

EDVA Judge Denies Motion to Strike New Evidence in Reply Brief and Transfers Patent Case to California

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In an October 3 decision, U.S. District Judge Thomas S. Ellis III granted a motion to transfer venue of a patent case brought in the EDVA to California under 28 U.S.C. § 1404(a). [Monarch Networking Solutions LLC .v Juniper Networks, Inc.](#), Case No. 1:23 CV670, Dkt. No. 70 (E.D.Va. Oct. 3, 2023).

Monarch's Motion to Strike: One of the interesting aspects of the decision was Judge Ellis' denial of a motion by the plaintiff, Monarch Networking Solutions, to strike information in an affidavit submitted with Juniper Networks' reply brief in support of the motion to transfer. Judge Ellis noted that under Fed. R. Civ. P. 6(c), most courts limit reply affidavits to issues raised in the opposing party's brief, and, in the face of new evidence, courts require that the nonmoving party have an opportunity to respond, either orally or in writing. Reply affidavits filed as soon as seven days before a hearing have been found adequate to permit the opposing party an opportunity to respond.

Judge Ellis denied Monarch Networking's motion to strike because much of the new evidence offered on reply responded directly to issues first raised in Monarch's brief in opposition. For example, Monarch's response brief identified a list of Juniper witnesses that they alleged would have relevant knowledge, and Juniper's reply affidavit responded that those witnesses had no special knowledge relative to other employees. Monarch also objected to sales data in an exhibit to Juniper's reply brief, but the issue of Juniper's sales was raised throughout Monarch's opposition brief, and so it was appropriate for Juniper to respond in its reply. Moreover, Juniper's reply was filed more than three weeks before the hearing, so Monarch had an adequate opportunity to respond to any new evidence.

Takeaway: The issue of new arguments or evidence in a reply brief comes up from time to time in motions practice in the EDVA. Typically, the nonmoving party will ask for the opportunity to file a surreply to address the new information, which the court will often grant. Monarch, however, chose to be more aggressive, moving to strike the evidence or to allow venue discovery. While not unprecedented, discovery on a preliminary motion like a venue motion is not often granted in the EDVA. As Judge Ellis stated, venue discovery "would transform a threshold determination of venue into a separate major litigation."

The lesson for litigants in the EDVA is clear: the court prefers parties to seek relief that allows both parties to be fairly heard without slowing down the speed of the case. Drastic relief, like striking evidence, will be less favored.

Juniper's Motion to Transfer Venue: Judge Ellis' decision on the motion to transfer followed the path of the

numerous other EDVA decisions on this topic. Since Monarch was not located in Virginia and was a non-practicing entity, its choice of forum was given little weight. Further, since the alleged infringement occurred nationwide, and sales of the accused products in Virginia were relatively small, Virginia was not the center of accused infringing activity. Third, the products accused of infringement were researched, developed, and primarily sold in California, where both parties were located.

These three factors predominated in the analysis, as Judge Ellis found that the convenience of witnesses did not favor either party, though Judge Ellis discounted much of Juniper's evidence on this issue because it failed to adequately describe how each witness' testimony would be material and non-cumulative.

Takeaway: Judge Ellis' decision reinforces the lesson of many other EDVA rulings on motions to transfer venue –the court will likely transfer actions between out-of-state companies where Virginia is not the center of the alleged events.

The decision also offers a second lesson for defendants moving to transfer venue – specifically to identify relevant witnesses and include as much detail as possible about the subject matter of each witness' testimony and explain how that testimony will be material and non-cumulative. Otherwise, the court will not consider those witnesses in weighing the factors on a motion to transfer.

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