

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LOUIS C. TALARICO, II,)
)
 Plaintiff)
)
 v.) **Civil No. 00-239-P-C**
)
 MARATHON SHOE COMPANY,)
)
 Defendant)

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
TO DISMISS FOR LACK OF PERSONAL JURISDICTION
AND IMPROPER VENUE OR, ALTERNATIVELY,
TO TRANSFER VENUE**

Defendant Marathon Shoe Company (“Marathon”) moves to dismiss the instant patent-infringement action pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(3) for lack of personal jurisdiction and improper venue or, alternatively, to transfer venue pursuant to 28 U.S.C. §§ 1404(a) or 1406(a). Defendant Marathon Shoe Company’s Motion To Dismiss or for Transfer of Venue (“Motion”) (Docket No. 2) at 1. Following the filing of the instant Motion, I permitted plaintiff Louis C. Talarico, II to conduct certain limited discovery on jurisdictional issues. *See* Plaintiff Louis C. Talarico’s Amended Motion for Leave To Depose Defendant on Jurisdictional Issues (Docket No. 11); Order on Amended Motion for Leave To Depose, etc. (Docket No. 13). With the benefit of the ensuing

supplemental briefs and discovery materials, I recommend for the reasons that follow that the Motion be denied.¹

I. Applicable Legal Standards

A motion to dismiss for lack of personal jurisdiction raises the question whether a defendant has “purposefully established minimum contacts in the forum State.” *Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992) (citation and internal quotation marks omitted). The plaintiff bears the burden of establishing jurisdiction; however, where (as here) the court rules on a Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing suffices. *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). Such a showing requires more than mere reference to unsupported allegations in the plaintiff’s pleadings. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). However, for purposes of considering a Rule 12(b)(2) motion the court will accept properly supported proffers of evidence as true. *Id.*²

The filing of a Rule 12(b)(3) motion likewise places the burden on the plaintiff to demonstrate the propriety of venue. 5A C. Wright & A. Miller, *Federal Practice and Procedure*, 1352 at 264-65 (2d ed. 1990). As in the case of a Rule 12(b)(2) motion, the court accepts a plaintiff’s properly supported proffers of evidence as true. *M.K.C. Equip. Co. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679, 682-83 (D. Kan. 1994). Per 28 U.S.C. § 1406(a), “The district court of a district in which is filed a

¹ Were the alternative request to transfer venue a stand-alone motion, I would issue a memorandum decision inasmuch as such motions are non-case-dispositive. *See, e.g., McEvily v. Sunbeam-Oster Co.*, 878 F. Supp. 337, 340 (D.R.I. 1994). However, because in this case the court must first rule on the dispositive motion to dismiss before reaching the alternative request, it seems only sensible to frame the portion of my discussion dealing with transfer as a recommended decision.

² On the substantive question whether, in a patent-infringement case, the exercise of personal jurisdiction comports with federal due-process standards, the caselaw of the United States Court of Appeals for the Federal Circuit controls. *See, e.g., Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564-65 (Fed. Cir. 1994). However, on the question of the type of showing necessary to sustain personal jurisdiction, the law of the court in which the case arose (here, First Circuit law) controls. *See, e.g., id.* at 1563 (applying law applicable in United States District Court, District of Virginia); *Phonometrics, Inc. v. Northern Telecom Inc.*, 133 F.3d 1459, 1468 (Fed. Cir. 1998) (applying Florida law).

case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”

Per 28 U.S.C. § 1404(a), “For 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.” A transfer pursuant to section 1404(a) lies within the discretion of the court. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). The factors to be considered in the exercise of this discretion include the convenience of the parties and witnesses, the order in which jurisdiction was obtained by the district court, the availability of documents, and the possibilities of consolidation. *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987). The fact that a prompt trial may be available in one of the districts at issue but not in the other is relevant to the statutory criteria. *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 925 F. Supp. 36, 39 (D. Me. 1996). The defendant bears “a substantial burden” of demonstrating the need for a change of forum. *Demont & Assoc. v. Berry*, 77 F. Supp.2d 171, 173 (D. Me. 1999). The evidence submitted by the defendant “must weigh heavily in favor of transfer” when this district is the plaintiff’s “home forum.” *Id.*

II. Factual Background

The following facts, with conflicts resolved in favor of the plaintiff’s properly supported proffers of evidence, are material to consideration of the pending motion.

Talarico, the exclusive owner of U.S. Patent No. 4,578,882 (the “Patent”), is an individual with a place of residence in DeLeon Springs, Florida. Complaint for Patent Infringement (“Complaint”) (Docket No. 1) ¶ 1. The Patent, which was granted on April 1, 1986, describes and claims a forefoot-compensating technology for footwear involving the placement of materials of

different thicknesses in the forefoot area of a footwear sole to provide varus (slightly inverted) forefoot compensation. *Id.* ¶ 4.

Talarico was born in Lewiston, Maine and resided there until 1995. Affidavit of Louis C. Talarico, II (Docket No. 7) ¶ 2. At the time he invented and patented his shoe method, Talarico was residing in Lewiston and maintained an office there. *Id.* Since approximately 1995, he has resided and maintained a place of business, Biomechanical Engineering and Shoe Research Laboratory, in New Gloucester, Maine. *Id.* ¶ 3. In February 2000 Talarico moved his personal residence to DeLeon Springs, Florida, with the intent of residing in Florida approximately seven months a year and in New Gloucester, Maine, approximately five months a year. *Id.* ¶ 4.

Talarico alleges that Marathon has been infringing the Patent by making, using, offering for sale and/or selling in this judicial district and elsewhere in the United States replacement shoe insoles, including but not limited to those sold under the trade name Flat Foot ® Insoles, without his consent. Complaint ¶ 5.

Marathon is an Ohio corporation with a sole place of business in Kent, Ohio. *Id.* ¶ 2; Rule 30(b)(6) Deposition of Marathon by its designee, Michael L. Pryce, M.D. (“Pryce Dep.”), filed with Plaintiff’s Supplemental Memorandum in Opposition to Defendant’s Motion To Dismiss (“Supplemental Opposition”) (Docket No. 15), at 10-11. It has never had an office, employees, a mailing address, bank accounts or a telephone listing in Maine. Pryce Dep. at 62. No Marathon employee has ever been to Maine on business. *Id.* at 56. Marathon has never manufactured replacement shoe insoles in Maine, produced any television, radio or newspaper advertising in Maine, done a direct mailing of sales brochures into Maine or used a distributor based in Maine. *Id.* at 62-63. Marathon’s eight present and former employees reside in northeast Ohio. *Id.* at 25-26, 60-62. Michael L. Pryce, M.D., its sole owner, is an orthopedic surgeon who has a full-time practice in

northeast Ohio. *Id.* at 11, 60. It would be more convenient for Dr. Pryce and his wife to attend hearings and trials in northeast Ohio than in Maine. *Id.* at 60-61.

Beginning in 1997 Marathon entered into a series of agreements with SecondWind Productions, Inc. *See* Patent License Agreement effective March 12, 1999 (“1999 SecondWind Agreement”), attached as Exh. 6 to Pryce Dep.; Patent License Agreement effective October 17, 1997 (“1997 SecondWind Agreement”), attached as Exh. 6 to Pryce Dep. The 1999 SecondWind Agreement was in effect until September 30, 2000. Pryce Dep. at 32. That agreement licensed SecondWind to manufacture and sell Marathon’s insoles to retailers, among others, exclusively in North America and non-exclusively in the rest of the world except Japan. 1999 SecondWind Agreement ¶¶ 1-2, 6. The 1997 agreement contained similar provisions, except that it conferred the right to exclusive worldwide distribution of the product. 1997 SecondWind Agreement ¶¶ 1-2, 6.

On March 16, 2001 Suzette M. Sass, a secretary at Verrill & Dana, LLP, visited SecondWind’s web site at www.2ndwind.com. Affidavit of Suzette M. Sass (“Sass Aff. II”) (Docket No. 19) ¶¶ 1-2. Among “e-tailers” and retailers listed on this web site as carrying SecondWind’s products were The Sports Authority and Sportshoe Center. *Id.* ¶ 2 & Exh. A thereto.³ Using hyperlinks in the SecondWind web site, Sass navigated to both The Sports Authority and Sportshoe Center web sites. *Id.* ¶ 2. The Sports Authority web site, www.thesportsauthority.com, listed one The Sports Authority store in Maine. *Id.* & Exh. C thereto. The Sportshoe Center web site, www.sportshoecenter.com, listed seven Sportshoe Center stores in Maine. *Id.* ¶ 2 & Exh. D thereto.

On October 20, 2000 Robyn S. Mills, a paralegal for attorney James G. Goggin, purchased two packages of Marathon replacement insoles from the Sportshoe Center at 448 Payne Road in

³ The Sass affidavit refers to these retailers as “the Sports Authority” and “SportShoe Centers”; however, the retailers’ own web-site (*continued on next page*)

Scarborough, Maine. Affidavit of James G. Goggin (“Goggin Aff.”) (Docket No. 5) ¶ 2. On December 5, 2000 Sass called each Sportshoe Center store located in Maine; all seven carried SecondWind Flat Foot Insole. Affidavit of Suzette M. Sass (“Sass Aff. I”) (Docket No. 6) ¶ 2. On December 15, 2000 Sass spoke with an employee of the Scarborough location (who also worked in the Windham location) who told her that the Sportshoe Center had carried these insoles since July 2000. *Id.* ¶ 3. On the back of the insoles purchased from Sportshoe Center is the name of the defendant, Marathon Shoe Company. *Id.* ¶ 4.

Marathon has never directed anyone at SecondWind to attempt to make sales of its product in Maine. Pryce Dep. at 66. Nor has Marathon ever called anyone in Maine to discuss anything having to do with the sale of its products. *Id.* Marathon does not know specifically where its insoles are sold. *Id.* at 29. Dr. Pryce testified, “All I do is license the product to them and they go through their distribution channels, and if it’s nationwide, that’s fine. But I don’t know where they sell.” *Id.* at 29. He further stated:

I have to tell you that my main business in my life is a surgeon. I developed a product. I licensed it to somebody to sell. I would presume he would do his best in that interest, and if that meant nationwide sales, yes; but I never pressured him to sell it one place or another.

So it was his business to go out and sell the insole wherever he could. As far as whether it was [sic] surprise me that he did that, no, I mean, I would presume that’s how he would want to run his business.

Id. at 58. SecondWind submitted reports to Marathon that identified the retailers and others to whom SecondWind had distributed Marathon’s insoles by name, although not by address. *See, e.g.*, SecondWind Sales of Flat Foot Insoles for All Customers in Units – 2000, attached as Exh. 12 to Pryce Dep.

materials indicate that their proper names are “The Sports Authority” and “Sportshoe Center.” *See* Exhs. C-D to Sass Aff.

Marathon now has an agreement with Benchmark Brands, Inc. calling “for Benchmark to distribute the [insoles] through its . . . catalog and other catalogs.” Pryce Dep. at 33; Undated License and Distribution Agreement (“Benchmark Agreement”), attached as Exh. 6 to Pryce Dep. The territory for distribution is the United States and Puerto Rico. Benchmark Agreement ¶ 1(H). Benchmark warrants that “it has currently established customers in the permitted License trade channels in the designated territory.” *Id.* ¶ 4(A). Marathon has never had discussions with anyone at Benchmark concerning attempted sale of its products in Maine. Pryce Dep. at 66.

Marathon in addition operates its own Internet web site. *Id.* at 29-30, 69. On March 16, 2001 Sass visited that web site, www.flatfoot.com. Sass Aff. II ¶ 3 & Exh. E thereto. Among other things, the site provides Marathon’s mailing address in Kent, Ohio, its e-mail address and its fax and phone numbers (including a toll-free number). Exh. E to Sass Aff. The site advertises the Flat Foot® Insole as available for \$29.95 plus shipping. *Id.* A “Place an Order” page on the web site contains three icons on which a user can click, “Order Online,” “Order by Mail” and “Order by Fax.” *Id.* Marathon’s records of its Internet sales indicate that it has consummated a total of five transactions with Maine residents via its web site, most recently (as of Dr. Pryce’s deposition on March 3, 2001) on September 20, 2000. Pryce Dep. at 22, 29-30. On March 12, 2001 Merritt T. Carey, an attorney employed by Verrill & Dana, LLP, called the toll-free number on Flat Foot’s web site and, upon inquiry, was told that products could be shipped anywhere in the world. Affidavit of Merritt T. Carey, Esq. (Docket No. 18).

Marathon placed advertisements for the sale of its insoles in the June 1997 issue of Runner’s World magazine and the January 1998 issue of Skiing magazine. Pryce Dep. at 53-55. Dr. Pryce testified that he did not know if other advertisements of Marathon’s product have been placed in either of these magazines. *Id.* at 64-65. Paralegal Mills purchased copies of both Runner’s World and

Skiing magazines in Maine in March 2001. Affidavit of Robyn S. Mills (Docket No. 16); Affidavit of Robyn S. Mills (Docket No. 17).

III. Discussion

The instant Motion is predicated on a three-tiered argument: (i) that the exercise of jurisdiction over Marathon would transgress both constitutional due process and the requirements of the Maine long-arm statute⁴; (ii) that the case should be dismissed or transferred pursuant to 28 U.S.C. § 1406(a) for improper venue; and (iii) that even if jurisdiction and venue are proper, the case nonetheless should be transferred for the convenience of parties and witnesses and in the interests of justice pursuant to 28 U.S.C. § 1404(a). Motion at 2-10; Defendant Marathon Shoe Company's Evidentiary Memorandum in Support of Its Motion To Dismiss or for Transfer of Venue ("Supplemental Motion") (Docket No. 14) at 4-7. As a practical matter, the first two tiers collapse into one question: whether the exercise of jurisdiction comports with constitutional due process. This is so because (i) the reach of the Maine long-arm statute is coextensive with the outer bounds of constitutional due process – at least when, as here, the assertion of jurisdiction is premised on so-called "specific jurisdiction," *see, e.g.,* 14 M.R.S.A. §§ 704-A(1) & (2)(I); *Lorelei Corp. v. County of Guadalupe*, 940 F.2d 717, 720 (1st Cir. 1991) (noting that Maine's long-arm statute provides only for the exercise of "specific jurisdiction" over defendants, "that is, jurisdiction which is asserted when the lawsuit arises directly out of [the defendant's] forum-based activities.") (citation and internal quotation marks omitted); *Suttie v. Sloan Sales, Inc.*, 711 A.2d 1285, 1286 (Me. 1998) ("[W]hen applying the [Maine long-arm] statute a court need only consider whether due process requirements have been satisfied."), and (ii)

⁴ Talarico clarifies that he relies on Federal Rule of Civil Procedure 4, which permits service of process consistent with the Maine long-arm statute, rather than on 28 U.S.C. § 1694, which provides an alternative means of service of process in patent-infringement cases. Plaintiff Louis C. Talarico's Objection to Defendant's Motion To Dismiss and to Defendant's Request for Transfer of Venue (*continued on next page*)

pursuant to 28 U.S.C. §§ 1391(c) and 1400(b), venue is proper in a patent-infringement case when a corporate defendant properly is subject to personal jurisdiction in the judicial district in question, *see, e.g., VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1584 (Fed. Cir. 1990); *Plant Genetic Sys., N.V. v. Ciba Seeds*, 933 F. Supp. 519, 526 (M.D.N.C. 1996).

In turn, the assertion of personal jurisdiction over a non-resident defendant comports with constitutional due process if (i) the defendant has established “purposeful minimum contacts” with the forum and (ii) the assertion of jurisdiction is “reasonable” – *i.e.*, consistent with notions of “fair play and substantial justice.” *Beverly Hills Fan*, 21 F.3d at 1568.

Talarico demonstrates the existence of “purposeful minimum contacts” on two independently sufficient theories: distributorship and Internet sales. Supplemental Opposition at 2-8. As to the first of these theories, Marathon (through its sole owner, Dr. Pryce) deliberately and knowingly entered into contractual relationships with SecondWind pursuant to which the latter was to distribute Marathon’s Flat Foot® Insoles on at least a nationwide basis. SecondWind did in fact distribute Marathon’s insoles in Maine. There is no evidence that Dr. Pryce knew that SecondWind had done so; however, he did receive listings of retailers to whom the products had been shipped (albeit without locations). He thus “reasonably could have foreseen [] that a termination point of the [distribution] channel” was Maine. *Beverly Hills Fan*, 21 F.3d at 1564. Marathon accordingly purposefully shipped its allegedly infringing products into Maine “through an established distribution channel” – a sufficient predicate for a finding of “purposeful minimum contacts.” *Id.* at 1565.

As to the second theory, Marathon created its own interactive web site, www.flatfoot.com, in which it invited web surfers to purchase its insoles directly from it. On at least five occasions persons

(“Opposition”) (Docket No. 4) at 3; *see also Talus Corp. v. Browne*, 775 F. Supp. 23, 25-26 (D. Me. 1991).

in Maine did in fact purchase Marathon's insoles via www.flatfoot.com. In dealing with questions of cyberspace and personal jurisdiction, courts have conceptualized a three-stage model of levels of Internet activity:

At the one end of the spectrum, there are situations where a defendant clearly does business over the Internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the Internet In this situation, personal jurisdiction is proper. At the other end of the spectrum, there are situations where a defendant merely establishes a passive website that does nothing more than advertise on the Internet. With passive websites, personal jurisdiction is not appropriate. In the middle of the spectrum, there are situations where a defendant has a website that allows a user to exchange information with a host computer. In this middle ground, the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website.

Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999) (citations and internal quotation marks omitted). Marathon's web site can be plotted on the high end of the middle spectrum, entailing a prominent offer to sell the allegedly infringing product, an option to complete an order form without leaving the confines of the web site, and the actual consummation via that site of at least five transactions with customers in Maine. Such a level of web-site interactivity has been found in the patent-infringement context to be tantamount to "purposeful minimum contacts." See, e.g., *Biometrics, LLC v. New Womyn, Inc.*, 112 F. Supp.2d 869, 872-73 (E.D. Mo. 2000) (offer to sell allegedly infringing products to Missouri residents via web site, coupled with sale of at least two such products in Missouri, triggered "tortious act" provision of Missouri long-arm statute, automatically establishing that the defendants purposefully directed their activities at Missouri residents).⁵

⁵ The Maine long-arm statute also contains a "tortious act" provision, pursuant to which a non-resident defendant submits itself to the jurisdiction of Maine courts "as to any cause of action arising from . . . [d]oing or causing a tortious act to be done, or causing the consequences of a tortious act to occur within this State[.]" 14 M.R.S.A. § 704-A(2)(B).

Turning next to whether the exercise of jurisdiction in this case is “reasonable,” the Court of Appeals for the Federal Circuit has clarified that “[i]n general, these cases [in which jurisdiction is denied on the basis of this concern] are limited to the rare situation in which the plaintiff’s interest and the state’s interest in adjudicating the dispute in the forum are so attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum.” *Beverly Hills Fan*, 21 F.3d at 1568. Maine – like the State of Virginia in *Beverly Hills Fan* – “has an interest in discouraging injuries that occur within the state” and “in cooperating with other states to provide a forum for efficiently litigating plaintiff’s cause of action.” *Id.* While not currently a Maine resident, the plaintiff has longtime ties to Maine and intends to continue to live in, and maintain a patent-related business in, Maine part-time. “That it is to plaintiff’s advantage to adjudicate the dispute in the [chosen] district court . . . does not militate against its right to have access to that court.” *Id.* The burden on Marathon to travel from Ohio to Maine, like the burden on defendant Royal in *Beverly Hills Fan* to traverse the distance from New Jersey to Virginia, “does not appear particularly significant” and “is not a burden sufficiently compelling to outweigh [Talarico’s] and [Maine’s] interests.” *Id.* at 1569.⁶

In short, the exercise of personal jurisdiction over Marathon comports with constitutional due-process constraints. Accordingly, both service of process pursuant to the Maine long-arm statute and venue in this court likewise are proper.

I finally consider Marathon’s alternative argument that – notwithstanding the appropriateness of the exercise of personal jurisdiction and the propriety of venue in this court – this court should

⁶ Marathon observes in relevant part that its principal witness is an orthopedic surgeon who has a full-time practice in northeast Ohio and that it would be more convenient for its witnesses to attend hearings and trials in northeast Ohio than in Maine. Supplemental Motion at 3.

exercise its discretion to transfer the case to the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to 28 U.S.C. § 1404(a). Motion at 6-10; *see also* Supplemental Motion at 7. Relying on caselaw other than that of this court or the First Circuit, Marathon suggests *inter alia* that transfer is warranted inasmuch as (i) there is little or no nexus between the instant case and this forum, (ii) none of the conduct complained of occurred in this forum, (iii) availability of compulsory process for attendance of unwilling witnesses is an important factor, (iv) the forum in which the majority of material principal witnesses resides is *per se* the most convenient forum, and (v) when the alleged wrongdoing occurred in the proposed transferee forum, transfer to that forum is appropriate. Motion at 8-10.

In patent-infringement cases, the law of the circuit in which a district court sits is controlling as to procedural matters, which include the availability of a transfer of venue pursuant to 28 U.S.C. § 1404(a). *See, e.g., Winner Int'l Royalty Corp. v. Wang*, 202 F.3d 1340, 1352 (Fed. Cir. 2000) (classifying section 1404(a) as procedural rule). As Talarico points out, under applicable law a party advocating transfer pursuant to section 1404(a) bears a “substantial burden” of demonstrating the need for a change. Opposition at 10; *see also Demont*, 77 F. Supp.2d at 173. A plaintiff’s choice of forum is entitled to deference even when the plaintiff is not a resident of this state. *Ashmore*, 925 F. Supp. at 39 (“This circuit . . . has not established the rule, as some other circuits have, that when plaintiffs sue in a forum that is not their residence, their choice of venue is entitled to only minimal consideration.”). In any event, Talarico demonstrates significant ties to this forum despite his current non-residency, including maintenance of a part-time patent-related place of business in New Gloucester, Maine.⁷

⁷ In addition, Talarico adduces evidence that trial likely would be speedier (albeit only slightly) in this court than in the Northern District of Ohio. *See* Exh. A to Goggin Aff. (1999 Federal Court Management Statistics showing that median time from filing to trial in civil cases in 1999 was fourteen months in District of Maine, nineteen months in Northern District of Ohio). The fact that a prompt trial may *(continued on next page)*

Talarico further depicts a nexus between the allegedly infringing sales and this forum, including sales of the Marathon product, both via Internet and retail outlets, in Maine. In terms of amenability to service of process, Marathon's current employees must be deemed to be within its control for purposes of a section 1404(a) analysis; they may be physically located outside the 100-mile limit for service of subpoenas imposed by Fed. R. Civ. P. 45(b)(2), but the fact that they are not within the range of this court's subpoena power is irrelevant when they are within the defendant's control. *See Ashmore*, 925 F. Supp. at 38.⁸

That Marathon's witnesses will be inconvenienced does not meet the "substantial burden" of demonstrating a need for transfer in this case. *See, e.g., Demont*, 77 F. Supp.2d at 174 ("While it would undoubtedly be more convenient for Defendant – and many of the witnesses – if this action were tried in Vermont, more is required before this Court will disturb Plaintiff's choice of this forum.").

IV. Conclusion

For the foregoing reasons, I recommend that the Motion be **DENIED** in its entirety.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

be available in one of the districts at issue but not in the other is relevant to the statutory criteria. *Ashmore*, 925 F. Supp. at 39.

⁸ Marathon, which bears the burden of proof in this context, makes no argument that any of its eight current or former employees would be outside of its control or otherwise not amenable to service of process were the case to remain in this forum. *See* Motion at 6-10; Defendant Marathon Shoe Company's Reply Memorandum in Support of Its Motion To Dismiss or for Transfer of Venue (Docket No. 9) at 1-2, 6; Supplemental Motion at 1-4, 7; *see also Ashmore*, 925 F. Supp. at 39 ("amorphous allegations of inconvenience regarding unspecified documents, as with unnamed witnesses, are inadequate to satisfy the required clear showing of balancing of conveniences in favor of [the party moving for transfer].").

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