

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

FRESHUB, INC., FRESHUB, LTD.,
Plaintiffs

-v-

**AMAZON.COM INC., AMAZON
DIGITAL SERVICES, LLC, PRIME
NOW, LLC, WHOLE FOODS
MARKET INC.,**
Defendants

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W-19-CV-00388-ADA

ORDER GRANTING DEFENDANTS' MOTION FOR INTRA-DISTRICT TRANSFER

Came on for consideration this date the Motion of the “Amazon” Defendants for the Court to transfer this litigation to the Austin Division. ECF No. 20. For the reasons stated below, the Court will do so. This Court will retain this case on its docket.

As a general background, jurisdiction for this suit clearly exists in the Western District of Texas. Also, as a general matter, this Court always takes into consideration to some degree the decision that the Plaintiff made in determining where to file its patent lawsuit. The question is whether this case should be maintained in the Waco division or transferred to the Austin Division. Whole Foods is headquartered in Austin. Neither Plaintiff Freshub nor any of the Defendants is based in or maintains any offices in the Waco Division. Whole Foods does not operate any stores in the Waco division. There is no disagreement that no relevant documents or source code exist in the Waco Division. Of greatest import to the Court is that no anticipated party or non-party witnesses reside in the Waco Division. Whole Foods has its headquarters and relevant employees in Austin and Amazon has both offices and relevant employees there. Freshub does not dispute any of these facts.

This Court has addressed this very issue already in another case. *Data Scape, Ltd. v. Dell Techs., Inc.*, No. 6:19-cv-129-ADA, Dkt. 44 (W.D. Tex. June 7, 2019). Dell (like Whole Foods) is headquartered in Austin. In *Data Scape*, which Freshub failed to address in its opposition, this Court considered nearly identical facts and granted intra-district transfer from Waco to Austin. In that case and in the case here neither Data Scape nor Dell was based in Waco or had offices or employees in Waco. Also like the facts in this case, Dell had both offices and employee witnesses in Austin. *Id.* at 3-4. Just as in *Data Scape*, Freshub “proffers neither facts nor arguments sufficient to demonstrate why this case should remain in Waco,” and “[m]ost—if not all—of the relevant connections in this case are to Austin rather than to Waco.” *Id.* at 2.

Plaintiffs’ most persuasive argument is that Whole Foods declined to make a similar motion in a different case that is also filed in this Division. This is contradicted by the actual language of the answer that Whole Foods filed in that separate litigation. It is also inaccurate, at least now, since Amazon (Whole Foods’ corporate parent) has in fact filed a motion for intra-district transfer in that separate litigation now.

Freshub avers that Amazon has a fulfillment center located in the Waco Division. Amazon has proffered sworn evidence to the contrary. The Court will treat this as a factual dispute (but just barely one) and determines that even if this were correct that it would not sustain maintaining this patent litigation in the Waco Division.

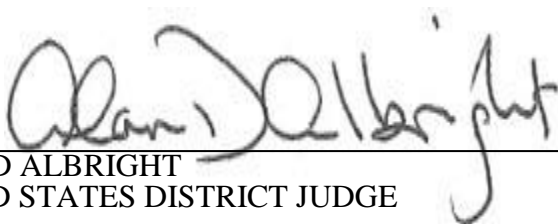
The Court also agrees with the Movants that the existence of the “Amazon Locker” locations in the Waco Divisions does matter with respect to whether jurisdiction exists (it clearly does in the Western District regardless) but extremely little to satisfy the question of where the proper venue for this litigation is within the District. As a general practice, this Court gives little weight to the location of the documents given the ease with which documents may be produced,

but again that does not weigh in favor of the Waco in this case since the Plaintiff is not arguing that it is a Waco resident who could easily receive the documents or source code in Waco. The fact that all of the relevant documents are in fact located in Austin without any offsetting reason for them to be produced elsewhere does not weigh in favor against the transfer.

With respect to the issue of the geographic distance between Waco and Austin being less than 100 miles, the Court again handles this issue with cases from both courts in the Western and the Eastern Districts holding that even 80 or 90 miles is inconvenient. Were there a compelling reason supporting maintaining venue in the Waco Division, then the Court would weigh the issue of the distance between the two courthouses more carefully. Here the Plaintiff is in the position of having little reason to compel anyone to travel between Austin where all of the anticipated witnesses are located.

The Motion to Transfer this case from the Waco Division to the Austin Division is **GRANTED**. The case will remain assigned to the docket of the Honorable Alan D Albright.

SIGNED this 9th day of September, 2019.


ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE