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

AUDIOEYE, INC.,
Plaintiff,

v.

ACCESSIBE LTD.,
Defendant.

PUBLIC VERSION

6:20-cv-997-ADA

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT ACCESSIBE'S OPPOSED MOTION TO TRANSFER VENUE TO THE WESTERN DISTRICT OF NEW YORK OR DISMISS FOR LACK OF PERSONAL JURISDICTION [ECF No. 21]

Came on for consideration this date is Defendant AccessiBe's Opposed Motion to Transfer Venue to the Western District of New York or Dismiss for Lack of Personal Jurisdiction (the "Motion"). ECF No. 21. AudioEye, Inc. ("AudioEye" or "Plaintiff") filed an opposition on August 27, 2021, ECF No. 34, to which accessiBe Ltd. ("accessiBe" or "Defendant") filed a reply on September 3, 2021, ECF No. 37. The parties filed supplemental documents with leave of this Court on September 15, 2021, ECF No. 39; September 21, 2021, ECF No. 41; and September 23, 2021, ECF No. 42. After careful consideration of the Motion, the Parties' briefs, and the applicable law, the Court **DENIES** Defendant accessiBe's Opposed Motion to Transfer Venue to the Western District of New York or Dismiss for Lack of Personal Jurisdiction.

I. BACKGROUND

Plaintiff AudioEye first filed suit against accessiBe on September 4, 2020, in the Austin division of the Western District of Texas. No. 1:20-cv-00924, ECF No. 1. On October 26, 2020, it voluntarily dismissed that case, No. 1:20-cv-00924, ECF No. 13, and refiled this case in Waco the same day, ECF No. 1. AudioEye filed its second amended complaint ("SAC") on December 29, 2020. *See* ECF No. 13 (Second Amended Complaint).

accessiBe is registered and located in Israel. ECF No. 21 at 3. It does not have any locations in the United States or employees located here. *Id.* AudioEye is based in Tucson, Arizona and incorporated in Delaware. ECF No. 13 ¶ 11.

The SAC alleges that accessiBe infringes nine related patents. The SAC also includes Lanham Act claims for False Advertising and Product Disparagement (collectively the "Lanham Act claims"). It further includes five New York state law claims for Product Disparagement, Slander/Defamation, Tortious Interference with Prospective Economic Advantage, Deceptive Business Practices, and Unjust Enrichment (collectively the "NYSL claims"). The Lanham Act claims and the NYSL claims (collectively the "Non-Patent claims") relate to conduct alleged to have occurred while marketing accessiBe's products, and more specifically, accessiBe's statements regarding accessiBe's or AudioEye's products and/or services that AudioEye alleges to be false, misleading, or disparaging.

accessiBe filed this Motion to transfer to the U.S. District Court for the Western District of New York ("WDNY") or, in the alternative, dismiss for lack of personal jurisdiction on March 8, 2021. ECF No. 21. Following venue and jurisdictional discovery, this Motion became ripe for judgment on September 3, 2021, *see* ECF No. 37, before the Court granted a supplemental affidavit and briefing, which concluded on September 23, 2021, ECF No. 42.

II. TRANSFER ANALYSIS

In patent cases, motions to transfer under 28 U.S.C. § 1404(a) are governed by the law of the regional circuit. *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008). Title 28 U.S.C. § 1404(a) 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." "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer

according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)).

"The preliminary question under § 1404(a) is whether a civil action 'might have been brought' in the [transfer] destination venue." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 (5th Cir. 2008). If the destination venue would have been a proper venue, then "[t]he determination of 'convenience' turns on a number of public and private interest factors, none of which can be said to be of dispositive weight." *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004).

The Court agrees with accessiBe that the WDNY is a proper venue under 28 U.S.C. §§ 1391, 1400(b) because accessiBe is a resident of Israel. *See* ECF No. 21 at 6. But accessiBe has not met or even attempted to meet its burden with respect to the WDNY's exercise of personal jurisdiction over accessiBe for any, much less all, of the claims at issue here.

The movant bears the burden of establishing personal jurisdiction and venue as to defendants in the transferee forum. *See Chirife v. St. Jude Med., Inc.*, No. 6:08-CV-480, 2009 U.S. Dist. LEXIS 50482, 2009 WL 1684563, at *1 (E.D. Tex. June 16, 2009). Proving that the transferee forum has subject-matter jurisdiction, personal jurisdiction, and proper venue is an explicit statutory requirement of the movant—not the respondent. It is also a threshold question. *See In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("[W]e have suggested that the first determination to be made is whether the judicial district to which transfer is sought would have been a district in which the claim could have been filed."); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 (5th Cir. 2008) ("The preliminary question under § 1404(a) is whether a civil action 'might have been brought' in the destination venue."). "If it has not been shown that the transferee

court could hear the case, the Court has no ability to transfer, regardless of how convenient or inconvenient the transfer might be." *Japan Display Inc. v. Tianma Microelectronics Co.*, No. 2:20-CV-00283-JRG, 2021 U.S. Dist. LEXIS 160256, at *8 (E.D. Tex. Aug. 25, 2021) (citing *Hoffman v. Blaski*, 363 U.S. 335, 340 (1960)).

accessiBe failed to fully address the threshold inquiry here by ignoring the question of personal jurisdiction. The question is not so simple that it can be glossed over, as even the parties' dispute over personal jurisdiction in this Court illustrates. For example, AudioEye's causes of action are multifaceted, covering federal patent infringement claims, federal Lanham Act claims, and state law claims. There are numerous, distinct activities from which AudioEye's claims arise. And different law pertains to different claims—Federal Circuit law controls the personal jurisdiction inquiry for the federal patent claims while Second Circuit law controls the inquiry for the Non-Patent claims. Moreover, New York's restrictive long-arm statute controls the personal jurisdiction inquiry.[1] *See Noval Williams Films LLC v. Branca*, 128 F. Supp. 3d 781, 788 (S.D.N.Y. 2015). accessiBe's failure to address personal jurisdiction is particularly egregious in view of the foregoing. accessiBe's error in disregarding the question of the WDNY's jurisdiction, therefore, dooms its motion to transfer.[2] The Court **DENIES** the motion to transfer.

III. PERSONAL JURISDICTION ANALYSIS

accessiBe moved, in the alternative, to dismiss AudioEye's Non-Patent claims. The Court **DENIES** that motion.

[1] One would expect that accessiBe would have instructed this Court on New York state law given accessiBe's contention that this Court is less familiar with it. *See* ECF No. 21 at 11.

[2] Because it is the movant's burden to show that the claims could have been brought in the transferee forum, it is irrelevant that AudioEye did not raise this issue in opposing transfer.

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(2) requires a court to dismiss a claim if the court does not have personal jurisdiction over the defendant. The plaintiff has the burden of establishing jurisdiction. *Patterson v. Aker Sols. Inc.*, 826 F.3d 231, 233 (5th Cir. 2016). When a court assesses a non-resident defendant's challenge to personal jurisdiction without holding an evidentiary hearing, the plaintiff bears the burden of presenting "sufficient facts" for a *prima facie* case of personal jurisdiction. *Thiam v. T-Mobile USA, Inc.*, No. 4:19-CV-00633, 2021 WL 1550814, at *1 (E.D. Tex. Apr. 20, 2021). The court accepts as true allegations in the plaintiff's complaint, except when they are contradicted by the defendant's affidavits. *Id.* However, "genuine, material conflicts" between the facts in the parties' affidavits and other evidence are construed in the plaintiff's favor. *Id.*

Fifth Circuit law applies to the personal jurisdiction question for these claims. AudioEye argues that Federal Circuit law applies because "the Lanham Act claims are closely related to the patent infringement claims." ECF No. 34 at 10 (citing *3D Sys. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1377 (Fed. Cir. 1998)). But Federal Circuit law only controls if the Lanham Act claims are "intimately linked" to patent law. *Silent Drive, Inc. v. Strong Indus.*, 326 F.3d 1194, 1201 (Fed. Cir. 2003). A count is so linked if its resolution depends on the resolution of the relevant patent infringement claim. *See Breckenridge Pharm., Inc. v. Metabolite Labs., Inc.*, 444 F.3d 1356, 1361 (Fed. Cir. 2006); *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 857 (Fed. Cir. 1999); *3D Sys.*, 160 F.3d at 1377 n.2. Because the Lanham Act claims in this instance do not depend on resolution of AudioEye's patent claims, Fifth Circuit law controls.

Establishing *in personam* jurisdiction in a federal question case is a two-step inquiry (at least when the implicated federal statute does not provide for service of process). First, a court asks whether a defendant is subject to the jurisdiction of a state court of general jurisdiction under

state law. Fed. Rule Civ. Proc. 4(k)(1)(A). This requires measuring the reach of the long-arm statute of the state in which the federal court sits. *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014). Second, the court asks if the exercise of personal jurisdiction would exceed the limitations of due process. *Id.* Since the Texas long-arm statute extends to the limits of due process, *see BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002), the Court need only focus on the due process aspects of the personal jurisdiction question, *see Jackson v. Tanfoglio Giuseppe S.R.L.*, 615 F.3d 579, 584 (5th Cir. 2010).

The constitutional inquiry requires the court to consider (1) whether a defendant has purposefully availed itself of the protections and benefits of the forum state by establishing "minimum contacts" with the state, and (2) whether the exercise of jurisdiction comports with traditional notions of "fair play and substantial justice." *Tanfoglio*, 615 F.3d at 584. Minimum contacts are satisfied by contacts creating either general or specific jurisdiction. *Thiam v. T-Mobile USA, Inc.*, No. 4:19-CV-00633, 2021 WL 1550814, at *2 (E.D. Tex. Apr. 20, 2021) (citing *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994)). If a plaintiff successfully shows "minimum contacts," the burden shifts to the defendant to show that the exercise of jurisdiction would offend the principles of "fair play and substantial justice." *Id.* at *6 (citing *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 271 (5th Cir. 2006)).

B. General Personal Jurisdiction

A corporation is only subject to general jurisdiction when its contacts with the state are so "continuous and systematic" they render it "essentially at home" in the forum state. *Daimler AG*, 571 U.S. at 138–39; *Frank v. P N K (Lake Charles) L.L.C.*, 947 F.3d 331, 336 (5th Cir. 2020). Ordinarily, a corporation is only subject to general jurisdiction where it is incorporated or has its principal place of business. *Daimler AG*, 571 U.S. at 137, 139 n.19. accessiBe is incorporated and located in Israel. *See* ECF No. 21 at 1. As AudioEye has not argued that accessiBe is otherwise at

home in Texas, the Court holds that accessiBe is not subject to general personal jurisdiction here. The Court will therefore move to assessing specific jurisdiction.

C. Specific Personal Jurisdiction for the Lanham Act Claims

This Court has specific personal jurisdiction over accessiBe for the Lanham Act claims. As an initial matter, accessiBe notes how the SAC "barely mentions Texas, and articulates no theory of personal jurisdiction let alone one based on partners, as Plaintiff advances now." ECF No. 37 at 7. The Court finds that irrelevant. "In making its determination, the district court may consider the contents of the record before the court at the time of the motion, including 'affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery.'" *Quick Techs. v. Sage Grp. Plc*, 313 F.3d 338, 344 (5th Cir. 2002) (quoting *Thompson v. Chrysler Motor Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985)). Relatedly, in determining whether a prima facie case for personal jurisdiction exists on a motion to dismiss, "uncontroverted allegations in the plaintiff's complaint must be taken as true." *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 2005).

1. Specific Personal Jurisdiction for the False Advertising Claim

Minimum contacts with Texas to support specific personal jurisdiction exist when a nonresident defendant "purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities." *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000) (quotations omitted). "In the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff 's claim came about because of the defendant's in-state conduct." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1026 (2021).

The Court begins with the Lanham Act false advertising claim. AudioEye founds this claim on the following allegations: (1) accessiBe's advertising and marketing materials included false and misleading statements regarding the accessiBe product's ability to automatically render websites WCAG and ADA compliant; and (2) accessiBe misrepresented the effectiveness of its product through spoofing the WAVE checker. ECF No. 13 ¶ 167.

accessiBe's Website. The Court holds that accessiBe's website is sufficient to establish specific personal jurisdiction over accessiBe in Texas for one false advertising claim. The Fifth Circuit has adopted the *Zippo* sliding-scale test as a standard for minimum contacts via a website. *See Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999). According to the Fifth Circuit:

> The *Zippo* decision categorized Internet use into a spectrum of three areas. 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.

Mink, 190 F.3d at 336; *see also Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002).

accessiBe's website is, in AudioEye's estimation, highly interactive—it "solicits and receives customer requests and feedback, offers 'live chats' with accessiBe personnel, and allows customers to access and make changes to customer accounts." ECF No. 34 at 11–12. And, crucially, [redacted]. ECF No. 34 at 12. accessiBe retorts, without much force, that its contact with Texas through accessiBe's website is "not purposeful, but rather merely random, fortuitous, and attenuated." ECF No. 21 at 15.

Based on the proffered evidence, the Court agrees with AudioEye. The websites in *Carrot Bunch Co. v. Comput. Friends*, 218 F. Supp. 2d 820, 826 (N.D. Tex. 2002) and *Tempur-Pedic Int'l, Inc. v. Go Satellite Inc.*, 758 F. Supp. 2d 366, 373 (N.D. Tex. 2010) established personal jurisdiction over defendants despite having less interactivity than accessiBe's website. Moreover, [redacted]. And because AudioEye has shown that accessiBe uses its website to disseminate some of its allegedly false and disparaging statements, ECF No. 34 at 12 (citing ECF No. 34-1, Ex. 5), the Court finds that the false advertising claim arises from or relates to accessiBe's contact with Texas. The Court holds that AudioEye has made *a prima facie* case that accessiBe's website is sufficient to establish personal jurisdiction for the false advertising claim. *See also Savvy Rest, Inc. v. Sleeping Organic, LL*, Civil Action No. 3:18CV00030, 2019 U.S. Dist. LEXIS 54259, at *16–17 (W.D. Va. Mar. 29, 2019) (finding personal jurisdiction over a defendant regarding false advertising claims based on website-based contact with the forum); *Key Components, Inc. v. Braille, LLC*, No. 3:09-CV-322, 2010 U.S. Dist. LEXIS 59916, at *12 (E.D. Tenn. June 16, 2010) (same); *Renaissance Learning, Inc. v. Metiri Grp., LLC*, No. 07-0413-CV-W-SWH, 2008 U.S. Dist. LEXIS 5766, at *16 (W.D. Mo. Jan. 25, 2008) (same).

Additional Texas Contacts. accessiBe's additional contacts with Texas related to its false advertising claim merely confirm the existence of accessiBe's minimum contacts. For example, [redacted] that included false and misleading statements about accessiBe's ability to render a website fully compliant with WCAG and ADA standards. ECF No. 34 at 3–4 (citing ECF No. 34-1, Exs. 7, 8). Indeed, AudioEye alleges that accessiBe [redacted]

[redacted]. ECF No. 34 at 4 (citing ECF No. 34-1, Ex. 11 at 4 [redacted]; *id.* at 4.

AudioEye also asserts that accessiBe partners with two other Texas entities: Volusion, Inc. and BigCommerce, Inc. ECF No. 34 at 5. These partners purportedly help accessiBe "disseminate its false and misleading statements." *Id.* For example, an [redacted] ECF No. 34 at 6. The Court finds that AudioEye has made out a *prima facie* case that these additional contacts, along with accessiBe's website, constitute sufficient activity purposefully directed at Texas, and these activities relate to AudioEye's false advertising claim directed to accessiBe's false and misleading statements regarding the accessiBe product's ability to automatically render websites WCAG and ADA compliant.

Pendent Personal Jurisdiction. accessiBe argues that AudioEye's evidence focuses almost exclusively on those false and misleading statements regarding compliance. AudioEye does not, according to accessiBe, cite any evidence showing that accessiBe directed any WAVE-checker spoofing to Texas residents. *See* ECF No. 37 at 8. The Court agrees (though notes that AudioEye presented evidence that [redacted]. ECF No. 34 at 4 (citing ECF No. 34-1, Ex. 14)).

Yet to the extent AudioEye has not independently established personal jurisdiction for a claim directed to WAVE spoofing, the Court will exercise pendent personal jurisdiction for that claim. Pendent personal jurisdiction "exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact, and then, because it

possesses personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim." *Rolls–Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 783 (N.D. Tex. 2008).

Courts conduct a three-part analysis to ensure the propriety of pendent personal jurisdiction. First, a court must identify an "anchor" claim that allows a court to exercise personal jurisdiction over the defendant. *Gen. Elec. Capital Corp. v. Mackzilla, LLC*, No. CV H-15-2425, 2016 U.S. Dist. LEXIS 34752, 2016 WL 1059529, at *5 (S.D. Tex. Mar. 17, 2016). Next, the court examines whether the anchor claim and the claim over which the court lacks an independent basis for personal jurisdiction "aris[e] out of the same nucleus of operative fact." *ESPOT, Inc. v. MyVue Media, LLC* , 492 F. Supp. 3d 672, 700 (E.D. Tex. 2020). If so, the court must determine whether entertaining the pendent claims against the defendant promotes "judicial economy, avoidance of piecemeal litigation[,] and the overall convenience of the parties." *Canyon Furniture Co. v. Rueda Sanchez*, No. SA-18-CV-00753-OLG, 2018 U.S. Dist. LEXIS 224455, 2018 WL 6265041, at *13 (W.D. Tex. Nov. 8, 2018); *see In re Commonwealth Oil/Tesoro Petrol. Corp. Sec. Litig.*, 467 F. Supp. 227, 247 (W.D. Tex. 1979). This final step—and, accordingly, the overall decision to invoke pendent personal jurisdiction—is "within the court's discretion." *Rolls-Royce*, 576 F. Supp. 2d at 784.

AudioEye's Lanham Act false advertising claim directed to accessiBe's false and misleading statements regarding accessiBe product's ability to automatically render websites WCAG and ADA compliant is the anchor claim. The Court finds that it shares a common nucleus of operative fact with AudioEye's false advertising claim directed to accessiBe misrepresenting the effectiveness of its product through spoofing the WAVE checker. Both claims revolve around a series of accessiBe marketing actions allegedly misrepresenting how effective accessiBe's product is at bringing a website into compliance with certain standards. *See Pension Advisory Grp.,*

Ltd. v. Country Life Ins. Co., 771 F. Supp. 2d 680, 696 (S.D. Tex. 2011) (finding personal jurisdiction over trade secret misappropriation, unfair competition, and tortious interference claims and exercising pendent personal jurisdiction over remaining product disparagement claims because they all arose from the same course of dealing and were closely related). Judicial economy and the parties' convenience favors exercising pendent personal jurisdiction because accessiBe is already before this Court as a defendant for AudioEye's patent claims involving the same product/service about which accessiBe is allegedly making false and misleading statement.

For the foregoing reasons, this Court has personal jurisdiction over accessiBe for the Lanham Act false advertising claims.

2. Specific Jurisdiction for Product Disparagement Claim

Next the Court turns to the Lanham Act product disparagement claims. AudioEye bases these claims on statements in accessiBe's advertising and marketing materials that AudioEye and its products: (1) do not render its customers' website compliant with certain WCAG requirements; (2) rely exclusively on manual remediation and do not leverage automated remediation; (3) cost $5,000-$50,000 per year; (4) do not provide continuous compliance monitoring, and do not provide a customizable interface. ECF No. 13 ¶ 175. According to AudioEye, these statements are false and misleading and misrepresent the characteristics and qualities of AudioEye. *Id.*

accessiBe's Website and Additional Contacts. For the same reasons identified above, the Court holds that accessiBe's website establishes personal jurisdiction over at least some of AudioEye's product disparagement claims. Those contacts are further supplemented by the webinar referenced above. [redacted] ECF No. 34 at 6. [redacted] *Id.*

Pendent Personal Jurisdiction. Yet the alleged disparagement included on accessiBe's website and the webinar slides is limited to criticizing certain features of AudioEye's services, like the price, project length, and success rate over time. Though AudioEye has presented a *prima facie* case of personal jurisdiction for product disparagement directed to cost—item (3) above—it has not done so for the other three product disparagement grounds. *See* ECF No. 37 at 8. But, as it did with the false advertising grounds, the Court will exercise pendent personal jurisdiction over the three other grounds of product disparagement, as each revolves around a common nucleus of fact: accessiBe's course of conduct disparaging AudioEye's product. Judicial economy and the parties' convenience favor exercising pendent personal jurisdiction because accessiBe is already before this Court as a defendant for AudioEye's Lanham Act false advertising claims, which are related to the Lanham Act product disparagement claims here, and patent claims.

D. Specific Personal Jurisdiction for the New York Law Claims

The Court will exercise pendent personal jurisdiction over AudioEye's NYSL claims because they share a common nucleus of operative fact with the Lanham Act claims.

AudioEye's NYSL product disparagement and slander/defamation claims share a common nucleus of operative fact with the Lanham Act product disparagement claim. The NYSL product disparagement claim is supported by allegations that

> statements in accessiBe's advertisements and marketing materials that AudioEye and its product do not render its customers' websites compliant with certain WCAG requirements and that AudioEye and its product rely exclusively on manual remediation and do not leverage automated remediation are disparaging, false, and misleading, and misrepresent the characteristics and qualities of AudioEye and its product.

ECF No. 13 ¶ 183. AudioEye specifically alludes to statements accessiBe made to New York consumers. *Id.* ¶ 184. The NYSL slander/defamation claim is supported by allegations that accessiBe told a New York consumer that AudioEye misleads its customers and extract higher

prices from its customers by claiming manual remediation is required. ECF No. 13 ¶ 189. Further, AudioEye alleges that accessiBe [redacted] *Id.* Because the federal Lanham Act product disparagement claim would likely cover this alleged conduct, these NYSL claims share a common nucleus of operative fact with the Lanham Act product disparagement claim.

AudioEye's NYSL tortious interference with prospective economic advantage claim shares a common nucleus of operative fact with the Lanham Act claims. The NYSL tortious interference with prospective economic advantage claim is supported by allegations that accessiBe "misrepresent[ed] the effectiveness of its product, [made] additional misrepresentations on its website and in the media about the effective [sic] of its product, and making false and disparaging comments about AudioEye's business, including AudioEye's pricing and installation times." ECF No. 13 ¶ 197. AudioEye's Lanham Act claims cover this alleged conduct, so this NYSL claim shares a common nucleus of operative fact with the Lanham Act claims.

AudioEye's NYSL deceptive business practices and unjust enrichment claims share a common nucleus of operative fact with the Lanham Act false advertising claim. The NYSL deceptive business practices claim is supported by allegations that accessiBe "spoof[s] third-party accessibility checkers to misrepresent the effectiveness of its product." ECF No. 13 ¶ 206. AudioEye's Lanham Act false advertising claim covers this alleged conduct, so this NYSL claim shares a common nucleus of operative fact with the Lanham Act false advertising claim. And because AudioEye's NYSL unjust enrichment claim is based on these deceptive business practices, ECF No. 13 ¶ 213, the NYSL unjust enrichment claim likewise shares a common nucleus of operative fact with the Lanham Act false advertising claim.

accessiBe argues that the NYSL claims do not share a common nucleus of operative fact with the Lanham Act claims. accessiBe asserts that the elements of a NYSL tortious interference claim, focusing on relationships with New York consumers, are different than those of the Lanham Act claims, which focus on false statements. ECF No. 37 at 10. Likewise, "[u]njust enrichment is only available when defendant has not breached a contract nor committed a recognized tort . . . and is thus—by its nature—based on a distinct nucleus of facts."[3] *Id.* at 10. And a deceptive business practices claim must relate to a transaction or services occurring in New York. *Id.*

Yet there is little doubt that the anchor Lanham Act claims and the NYSL claims over which the Court lacks an independent basis for personal jurisdiction "share the 'loose factual connection' characteristic of a common nucleus of operative fact.'" *In re Toyota Hybrid Brake Litig.*, No. 4:20-CV-127, 2021 U.S. Dist. LEXIS 124918, at *51 (E.D. Tex. July 6, 2021) (quoting 13 Charles Alan Wright et al., Federal Practice & Procedure § 3523 (3d ed.)). Each is directed to a series of actions allegedly meant to mislead potential consumers about the effectiveness of accessiBe services and/or the effectiveness or cost of AudioEye's competing service.

Moreover, claims have generally been found to derive from a common nucleus of operative fact when they are "so interrelated that plaintiffs 'would ordinarily be expected to try them all in one judicial proceeding.'" *Espino v. Besteiro*, 708 F.2d 1002, 1010 (5th Cir. 1983) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)).

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[3] Just because two causes of action include different elements does not mean that invoking pendent jurisdiction is inappropriate. *Cf. Schuchart & Assocs. v. Solo Serve Corp.*, No. SA-81-CA-5, 1983 U.S. Dist. LEXIS 15936, at *60 (W.D. Tex. June 28, 1983) (concluding that exercising pendent jurisdiction is still appropriate when "state and federal claims arise from the same series of events that call for entirely different elements of proof"). Rather, the pendent jurisdiction inquiry is dominated by the question of whether the causes of action share a common nucleus of operative fact.

The Court thus turns to the final analytical step and looks to whether judicial economy, the avoidance of piecemeal litigation, and the overall convenience of the parties would be served by the exercise of pendent personal jurisdiction against accessiBe. The inconvenience to accessiBe is slight given that it is already present in this action and must remain before the Court as a defendant to the patent and Lanham Act claims. *See In re Toyota Hybrid Brake Litig.*, 2021 U.S. Dist. LEXIS 124918, at *51-52 (E.D. Tex. July 6, 2021) (first citing *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 628 (4th Cir. 1997), and then citing *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 36 (D.D.C. 2010)). Moreover, accessiBe has already conceded that judicial economy and the avoidance of piecemeal litigation favor keeping all of AudioEye's claims together in one venue. *See* ECF No. 21 at 10. The Court concludes, then, that it will exercise pendent personal jurisdiction over accessiBe for the NYSL claims.

E. Fair Play and Substantial Justice

Fair Play and Substantial Justice. Since AudioEye have shown accessiBe to have minimum contacts with Texas in this litigation, accessiBe must now demonstrate that "asserting jurisdiction would offend traditional notions of fair play and substantial justice." *Hess v. Bumbo Int'l Tr.*, 954 F. Supp. 2d 590, 593 (S.D. Tex. 2013). accessiBe "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King v. Rudzewicz*, 471 U.S. 462, 477 (1985). Furthermore, because it is highly uncommon for an assertion of jurisdiction to be unfair once minimum contacts have been established, the "fair play and substantial justice" factor should rarely be outcome determinative. *Blunt Wrap USA, Inc. v. Grabba-Leaf, L.L.C.*, No. CV 15-2764, 2016 U.S. Dist. LEXIS 118080, 2016 WL 4547992, at *3 n.3 (E.D. La. Sept. 1, 2016).

To determine whether the exercise of jurisdiction is fair and reasonable, courts balance: "(1) the burden on the nonresident defendant of having to defend itself in the forum, (2) the

interests of the forum state in the case, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in the most efficient resolution of controversies, and (5) the shared interests of the states in furthering fundamental social policies." *Sangha v. Navig8 Shipmanagement Private Ltd.*, 882 F.3d 96, 102 (5th Cir. 2018).

accessiBe suggests that it is burdened in having to litigate in Texas because it resides in Israel. *See* ECF No. 21 at 17. But accessiBe has not shown that its burden is anything but "de minimis" considering the substantial business it conducts in the United States, including Texas. *See Access Telecomms., Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 716 (5th Cir. 1999). accessiBe also asserts that it is New York, not Texas, that "has a local interest in the Non-Patent Claims." *Id.* The Court disagrees. Texas has a demonstrable interest in providing a forum for litigating AudioEye's federal claims because accessiBe has directed allegedly false advertising and disparaging statements at Texas residents, and even enlisted the help of Texas residents in spreading those statements. *Cf. EVOL, Inc. v. Supplement Servs., LLC*, Civil Action No. 3:09-CV-1839-O, 2010 U.S. Dist. LEXIS 24764, at *10 (N.D. Tex. Feb. 28, 2010) ("There is no doubt that residents of . . . Texas have an interest in this dispute because the allegedly false advertisements entered Texas."). accessiBe has not shown that New York has a greater interest in litigating these federal claims. While it true that New York may have a greater interest in the NYSL claims, this Court may, as explained above, exercise pendant personal jurisdiction over accessiBe for those claims in the interests of: obtaining convenient relief for the AudioEye, who will in any event be litigating its federal claims here; and reaching the "most efficient resolution of controversies," as judicial economy is served by *not* litigating this case piecemeal. *Sangha*, 882 F.3d at 102.

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AudioEye needed to make out a *prima facie* case supporting jurisdiction over accessiBe. It did that. For the foregoing reasons, the Court finds AudioEye to have demonstrated the Court's jurisdiction over accessiBe for all AudioEye's Non-Patent claims.

IV. CONCLUSION

Defendant's Motion to Transfer is **DENIED** due to Defendant's failure to establish the transferee court's jurisdiction. Defendant's alternative Motion to Dismiss the Non-Patent claims for Lack of Personal Jurisdiction is **DENIED** because Plaintiff has made a *prima facie* case that this Court has personal jurisdiction over the Non-Patent claims.

SIGNED this 18th day of October, 2021.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE