the California litigation"); (3) Plaintiff knew that in the California litigation, the Elekta entities would be entitled to seek an automatic stay of the action pursuant to 28 U.S.C. § 1659, pending the completion of the ITC proceeding; (4) Plaintiff was "likely worried" that if it included infringement allegations regarding the '919 patent in the California litigation, the District Court in that case might extend a stay to include the '919 patent claims as well; and so (5) Plaintiff brought this separate suit as to the '919 patent in this District instead, for "tactical" reasons. (D.I. 20 at 1, 8-9; D.I. 24, ex. J)

The Court simply does not have a basis to find that Plaintiff has engaged in bad faith or improper conduct here (e.g., conduct equivalent to forum shopping). It has been told by Plaintiff (and has no basis to believe otherwise) that: (1) the California litigation included claims against an Elekta entity (IMPAC Medical Systems, Inc., or "IMPAC"), whose principal place of business is located in the Northern District of California; (2) given that Plaintiff and IMPAC were both

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regarding Elekta Holdings does not change the Court's calculus as to this first *Jumara* private interest factor.

located in the Northern District of California, that district was a rational place for the suit to be brought; and (3) IMPAC has no relationship to the infringement allegations regarding the '919 patent. (D.I. 24 at 8) The ITC proceeding and the California litigation also appear to have included a number of Elekta entities not sued in this matter (in addition to IMPAC), and involved different patents and different accused products than do the allegations in this matter. (D.I. 24, ex. J at ¶¶ 1, 5, 8-11, 29) The Court cannot conclude, on this record, that all of those differences are not meaningful, or that those differences could not have reasonably warranted the choice of different venues for the two cases. After all, plaintiffs are not typically seen as acting in bad faith if they choose different venues for their various litigation matters—any more than are defendants who seek to transfer such matters to their preferred jurisdiction pursuant to Section 1404(a). *See Cellectis S.A. v. Precision Biosciences, Inc.*, 858 F. Supp. 2d 376, 385 (D. Del. 2012).

Therefore, because there are clear, legitimate reasons why Plaintiff chose this forum for suit, this factor weighs against transfer.

b. Defendant's forum preference

As for the second private interest factor—the defendant's forum preference—Defendants prefer to litigate in the Northern District of Georgia. In analyzing this factor, the Court has similarly "tended to examine whether the defendant can articulate rational, legitimate reasons to support that preference." *Pragmatus I*, 2012 WL 4889438, at *6 (citation omitted).

Defendants contend that they have a number of legitimate reasons for seeking to transfer this action to the Northern District of Georgia, including: (1) Defendant Elekta Inc. is headquartered in that forum; (2) most of Elekta Inc's employees are based there; (3) all of Defendants' sales, marketing, and importation activities are "coordinated through" Elekta Inc. in

that district; and (4) many of the "likely U.S.-based Elekta witnesses" will be located in or near that district. (D.I. 20 at 10) As this Court has often held, the physical proximity of the proposed transferee district to a defendant's principal or key place of business (and relatedly, to witnesses and evidence potentially at issue in the case) is a clear, legitimate basis for seeking transfer. *See, e.g.*, *Nalco Co. v. AP Tech Grp. Inc.*, C.A. No. 13-1063-LPS, 2014 WL 3909114, at *1 (D. Del. Aug. 8, 2014); *Genetic Techs. Ltd. v. Natera, Inc.*, C.A. No. 12-1737-LPS, 2014 WL 1466471, at *1 (D. Del. Apr. 15, 2014). Although there are real disputes here as to what percentage of alleged infringing activity can be linked to the Northern District of Georgia, (D.I. 24 at 10), at a minimum, it is clear that the district is the home of the only one of the U.S.-based Defendant entities that is asserted by Defendants to be anything more than a holding company. It is understandable and rational, then, why Defendants wish to pursue this U.S.-based litigation in that particular district.

Thus, the second private interest *Jumara* factor weighs in favor of transfer.

c. Whether the claim arose elsewhere

The third private interest *Jumara* factor asks "whether the claim arose elsewhere." As a matter of law, a claim regarding patent infringement arises "wherever someone has committed acts of infringement, to wit, 'makes, uses, offers to sell, or sells any patented invention' without authority." *McRo, Inc.*, 2013 WL 6571618, at *5 (certain internal quotation marks and citations omitted). Nevertheless, as to this factor, this Court typically focuses on the location of the production, design and manufacture of the accused instrumentalities. *Id.* (citing cases).

In this case, as was previously noted above, the direct and indirect infringement allegations implicate the making, using, selling and offering for sale of the Gamma Knife Icon

machine. (D.I. 1 at ¶ 35) The parties' arguments regarding this factor, however, tend to focus on the sales and marketing of the product. This appears to be the case for a few reasons. For one thing, Plaintiff states (and Defendants do not dispute), that the Gamma Knife Icon machine is not produced, designed or manufactured in Georgia. (D.I. 24 at 11)[5] Additionally, while seven U.S. hospitals are slated to receive a Gamma Knife Icon in the future, no operational Gamma Knife Icon has yet been installed or operated anywhere in the United States. (D.I. 21 at ¶¶ 17-18)

Defendants assert that the "locus of Varian's direct infringement allegations is in Georgia," and in support, states that "*all* of [Elekta Holdings'] sales and marketing activities, as well as importation of the Gamma Knife Icon, are coordinated through Elekta Inc." in Atlanta. (D.I. 20 at 11 (emphasis in original) (citing D.I. 21 at ¶ 4)) As to indirect infringement, Defendants argue that Plaintiff failed to allege "any specific acts of underlying infringement by Elekta's customers, *nor could it* since none of Elekta's U.S. customers have yet installed or operated a Gamma Knife Icon." (*Id.* (emphasis in original)) Given the "complex nature and massive size" of the accused machine, Defendants believe "[o]nly those specific locations where a Gamma Knife Icon is scheduled to be installed, locations where sales actually occurred, and Elekta's U.S.-based headquarters for sales and marketing . . ., can legitimately be considered" as the situs of alleged infringement. (D.I. 26 at 4)

Looking harder at Defendants statements, however, it is hard to see how the locus of

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[5] Indeed, Defendants never say in their briefing exactly where the accused product *is* produced, designed or manufactured. In a declaration submitted by Elekta Inc.'s Senior Vice-President for Legal Affairs, Michael Hartman, Mr. Hartman states that Elekta Inc. is or will be responsible for "marketing, selling, and importing the Gamma Knife Icon in the United States[,]" (D.I. 21 at ¶ 4), but says nothing about where (presumably overseas) the product is designed or made, (*id.* at ¶¶ 17-20).

U.S.-based infringement can be said to be well-settled in the Northern District of Georgia. As noted above, Defendants state that their sales and marketing efforts are "coordinated through" Elekta Inc.'s Atlanta-based offices, (D.I. 20 at 11), but it is hard to know exactly what that vague statement means. Indeed, the Court cannot find any concrete support in the record for the proposition that any sales and marketing event relating to the accused product took place in Atlanta.[6] Moreover, Plaintiff, for its part, points to exhibits that it submitted—exhibits that show that "Elekta" has (1) sales-related "Client Managers" who are physically located throughout the United States; these include Client Managers responsible for oncology-related sales located in Delaware and Pennsylvania (the home state of the customer who made the first known purchase of the accused product in the United States); and (2) Client Managers responsible for neuroscience territories, who are located throughout the United States (including in Washington, D.C., and the New York City area). (D.I. 24 at 11; *id.*, exs. A-H) From this limited record, it appears just as likely that relevant sales and marketing activities took place predominantly *outside* Atlanta (and throughout the United States, including in the mid-Atlantic region) as it does that the activity took place predominantly in Atlanta.

Additionally, to the extent that it is relevant to the situs of the infringement claims, the location of the seven U.S. hospitals who have agreed to purchase the accused product does not

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[6] For example, in support of the "coordinated through" statement, Defendants cite to paragraph 4 of Mr. Hartman's declaration. (D.I. 20 at 11 (citing D.I. 21 at ¶ 4)) But that paragraph simply states that "Elekta Inc. sells products in the United States. Among other things, Elekta Inc. is or will be responsible for marketing, selling, and importing the Gamma Knife Icon in the United States." (D.I. 21 at ¶ 4) Paragraph 2 of the Hartman declaration does include the "coordinated through" statement, (*id.* at ¶ 2), but says nothing more about what that means, or what role any particular Atlanta-based Elekta Inc. employee has played in the sales and marketing of the accused product.

help Defendants' argument. Those seven hospitals are located in: (1) Atlanta; (2) Charlottesville, Virginia; (3) Buffalo, New York; (4) Houston, Texas; (5) Miami, Florida; (6) Pittsburgh, Pennsylvania; and (7) Spokane, Washington. (D.I. 21 at ¶ 18) These locations obviously extend throughout the nation; although one is in Atlanta, many others are located far closer to Delaware than they are to the Northern District of Georgia.[7]

The Court agrees with Defendants that, on this record, the alleged patent infringement has truly "arisen on a national level[.]" (D.I. 24 at 12) This factor is therefore neutral.

d. Convenience of the parties as indicated by their relative physical and financial condition

In assessing the next private interest factor—"the convenience of the parties as indicated by their relative physical and financial condition"—this Court has traditionally examined a number of issues. These issues include: "(1) the parties' physical location; (2) the associated logistical and operational costs to the parties' employees in traveling to Delaware (as opposed to the proposed transferee district) for litigation purposes; and (3) the relative ability of each party to bear these costs in light of its size and financial wherewithal." *Audatex N. Am., Inc. v. Mitchell Int'l, Inc.*, C.A. No. 12-CV-139 (GMS), 2013 WL 3293611, at *4 (D. Del. June 28, 2013) (internal quotation marks and citations omitted); *see also McKee v. PetSmart, Inc.*, C.A. No. 12-1117-SLR-MPT, 2013 WL 1163770, at *4 (D. Del. Mar. 20, 2013) (footnote omitted).

Defendants state that because Elekta Inc. has its principal place of business in Atlanta and because most of Elekta Inc.'s employees are based there, litigation in the Northern District of

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[7] Indeed, in a press release that "Elekta" distributed touting these same seven orders, "Elekta" described itself as a company whose "corporate headquarters [are] located in Stockholm, Sweden[.]" (D.I. 24, ex. M at 3)

Georgia would be more convenient for that party. (D.I. 20 at 13 (citing D.I. 21 at ¶ 2)) The Court agrees that it would. Of course, while these Elekta Inc. employees would face some additional inconvenience were they obligated to travel to Delaware for pre-trial or trial proceedings, the amount of such travel is not likely to be large—particularly if this case does not result in a trial. *See, e.g., Human Genome Scis., Inc. v. Genentech, Inc.*, C.A. No. 11-082-LPS, 2011 WL 2911797, at *7 (D. Del. July 18, 2011) (noting that the likelihood that few case events would occur in Delaware—particularly few if the case did not go to trial—weighed against transfer, as did technological advances that allow traveling employees to more easily interact with their office while away). Moreover, as was previously noted above regarding the third private interest *Jumara* factor, it is still decidedly unclear to the Court exactly what type of Atlanta-based Elekta Inc. employee witnesses will have relevant information as to the claims and defenses at issue in this case.

As for the three other Elekta Defendants, it seems a stretch for them to claim that the Northern District of Georgia would be decidedly more convenient than this District. For example, Defendant Elekta Holdings has chosen to incorporate in Delaware, making it hard for it to argue that Delaware is an inconvenient litigation locale. *Altera*, 842 F. Supp. 2d at 756.[8] And as for the Swedish Defendants (Elekta AB and Elekta Instrument AB), any additional benefit that their employees might gain from litigating in the Northern District of Georgia (where their affiliate Elekta Inc. is located), (D.I. 26 at 5-6), has to be about offset by the reality that the proposed transferee district is *further away from* their principal places of business than is the

[8] Of course, Defendants argue that Elekta Holdings is merely a holding company and that it has no role to play in this case at all. If that turns out to be so, whether it is inconvenienced by litigating in Delaware will not ultimately be relevant in the case.

District of Delaware, (D.I. 24 at 12).

With regard to Plaintiff, it acknowledges that it has long had an office in the Northern District of Georgia and that in 2015, it significantly expanded its East Coast operations in Atlanta. (D.I. 22, ex. 1; D.I. 24 at 12-13) But it asserts that the Atlanta expansion relates to a part of its business that is unaffiliated with the instant case, and that its offices in the Northern District of Georgia are not the location of any "relevant evidence, witnesses, personnel or operations[.]" (D.I. 24 at 13) It also adds that its employees are accustomed to litigating in Delaware, citing to a 2015 case in this District in which it was a defendant. (*Id.*) From all of this, the Court concludes that while Plaintiff certainly wishes to litigate in Delaware, the Northern District of Georgia is not decidedly inconvenient for it either.

Lastly, it appears undisputed that all parties are "large multinational businesses that will suffer no 'large or *undue* financial burden' as a result of travel costs." (D.I. 24 at 13 (emphasis in original); *see also* D.I. 20 at 13)

In the end, with neither side demonstrating that any of the considerations relating to this factor weigh meaningfully in their favor, the Court concludes that the factor is neutral.

e. Convenience of the witnesses to the extent that they may actually be unavailable for trial in one of the fora

The "convenience of the witnesses" is the next factor, "but only to the extent that the witnesses may actually be unavailable for trial in one of the fora." Of particular concern here are fact witnesses who may not appear of their own volition in the venue-at-issue and who could not be compelled to appear by subpoena pursuant to Federal Rule of Civil Procedure 45. *ADE Corp. v. KLA-Tencor Corp.*, 138 F. Supp. 2d 565, 569 (D. Del. 2001); *Affymetrix,* 28 F. Supp. 2d at

203-05.

In *Jumara*, the Third Circuit made clear that in order for this factor to meaningfully favor the movant, the movant must come forward with some amount of specificity. This is evident from the wording of the factor itself, which notes that the witnesses' convenience should be considered "only to the extent that the witnesses may *actually be* unavailable for trial in one of the fora[.]" *Jumara*, 55 F.3d at 879 (emphasis added). It is also evident from the legal authority that *Jumara* cited to in setting out this factor, which explains:

> The rule is that these applications [for transfer] are not determined solely upon the outcome of a contest between the parties as to which of them can present a longer list of possible witnesses located in the respective districts in which each party would like to try the case. The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this showing rather than numbers. One key witness may outweigh a great number of less important witnesses. If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied.

15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3851, at 425-28 (2d ed. 1986) (footnotes omitted) (cited in *Jumara*, 55 F.3d at 879). In light of this, in order for the movant to convincingly argue that this factor squarely favors transfer, the Court believes that the movant must provide specificity as to: (1) the particular witness to whom the movant is referring; (2) what that person's testimony might have to do with a trial in this case; and (3) what reason there is to think that the person will "actually" be unavailable for trial (as opposed to the proffer of a guess or speculation on that front). *See Elm 3DS Innovations LLC v. SK Hynix Inc.*, Civil Action No. 14-1432-LPS-CJB,

2015 WL 4967139, at *8 (D. Del. Aug. 20, 2015).

In their opening brief, Defendants identified a number of non-party individuals or entities, located in or closer to the proposed transferee forum, and set out (in general terms) how their testimony may be relevant to this case:

> (1) Andre Gibbs, a Durham, North Carolina-based attorney who helped prosecute the '919 patent on behalf of Plaintiff, and whose testimony is said to be potentially "critical" to an inequitable conduct defense that Defendants "intend to investigate";
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> (2) Employees at St. Joseph's Hospital in Atlanta, at the University of Texas MD Anderson Cancer Center in Houston, Texas, and at the Miami Cancer Institute at Baptist Health South Florida in Miami, Florida—three of the hospitals that are to receive the accused product. Their employees are said to be possible testifiers in order to "support or rebut Varian's indirect infringement allegations."

(D.I. 20 at 14-15) Yet with regard to Mr. Gibbs, it is not asserted that he is within the subpoena power of either court at issue. Moreover, Defendants do not provide any evidence suggesting that he will "actually be" unavailable for trial in Delaware, nor even that he would find trial more convenient in the Northern District of Georgia as compared to (nearly equidistant) Delaware. As for the employees of the three hospitals, no evidence of potential unavailability is cited. And if the testimony of these hospital employees is said to be possibly important, it stands to reason that so too would the testimony of employees at the other four customer hospitals. Yet, as noted above, at least three of those other hospitals (in Buffalo, Charlottesville and Pittsburgh) are a lot closer to Delaware than the Northern District of Georgia. (D.I. 24 at 14)[9]

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[9] A few times in its briefing, including as to this factor, Defendants suggest that the proximity of a "major international airport" to the city of Atlanta is a reason why out-of-town witnesses would find "air travel to Atlanta more convenient than travel to Delaware." (D.I. 26 at 7; *see also id.* at 6) But Philadelphia, Pennsylvania has a fairly large international airport too,

Plaintiff, for its part, identifies two potential witnesses that may find this District more convenient: Michael Graham, another prosecuting attorney for the '919 patent who is located in Washington, D.C., and the American Society for Radiation Oncology, a Fairfax, Virginia organization that hosted an exhibition of the Gamma Knife Icon in Texas. (D.I. 24 at 15 (citing D.I. 22, ex. 7 & D.I. 24, ex. O)) Here too, the Court has little on which to base a decision that any of these potential witnesses would actually be unavailable for trial in the Northern District of Georgia.

With some number of possible third-party trial witnesses located in or closer to the transferee district and with some closer to Delaware, the Court finds that this factor is neutral. *See Helicos Biosciences Corp. v. Illumnia, Inc.*, 858 F. Supp. 2d 367, 373-74 (D. Del. 2012) ("At this stage of the proceedings, when the parties are simply speculating about who might be a critical enough fact witness to be called to testify at trial and when neither fora has subpoena power over the majority of the potential non-party fact witnesses, this factor is neutral." (footnote omitted)); *cf. McRo, Inc.*, 2013 WL 6571618, at *9 (finding this factor weighed slightly in favor of transfer, where there was little proffered evidence regarding unavailability, but where "an overwhelming number" of the relevant non-party witness who might possibly testify "would likely find appearing for trial more convenient" in the transferee district due to their physical proximity to that district).

f. Location of books and records

Next the Court considers "the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum)." "In patent infringement

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and it is located minutes from Wilmington, Delaware.

cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant's documents are kept weighs in favor of transfer to that location." *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) (internal quotation marks and citation omitted). Yet this factor is commonly given little weight, as technological advances have "shortened the time it takes to transfer information, reduced the bulk or size of documents or things on which information is recorded . . . and have lowered the cost of moving that information from one place to another." *Cypress Semiconductor Corp. v. Integrated Circuit Sys., Inc.*, No. 01-199-SLR, 2001 WL 1617186, at *3 (D. Del. Nov. 28, 2001) (internal quotation marks and citation omitted); *see also Cellectis*, 858 F. Supp. 2d at 382.

Defendants assert that "the majority of relevant documentation regarding the claims and defenses in this case will be located in Atlanta, Georgia [Elekta Inc.'s home] and in Elekta's European facilities." (D.I. 20 at 16; *see also* D.I. 26 at 8) But again, if one reads closely, there is only the most vague record support for the idea that any significant number of Defendants' case-related documents are likely to be found in Atlanta (as *opposed to* Elekta's European facilities, or Elekta's facilities elsewhere in the United States).[10]

With no indication that there is any real difficulty in producing the records at issue in either district, and with a lack of clarity as to where significant case-related documents are even likely to be located in the first place, the Court finds this factor to be neutral. *Cf. TSMC Tech., Inc. v. Zond, LLC*, Civil Action No. 14-721-LPS-CJB, 2014 WL 7251188, at *18 (D. Del. Dec.

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[10] The one record citation that Defendants make on this point is to paragraphs 2-4 of Mr. Hartman's declaration, (D.I. 20 at 16), which establish that Elekta Inc. is headquartered in Atlanta and that Elekta's U.S. sales and marketing activities are "coordinated through" Elekta Inc. in Atlanta, (D.I. 21 at ¶¶ 2-4). The Court has already noted the opacity of the latter of these two statements.

19, 2014).

2. Public Interest Factors

The Court below addresses the three public interest factors that were asserted by the parties to be anything other than neutral.

a. Practical considerations that could make the trial easy, expeditious, or inexpensive

The Court next considers the "practical considerations that could make the trial easy, expeditious, or inexpensive." In their briefing, Defendants raise one "practical consideration[]": that they would be able to avoid the cost of retaining local counsel if the case was transferred. (D.I. 20 at 16-17) With this as an added cost to litigation in this District, but with all parties financially capable of bearing the expense, the Court concludes that this factor should weigh only slightly in favor of transfer. *See Papst Licensing GmbH & Co. KG v. Lattice Semiconductor Corp.*, 126 F. Supp. 3d 430, 444 (D. Del. 2015) (concluding the same); *see also Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.*, 797 F. Supp. 2d 472, 485-86 (D. Del. 2011) ("*Checkpoint Software*") (concluding the same).

b. Administrative difficulties in getting the case to trial

The next factor is the "relative administrative difficulty in the two fora resulting from court congestion." Defendants assert that this factor favors transfer, and cite Federal Court Management Statistics showing, for example, that: (1) in a 12-month period ending June 30, 2015, the average time to trial for civil cases in the Northern District of Georgia was 29.8 months, compared to 34.1 months in this District; and (2) for the same 12-month period, the median time from filing to disposition in the Northern District of Georgia was 4.1 months faster

than in this District. (D.I. 20 at 17; *see also* D.I. 22, ex. 8; *id.*, ex. 9 at 3, 11) Yet the parties have provided the Court with a good amount of data from this source that goes beyond a one-year snapshot, including data for each one-year period between June 2009 and June 2015. And as Plaintiff notes, (D.I. 24 at 17-18), a look at these broader statistics show that: (1) in the one-year periods spanning June 2009 to June 2014, time to trial was typically between 1-3 months *faster in this District* (and in only one of those one-year periods was it faster to trial in the Northern District of Georgia); and (2) the time to disposition was more typically 2-3 months faster in the Northen District of Georgia.

In light of the data the Court has now been presented with as to these two districts, the Court agrees with Plaintiff that these differences are "too small to make this [court congestion] factor weigh in favor of transfer." (*Id.* at 17) This factor is therefore neutral. *See Elm 3DS*, 2015 WL 4967139, at *11 (concluding the same where the difference in the median time from filing to trial was 3.6 months in favor of the proposed transferee district); *Pragmatus I*, 2012 WL 4889438, at *13 (concluding the same, where, *inter alia*, the average time from filing to disposition was 3.1 months faster in the proposed transferee district); *see also Checkpoint Software*, 797 F. Supp. 2d at 486 (citation omitted) (concluding the same where the difference in time to trial favored the proposed transferee district by 3.7 months, which was an "inconsequential" amount).

c. Local interests in deciding local controversies at home

In patent litigation, the local interest factor is typically neutral, as patent issues tend to raise controversies that are more properly viewed as national, not local, in scope. *Graphics Props. Holdings Inc. v. Asus Comput. Int'l, Inc.*, 964 F. Supp. 2d 320, 330 (D. Del. 2013).

Nevertheless, "[w]hile the sale of an accused product offered nationwide does not give rise to a substantial interest in any single venue, if there are significant connections between a particular venue and the events that gave rise to a suit, this factor should be weighed in that venue's favor." *In re Hoffman-La Roche, Inc.*, 587 F.3d 1333, 1338 (Fed. Cir. 2009) (internal citation omitted); *see also Graphics Props.*, 964 F. Supp. 2d at 330-31.

Defendants suggest that there is a stronger local interest in this case in the Northern District of Georgia because "the locus of the accused marketing and sales activities at the heart of [Plaintiff's] Complaint is in Atlanta, Georgia, where Elekta Inc. is headquartered." (D.I. 20 at 18) The Court has previously discussed why the record evidence supporting that assertion is not substantial. For purposes of analyzing this factor, the Court will assume *arguendo* that there are some number of Elekta Inc.'s employees in the proposed transferee district with a direct connection to this case. Even so, Defendants have made no showing that events relating to this case have outsized resonance to the citizens of the Northern District of Georgia, nor that the case outcome would significantly impact that district. *See Papst Licensing*, 126 F. Supp. 3d at 445-46 & n.12 (citing cases).

On the other hand, our Court's caselaw indicates that Plaintiff's incorporation in Delaware (and the fact that one Defendant, Elekta Holdings, is also incorporated here) could be said to foster a local interest in Delaware as to the outcome of this dispute. *See Human Genome Scis.*, 2011 WL 2911797, at *11 ("Delaware has an interest in adjudicating disputes involving companies incorporated in Delaware[.]"). That interest should not be overplayed here either, particularly in light of the uncertainty over Elekta Holdings' future in this case.

Ultimately, with both districts having connections to the parties, and with little on the

record suggesting that this case will have a significant impact in either district, the Court concludes that this factor is neutral. *See Elm 3DS*, 2015 WL 4967139, at *12.

3. Conclusion Regarding Impact of *Jumara* Factors

In sum, Defendants' forum preference squarely favors transfer, while the "practical considerations" factor slightly favors transfer. Plaintiff's choice of forum weighs squarely against transfer. The remainder of the *Jumara* factors are neutral.

As this summary makes clear, a weighing of the *Jumara* factors does not produce a result that is "*strongly* in favor of" transfer. *Shutte*, 431 F.2d at 25 (emphasis added). Indeed, nearly every factor is neutral—a result that simply underscores the reality that this case is one between truly national (and international) entities that have previously litigated against each other all over the globe. (*See* D.I. 20 at 16) There is nothing surprising or particularly inconvenient about the fact that this new skirmish will go forward in Delaware: (1) the site of Plaintiff's corporate home; (2) the site of the corporate home of one of the two U.S.-based Defendants; (3) a location that sits centrally located vis-a-vis the places of business of the various parties; and (4) a location close to some number of possible witnesses.

III. CONCLUSION

The Court therefore DENIES Defendants' Motion to Transfer.

Dated: June 8, 2016

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE