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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

SD HOLDINGS, LLC, a Washington
limited liability company,

Plaintiff,

v.

**AIRCRAFT OWNERS AND PILOTS
ASSOCIATION**, a New Jersey
Corporation,

Defendant.

Case No. 3:13-cv-01296-AC

**MEMORANDUM IN SUPPORT OF
AOPA'S MOTION TO DISMISS
OR IN THE ALTERNATIVE TO
TRANSFER**

Oral Argument Requested

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Plaintiff SD Holdings, LLC (“SDH” or “Plaintiff”) is a patent holding company, referred to as a non-practicing entity (“NPE”), and according to Washington Secretary of State records, SDH is a Washington limited liability company, not an Oregon company. The Aircraft Owners and Pilots Association (“AOPA”), incorporated on May 15, 1939, is a Frederick, Maryland-based non-profit association that advocates for general aviation and its members (aircraft owners and pilots) to promote the economy, safety, utility, and popularity of general aviation aircraft.

As a free service that AOPA provides to its membership, AOPA offers an internet-based flight planning tool called FlyQ Web, which is a flight planning, airport information, and aviation weather tool for pilots. In this case, citing the free AOPA FlyQ Web tool, SDH has sued AOPA for the alleged infringement of U.S. Patent No. 7,640,098 (“the ’098 patent”) and U.S. Patent No. 8,447,512 (“the ’512 patent”) (collectively, “the Asserted Patents”).

After the filing of the Complaint, on July 29, 2013, counsel for AOPA contacted counsel for SDH to advise that there was no basis for SDH’s patent infringement allegations, providing a detailed explanation of why the patents were not (and could not be) infringed. Specifically, the SDH patents pertain to a way of presenting aviation charts, and AOPA explained that FlyQ Web did not present aviation charts in the alleged manner. Yet, SDH refused to dismiss the case.

Therefore, AOPA respectfully moves for the dismissal of SDH’s Complaint. First, AOPA moves for dismissal for failure to state a claim under Rule 12(b)(6), as there is no basis for SDH’s patent infringement allegations. Alternatively, second, AOPA moves for dismissal for lack of jurisdiction under Rule 12(b)(2). Alternatively, third, AOPA moves for dismissal for misvenue under Rule 12(b)(3), as there is absolutely no basis for this lawsuit in Oregon. Fourth, as yet a final alternative, if the Court does not dismiss under Rules 12(b)(2), (3), and (6), AOPA respectfully requests the transfer of this case from Oregon to Maryland, the appropriate venue.

I. THE UNDISPUTED FACTS OF THIS CASE DEMONSTRATE THAT THE CASE SHOULD BE DISMISSED, OR AT THE LEAST, TRANSFERRED

A. AVIATION CHARTS ARE USED BY PILOTS TO SAFELY FLY FROM POINT A TO POINT B; THE FAA PROVIDES CHARTS FOR FREE

Before the advent of aviation navigation charts, pilots navigated using landmarks such as mountains, roads, and rail lines, typically flying low to the ground to keep in visual contact with landmarks. As more aircraft took to the skies, standard aviation charts were developed. Present day aviation charts, such as Sectional Charts, are provided for free in digital format by the FAA (e.g., online at http://aeronav.faa.gov/index.asp?xml=aeronav/applications/VFR/chartlist_sect). An example of a portion of a Sectional Chart for the Portland Airport area is depicted below.

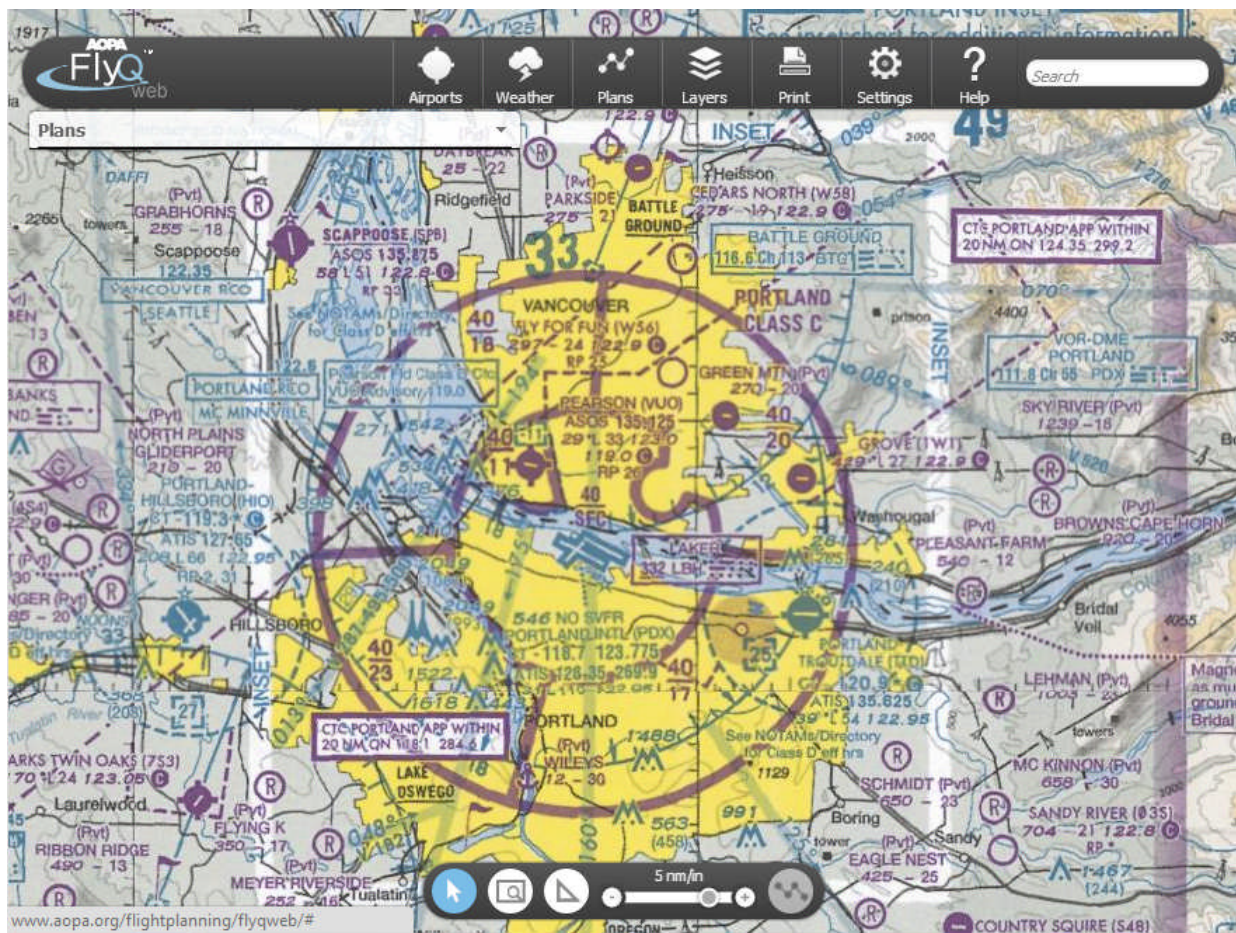


These types of aviation charts contain the information that is necessary for a pilot to fly from one point to another. The charts include terrain and navigation information such as mountain

locations and their elevations, major waterways, antenna locations and heights, airport locations and runway orientations, the location and frequency of radio navigation aids, and major roads.

B. AOPA PROVIDES A FREE AVIATION FLIGHT PLANNING TOOL, FLYQ WEB

FlyQ Web is AOPA's online aviation flight planning tool that is available to members for free. The tool provides an interface that allows pilots to view FAA charts and to use the charts in planning flights from point A to point B, something referred to by pilots as "flight planning."



As shown above, the FlyQ Web tool displays the same information as the FAA charts but also gives pilots additional capabilities to safely plan flights. By use of the FlyQ Web tool, pilots

may access FAA aviation charts and plan a flight, using the information on the chart, such as a flight from the KFDK airport in Frederick, Maryland to the KPDX airport in Portland, Oregon.

C. SDH’S PATENTS CLAIM A SPECIFIC WAY OF CREATING AND PRESENTING “COMPOSITE CHARTS” FOR FLIGHT PLANNING

SDH’s two Asserted Patents generally claim a specific manner of generating “composite travel navigation charts” on a server and then transmitting those composite charts to a browser for use by pilots in planning flights. For example, claim 1 of the ’098 patent recites:

A process for generating a flight plan for preflight use by a pilot, comprising:
 accessing over a computer network from a client computer a web page having a housekeeping frame and a selected composite travel navigation chart from among plural selected composite travel navigation charts stored at a server computer, each selected composite travel navigation chart including a travel chart merged with travel navigation waypoints, the travel navigation waypoints including radio navigation aids;
 downloading the web page with the selected composite travel navigation chart from the server computer to the client computer as a two-dimensional array of map tiles that include up-to-date navigation data and cover an area over which a flight is to be planned;
 indicating X, Y coordinates of each of a plurality of navigation waypoints on the selected composite travel navigation chart at the client computer;
 sending the X, Y coordinates of each navigation waypoint to the housekeeping frame of the web page; and
 drawing over the selected composite travel navigation chart on the client computer route line segments according to the X, Y coordinates, as instructed by housekeeping frame of the web page, to generate a flight plan for preflight use by a pilot.

Thus, the first element of claim 1 of the ’098 patent includes merging a travel chart with travel navigation waypoints at a server. Similarly, claim 1 of the ’512 patent also requires “overlaying at the server computer [a] plurality of selected travel navigation waypoints on [a] selected one of the travel chart images to form a selected composite travel navigation chart.” Thus, as with claim 1 of the ’098 patent, claim 1 of the ’512 patent also requires merging a travel chart with travel navigation waypoints at a server. Indeed, all of the claims of the two Asserted Patents

require merging, overlaying, and/or compressing of composite charts at the server computer.¹

Figure A2,² reproduced below, depicts the steps that underlie every claim, including the merging, overlaying, and/or compressing of composite charts at the server computer.

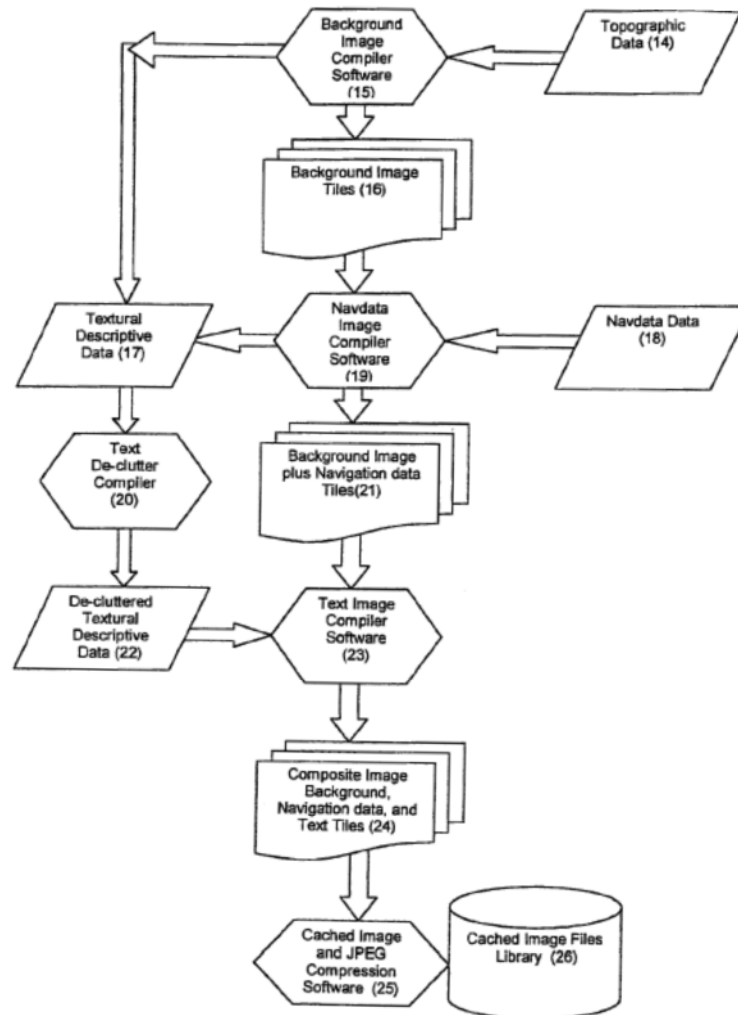


Figure A2 Chart Generator System

As shown in Figure A2, the composite charts are created in three distinct steps, namely by

(1) creating a background image, (2) overlaying navdata, and (3) adding chart text labels. '098

¹ The two Asserted Patents include a total of 42 claims, including 6 independent claims and 36 dependent claims.

² The specifications for the patents are identical, and we only cite the '098 patent for simplicity.

Patent at 7:5-10. In creating the background image, a compiler (15) uses a database that contains topographical data (14) (e.g., elevation data) and creates color coded relief charts (Background Image Tiles (16)) with shading that “closely emulates the colors assigned to a U.S. Government Sectional Aeronautical chart.” *Id.* at 7:17-27. In other words, when a chart is generated according to the Asserted Patents, a new chart is created based on topographical data and not using and/or manipulating an existing chart. Thus, the two patents describe and claim generating a chart on a server computer as an alternative to using the actual U.S. Government Aeronautical charts. After the Background Image (16) is generated, navigational data (“e.g. airport, navigation aids, airways, roads, towns, obstructions etc.”) is overlaid onto and combined with the Background Image using a Navdata Image Compiler. *Id.* at 7:8-9; 7:42-45. This step is necessary because the Background Image (16) does not include information for flight planning, and that information must be added. Next, Background Image (16) is overlaid with text labels. *Id.* at 7:53-54. By running the Textural Descriptive data (17) through Text De-Clutter Compiler (20) (*id.* at 54-60), and eventually through the Text Image Compiler Software (23), the Background Image (16) is combined with text information to generate the composite image. *Id.* at 8:13-17.

D. AFTER THE FILING OF THE COMPLAINT, COUNSEL FOR AOPA ADVISED COUNSEL FOR SDH THAT THERE WAS NO BASIS FOR AN ALLEGATION OF PATENT INFRINGEMENT AGAINST THE AOPA

After the Complaint was filed on July 29, 2013, AOPA reviewed the allegations and sent a letter to SDH on August 28, 2013, explaining that the accused AOPA tool cannot infringe and noting that AOPA sees no good-faith basis for initiating the suit. In particular, AOPA explained:

[T]he claims of the '098 patent all require a “composite travel navigation chart” that is “stored at a server computer” and/or provided “over a computer network” and that the “composite travel navigation chart” includes “a selected travel

navigation travel chart merged with . . . radio navigation aids.” So, for SDH to have a tenable case of patent infringement as to the ‘098 patent, there must be an accused product that stores and/or provides “composite travel navigation charts” that are a “travel navigation chart merged with . . . radio navigation aids.” However, AOPA’s FlyQ Web product, as evident to anyone using the AOPA product, does not store or provide such composite charts. Instead, the accused AOPA product stores and/or provides images of traditional paper charts that are not merged with navigation waypoints of any kind, something specifically disclaimed in the specification and prosecution histories.

Similarly, with respect to the ’512 patent, all of the patent claims require a “composite travel navigation chart” formed by “overlaying at the server computer [a] plurality of selected travel navigation waypoints on [a] selected one of the travel chart images.” For at least the same reasons as noted above as to the ‘098 patent, AOPA does not form a “composite travel navigation chart” as required by these patent claims.

Declaration of Lionel Lavenue (“Lavenue Decl.”), Ex. 1 at 1. In the context of the information provided in this motion, SDH has accused AOPA of infringing patents that are directed to the merging, overlaying, and/or compressing of composite charts at the server computer, while the AOPA tool does not perform these acts. Indeed, the AOPA tool takes an FAA aviation chart and uses that chart for flight planning, whereas the Asserted Patents require the creation/manipulation of a composite chart at a server.

Given the fact that the FlyQ Web tool uses FAA aviation charts that already include terrain and navigation information, and because the FlyQ Web tool does not need to merge, overlay, and/or compress composite charts at a server computer, AOPA also explained:

Given the fact that we cannot identify any AOPA product (specifically including the FlyQ Web product, which is the only AOPA product listed in the Complaint) that can even arguably infringe any claim of the ‘098 or ’512 patents under any reasonable claim construction, we would like to enter into a discussion regarding SDH’s basis for bringing this lawsuit against AOPA. For example, if SDH has information that is inconsistent with our internal research (e.g. an example of any AOPA product with composite travel navigation charts, as claimed in the two patents), we would certainly like to be made aware of that information. However, if SDH does not have any information inconsistent with our investigation, then,

we see no good faith basis for SDH's claims against AOPA. If that is the case, then we kindly ask that SDH withdraw its Complaint against AOPA.

Id., Exhibit 1 at 2. As of yesterday (October 6, 2013), SDH had not responded to AOPA's letter.³

E. NEITHER PLAINTIFF NOR DEFENDANT ARE LOCATED IN OREGON

Neither Plaintiff SDH nor Defendant AOPA is an Oregon entity, has an office in Oregon, or apparently has any particular relationship with the Oregon jurisdiction. Indeed, a quick summary of the facts known to date show absolutely no connections to the State of Oregon:

- Plaintiff SDH is an out-of-state company with no discernible ties to Oregon. According to the Complaint and the Washington Secretary of State Office, SDH is a Washington company. AOPA has found no ties to the Oregon jurisdiction.
- Plaintiff SDH states that "members of [SDH] are located in the State of Oregon" (Complaint at ¶ 6), but the Washington Secretary of State states that Flight Prep, SDH's only listed member, is located at the same Washington address as SDH.
- Defendant AOPA is also an out-of-state company with no ties to Oregon. The AOPA is a New Jersey corporation with a headquarters and main office in Frederick, Maryland. AOPA has association members in Oregon, but AOPA has no physical presence in Oregon, is not registered to conduct business in Oregon, and has no registered agents, employees, or sales representatives in Oregon.
- Relevant Third-Parties are also out of state with no discernible ties to Oregon. Notably, AOPA has two suppliers for the accused technology: (1) Orases, a Maryland company, and (2) Seattle Avionics, a Washington company.
- Relevant AOPA documents are located out of state with no discernible ties to Oregon. AOPA documents regarding the accused FlyQ Web tool are located in Maryland, New Jersey, Virginia, or Washington (none are located in Oregon).
- Relevant AOPA witnesses are located out of state with no discernible ties to Oregon. AOPA witnesses regarding the accused FlyQ Web tool are located in Maryland, New Jersey, Virginia, or Washington (none are located in Oregon).

³ If this case continues in any form, AOPA may pursue Rule 11 sanctions against SDH.

- Relevant AOPA servers are located out of state with no discernible ties to Oregon. Regarding the servers for the accused FlyQ Web tool, all are located in Virginia.

The only possible connection to Oregon is the fact that one named inventor on the patents is identified as located in Oregon, but inventor testimony is generally irrelevant in patent cases.⁴

II. PLAINTIFF’S COMPLAINT IS FLAWED AND DISMISSAL IS PROPER

Rule 12(b) outlines seven specific defenses that “must be made before [a] pleading.”

Here, SDH’s Complaint suffers at least three flaws under Rule 12(b), including: (1) failure to state a claim upon which relief may be granted, per Rule 12(b)(6); (2) lack of personal jurisdiction, per Rule 12(b)(2), and (3) lack improper venue, per Rule 12(b)(3). Below, AOPA outlines these three flaws, any or all of which support AOPA’s requested relief of dismissal.

Where, as here, a plaintiff fails to allege a cognizable legal theory or facts sufficient to state a plausible claim for relief, a motion to dismiss for failure to state a claim under Rule 12(b)(6) should be granted. *Erickson v. Blake*, 839 F.Supp.2d 1132, 1134 (D. Or. 2012) (“A motion to dismiss for failure to state a claim should be granted when there is no cognizable legal theory to support the claim, *or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief.*” (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (emphasis added)). As for personal jurisdiction, SDH’s allegation of jurisdiction against AOPA are not proper under Rule 12(b)(2) because the claims do not “arise out of or relate[] to the defendant’s forum-related activities.” *Indoor Billboard Northwest Inc. v. M2 Systems Corp.*, 922 F.Supp.2d 1154 (D. Or. 2013) (“Plaintiffs in this case must establish they would not have been injured “but for” Defendant's activities in Oregon.”).

As for venue, it is only proper in a district where the defendant was subject to personal

⁴ *Roton Barrier, Inc. v. Stanley Works*, 79 F.3d 1112, 1126 (Fed. Cir. 1996) (recognizing that “inventor’s ‘after-the-fact testimony is of little weight’” in patent cases (citations omitted)).

jurisdiction at the time the action was commenced, and SDH has failed this showing under Rule 12(b)(3). *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990) (holding that “venue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced”).

A. SDH FAILS TO STATE A CLAIM UNDER RULE 12(B)(6)

If a complaint fails to state a claim upon which relief may be granted, dismissal is appropriate. *Erickson v. Blake*, 839 F.Supp.2d 1132, 1134 (D. Or. 2012). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain more than an “unadorned, the-defendant-unlawfully-harmed-me accusation” and will not survive unless “taking all well-pleaded factual allegations as true, it contains enough facts to ‘state a claim to relief that is plausible on its face.’” *Sovereign v. Deutsche Bank*, 856 F. Supp. 2d 1203 at 1208-1209 (D. Or. 2012) (citing *Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir.2010) and quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (1955)). Thus, claims in a complaint must be supported by factual allegations to state a claim to relief that is plausible on its face, and, therefore, merely conceivable claims lacking in sufficient factual allegations to state a claim for relief are not plausible on their face and must be dismissed in accordance with Rule 12(b)(6). Thus, although, in deciding a motion to dismiss, a court must accept the *factual allegations* as true, a court is not required to accept the *legal conclusions* as true, and therefore, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.*

1. SDH DOES NOT ASSERT A TENABLE CLAIM OF PATENT INFRINGEMENT

In a letter that AOPA sent to SDH on August 28, 2013, AOPA explained that the accused AOPA tool cannot infringe. Specifically, in the August 28, 2013 letter, AOPA explained:

[T]he claims of the '098 patent all require a "composite travel navigation chart" that is "stored at a server computer" and/or provided "over a computer network" and that the "composite travel navigation chart" includes "a selected travel navigation travel chart merged with . . . radio navigation aids." So, for SDH to have a tenable case of patent infringement as to the '098 patent, there must be an accused product that stores and/or provides "composite travel navigation charts" that are a "travel navigation chart merged with . . . radio navigation aids." However, AOPA's FlyQ Web product, as evident to anyone using the AOPA product, does not store or provide such composite charts. Instead, the accused AOPA product stores and/or provides images of traditional paper charts that are not merged with navigation waypoints of any kind, something specifically disclaimed in the specification and prosecution histories.

Similarly, with respect to the '512 patent, all of the patent claims require a "composite travel navigation chart" formed by "overlaying at the server computer [a] plurality of selected travel navigation waypoints on [a] selected one of the travel chart images." For at least the same reasons as noted above as to the '098 patent, AOPA does not form a "composite travel navigation chart" as required by these patent claims.

Lavenue Decl., Ex. 1 at 1. SDH has accused AOPA of infringing patents that are directed to the merging, overlaying, and/or compressing of composite charts at the server computer, and because the AOPA tool does not perform these acts, SDH has no valid basis to assert infringement. Notably, there is nothing in the Complaint that provides more than *legal conclusions* as to infringement, and given the absence of data otherwise, SDH's pleading offers nothing more than labels and conclusions and thus does not satisfy the requirements to overcome a Rule 12(b)(6) motion.

2. SDH'S ONLY ALLEGATION OF PATENT INFRINGEMENT IS DEFECTIVE

The sole apparent basis for SDH's allegations of patent infringement against AOPA is: "AOPA's on-line flight planning software is configured to receive program and electronic chart data updates from an online server and is compatible with desktop computers, notebook computers, tablet computers, and mobile devices. Users, including Oregon pilots, interact with AOPA's on-line flight planning products by selecting desired waypoints and charting flight plans." *Id.* at ¶¶ 15-16. But, even these allegations, if taken as true, do not support a claim for patent infringement. As the Federal Circuit has stated, "[t]he law of this circuit is axiomatic that a method claim is directly infringed only if each step of the claimed method is performed." *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1378-79 (Fed. Cir. 2007); *Muniauction v. Thompson Corp.*, 532 F.3d 1318, 1329 (Fed. Cir. 2008). But, SDH does not make even make a good faith attempt to map the claims of the Asserted Patents to the accused AOPA technology. For example, SDH alleges that "AOPA's on-line flight planning software is configured to receive program and electronic chart updates from an online server." Complaint at ¶ 15. But, notably, the claims of the Asserted Patents do not include "electronic chart updates" or "program updates," instead referencing a "composite travel navigation chart" that is "provided" or "delivered." SDH's bare allegations fail to support a claim that is plausible on its face.

3. SDH LACKS A GOOD-FAITH BASIS TO ASSERT INFRINGEMENT

If SDH had conducted a proper pre-filing investigation, it could have determined that AOPA cannot infringe any claim in the Asserted Patents, at least because every claim requires a server to create or form a "composite travel navigation chart" that is "stored at a server computer" and/or provided or delivered "over a computer network" to a browser. Thus, not only

has SDH failed to plead sufficient facts to state a claim, but when confronted with additional information that is available and apparent to anyone who has ever used the FlyQ Web tool, SDH has chosen to willfully ignore the clear non-infringement implications of this information. Accordingly, because Plaintiff has no possible basis for its claims, not only should SDH's Complaint be dismissed under Rule 12(b)(6) but consideration should also be given to Rule 11.⁵

B. THERE IS NO JURISDICTION PER RULE 12(B)(2)

If a plaintiff fails to demonstrate that a court has jurisdiction over a defendant, dismissal is proper. *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 761 (9th Cir. 1990).

In patent cases, personal jurisdiction is determined by the law of the Federal Circuit. *See Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565 (Fed. Cir. 1994) (with respect to personal jurisdictional issues, there is no special deference to regional circuit law in patent cases). Personal jurisdiction exists over an out-of-state defendant only if two tests are satisfied: (1) the forum state's long-arm statute must permit service of process and (2) the assertion of personal jurisdiction must not violate due process. *Genetic Implant Sys., Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1458 (Fed. Cir. 1997). Oregon state law permits a court to exercise jurisdiction over any party so long as "prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States." Or.R. Civ.P. 4 L. Therefore, Oregon's long arm statute is coextensive with the limits of federal due process. *Gray & Co.*, 913 F.2d at 760.

A court may not exercise general personal jurisdiction over a defendant without violating due process rights unless the activities of a defendant within the state are "continuous and

⁵ AOPA has not yet begun formal procedures of Rule 11, but if this case proceeds, AOPA may file a motion under Rule 11 for all appropriate remedies, including attorney fees and costs.

systematic.” *AFTG-TG, LLC v. Nuvoton Technology Corp.*, 689 F.3d 1358, 1360 (Fed. Cir. 2012). Indeed, sporadic and insubstantial contacts are not sufficient for general jurisdiction. *See Campbell Pet Co. v. Miale*, 542 F.3d 879, 884 (Fed.Cir. 2008). The standard for general jurisdiction is high, requiring that the contacts in the forum “approximate physical presence.” *Tuazon v. R.J. Reynolds Tobacco Co.*, 42 F.3d 1163, 1169 (9th Cir. 2006). And, significantly here, mere access to a party’s website is not enough to support a finding of personal jurisdiction *Trintec Ind. v. Pedre Promotional Products*, 395 F. 3d 1275, 1281 (Fed. Cir. 2005).

When a plaintiff only establishes sporadic and insubstantial contacts, general jurisdiction is not proper, and the plaintiff must attempt to establish specific jurisdiction. Under the Federal Circuit’s three-part test, there is specific jurisdiction for a patent case when: “(1) the defendant purposefully directed its activities at residents of the forum, (2) the claim arises out of or relates to those activities, and (3) assertion of personal jurisdiction is reasonable and fair.” *AFTG-TG*, 689 F.3d at 1360-61. For purposes of specific jurisdiction, the plaintiff has the burden under the first two prongs while, under the third prong, the defendant has the burden of “present[ing] a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Breckenridge Pharm., Inc. v. Metabolite Labs., Inc.*, 444 F.3d 1356, 1363 (Fed.Cir. 2006); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). *See AFTG-TG, LLC v. Nuvoton Technology Corp.*, 689 F.3d 1358, 1360. The third prong is applied sparingly. *Nuance Commc’n, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1231 (Fed. Cir. 2010).

1. AS TO GENERAL PERSONAL JURISDICTION, SDH DID NOT ALLEGE IT, AND THE FACTUAL ALLEGATIONS DO NOT SUPPORT GENERAL JURISDICTION

SDH does not appear to assert general jurisdiction, as none of the parties to the case appear to have even an arguable physical presence in Oregon. Plaintiff SDH is a Washington

limited liability company, which has an address in Washington, and according to Washington Secretary of State documents, SDH's sole member, Flight Prep, is a Washington corporation, which has an address in Washington. In fact, both SDH and Flight Prep share the exact same address according to Washington state records. And, Defendant AOPA is a New Jersey corporation with its principal place of business in Frederick, Maryland. AOPA has no physical presence in Oregon, is not registered to conduct business in Oregon, and has no registered agents, employees, or sales representatives in Oregon. The sporadic contacts with Oregon that SDH cites in its Complaint (such as the fact that AOPA has members in Oregon) do not rise to the "continuous and systematic" contacts for general personal jurisdiction. *AFTG-TG, LLC v. Nuvoton Technology Corp.*, 689 F.3d 1358, 1360. Similarly, the sporadic contacts cited by SDH also certainly do not meet the high standard for general jurisdiction, which requires that the contacts of the parties in the forum have "approximate physical presence." *Tuazon*, 42 F.3d at 1169. Therefore, there are simply no sufficient continuous and systematic contacts for general jurisdiction here.

2. AS TO SPECIFIC PERSONAL JURISDICTION, SDH DOES ALLEGE IT, BUT THE FACTUAL ALLEGATIONS DO NOT SUPPORT SPECIFIC JURISDICTION

For specific jurisdiction, Plaintiff SDH has the burden to show that Defendant AOPA (1) purposefully directed its activities at residents of the forum and (2) the claim arises out of or relates to those activities. *Id.*; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

To support an allegation of specific jurisdiction under the first consideration (if AOPA purposefully directed its activities at residents of the forum), Paragraph 3 of SDH's Complaint alleges that AOPA "[1] solicits membership from citizens of Oregon, [2] has Oregon citizens who are members and also pay membership dues, [3] advertise to the citizens of Oregon, and [4]

provides services to citizens of Oregon and is available in this judicial district by means of a website www.aopa.org and reports on, lobbies for, and otherwise advocates positions on Oregon-based aviation and aircraft policy, issues, laws, rules, and regulations.” Taking these arguments in order, SDH’s allegations of patent infringement do not pertain to (1) solicitation of members, (2) payment of membership dues, (3) advertisements, or (4) advocating for pilots. Instead, SDH’s allegations are directed to the fact that AOPA provides members with a free internet tool, called FlyQ Web. Thus, the only allegation by SDH with any nexus to the accused activities pertain to the FlyQ Web that is accessible via the www.aopa.org website. So, the question regarding jurisdiction is whether offering a tool over the Internet satisfies specific jurisdiction.

Notably, the Federal Circuit has made clear that, for a website to be directed to the residents of a particular forum (and thus to satisfy the requirements for specific jurisdiction), there must be more than mere availability of the website to residents of the forum. *Trintec Ind. v. Pedre Promotional Products*, 395 F. 3d 1275, 1281 (Fed. Cir. 2005). In *Trintec*, the Federal Circuit found that there was no specific jurisdiction, because the website in question was available “to all customers throughout the country who have access to the internet.” *Id.*; *Videx, Inc. v. Micro Enhanced Technology, Inc.*, 2013 WL 1597380 (D. Or. May 4, 2012) (dismissing case for lack of personal jurisdiction because the website was “not specifically directed at customers in Oregon”); *Xactware, Inc. v. Symbility Solution Inc.*, 402 F.Supp.2d 1359, 1364 (D. Utah 2005) (dismissing case for lack of personal jurisdiction where “plaintiff asserts that defendant targeted Utah residents because Symbility’s website was interactive and had no constraints against Utah residents” and “plaintiff has presented no evidence which demonstrates that Symbility intentionally targeted Utah residents” and “at most, Utah residents simply were enabled to interact with Symbility’s website [but did not]” (internal citations omitted)).

Here, there is absolutely no basis to conclude the FlyQ Web tool available via AOPA's website is purposely directed to pilots in Oregon, so AOPA's website does not satisfy specific jurisdiction. The AOPA website, just like the website in *Trintec*, is available "to all customers throughout the country who have access to the internet" - there is no specific targeting of Oregon citizens. SDH argues that AOPA's website is somehow specific to Oregon because the FlyQ Web tool "utilizes Oregon maps, Oregon charts, and airports in Oregon."⁶ Complaint at ¶ 12. This argument strains credulity. The FlyQ Web tool uses FAA aviation charts from throughout the United States, and there is no focus on any particular location (state, location, or otherwise).

To support an allegation of specific jurisdiction under the second consideration (if the claim arises out of or relates to the accused activities), again, SDH only points to one thing - the AOPA website, which is insufficient for jurisdiction under *Trintec*. Moreover, SDH's legal premise is fatally flawed.⁷ All of the claims in the Asserted Patents are method claims, so every claim requires that the servers undertake certain actions. Notably, for a method patent, the patent infringement occurs where the allegedly infringing process is physically carried out, such as, in this case, on computer servers outside Oregon. *North Am. Philips Corp. v. American Vending Sales, Inc.*, 35 F. 3d 1576, 1578-79 (Fed. Cir. 1994); *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005). Thus, the alleged infringing activity, and any alleged injury, is

⁶ In the Complaint, SDH highlights that "Oregon pilots, interact with AOPA's on-line flight planning products by selecting desired waypoint and charting flight plans." Complaint at ¶ 16. However, this is irrelevant. Even if true, the issue is not whether a pilot from Oregon can access the FlyQ Web tool on the AOPA website, the issue is whether AOPA's website is *directed* at Oregon. *Trintec*, 395 F. 3d at 1281. SDH points to nothing directed only to Oregon.

⁷ In paragraph 17 of the Complaint, SDH alleges that Oregon pilots pay a fee to access and use AOPA's FlyQ Web tool. This is false. The FlyQ Web tool is available for free to all AOPA members, and a proper pre-filing investigation would have shown this simple fact.

outside Oregon and does not arise in and does not relate in any way to AOPA's limited contacts with Oregon. Therefore, Plaintiff has failed to show that either of the prongs of the Federal Circuit's specific jurisdiction test is met, and the case should be dismissed for lack of jurisdiction pursuant to Rule 12(b)(2).

As for the third consideration for specific jurisdiction (if the assertion of personal jurisdiction is reasonable and fair), it is clear that there is no basis for jurisdiction in Oregon.

C. THERE IS LACK OF VENUE UNDER RULE 12(B)(3)

Under 28 U.S.C. § 1400(b), venue is proper in (1) "the judicial district where the defendant resides," or (2) "where the defendant has committed acts of infringement and has a regular and established place of business." Under 28 U.S.C. § 1391(c), a defendant in a patent infringement suit resides where personal jurisdiction exists at the time of the suit. *See, VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990).

Indisputably, Defendant AOPA does not reside in Oregon, and therefore, there is absolutely no basis for SDH to claim venue in Oregon on the first consideration of § 1400(b). Also, indisputably, Defendant AOPA does not have a regular and established place of business in Oregon, and because the second consideration of § 1400(b) considers both "where the defendant has committed [alleged] acts of infringement" and "[where the defendant] has a regular and established place of business," there is also absolutely no basis for SDH to claim venue in Oregon under the second consideration, because AOPA has no "regular and established place of business" in Oregon. Thus, there simply appears to be no basis at all for venue in Oregon.

Under the first consideration for venue ("the judicial district where the defendant resides"), SDH generally alleges venue, but, as described above, AOPA is an out-of-state company with no ties to Oregon. AOPA is a New Jersey corporation with a headquarters and

main office in Frederick, Maryland. And, although AOPA has members in Oregon, AOPA has no physical presence in Oregon, is not registered to conduct business in Oregon, and has no registered agents, employees, or sales representatives in Oregon. Thus, venue is clearly improper in Oregon under the first prong of 28 U.S.C. § 1400(b) and 28 U.S.C. § 1391(c).

Under the second consideration for venue (“where the defendant has committed acts of infringement and has a regular and established place of business”), again, SDH generally alleges venue, but AOPA has no regular and established place of business in Oregon. AOPA is based in Frederick, Maryland and has no place of business in Oregon, let alone one that is “regular and established.” And, as to any alleged acts of infringement, as the Federal Circuit has stated, for a method claim (and all of the claims in the Asserted Patents are method claims), alleged patent infringement occurs where the allegedly infringing process is carried out and, as noted above, all of the servers for the accused FlyQ Web tool are located outside of Oregon. *See North Am. Philips Corp. v. American Vending Sales, Inc.*, 35 F. 3d 1576, 1578-79 (Fed. Cir. 1994); *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005). Thus, there is nothing to rebut that venue is also improper in Oregon under the second prong of 28 U.S.C. § 1400(b).

III. IF THE COURT DOES NOT DISMISS THIS CASE UNDER RULE 12, AOPA RESPECTFULLY REQUESTS TRANSFER OF THE CASE TO MARYLAND

In the preceding pages, AOPA has set forth at least three separate reasons why SDH’s Complaint should be dismissed under Rule 12(b), including (1) failure to state a claim upon which relief may be granted, per Rule 12(b)(6); (2) lack of personal jurisdiction, per Rule 12(b)(2), and (3) improper venue, per Rule 12(b)(3). Therefore, AOPA respectfully requests that this Court dismiss SDH’s flawed Complaint. But, if this Court declines to dismiss the SDH’s Complaint, alternatively, AOPA at least respectfully requests transfer of this case to Maryland.

Under 28 U.S.C. § 1404(a), “[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.” The Ninth Circuit law governs this motion to transfer. *In re EMC Corp.*, 677 F.3d 1351, 1354 (Fed. Cir. 2012). And, both the Ninth and Federal Circuits have enunciated the now well-known factors to be considered in deciding motions to transfer venue. *See In re Genentech Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145 (9th Cir. 2001) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) and *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990)).

In deciding motions to transfer venue, there are two groups of considerations (or two “prongs” in the analysis), the private interest prong factors and the public interest prong factors. *Lueck*, 236 F.3d at 1145. The factors of the private interests prong include: (1) the residence of the parties and witnesses, (2) the forum's convenience to the litigants, (3) access to physical evidence and other sources of proof, (4) whether unwilling witnesses can be compelled to testify, (5) the cost of bringing witnesses to trial, (6) the enforceability of the judgment, and (7) any practical problems or other factors that contribute to an efficient resolution. *Id.* at 1145. And, the public interest prong factors include: (1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum. *Id.* at 1147.

In the sections below, in analyzing each of these factors, it becomes clear that the balance of these factors very strongly favors the transfer of this case from Oregon to Maryland. Indeed, as set forth in the factual recitations sections of this motion (with the pertinent portions thereof copied below for reference), there is simply no reason for this case to remain in Oregon.

- Plaintiff SDH is an out-of-state company with no discernible ties to Oregon. According to the Complaint and the Washington Secretary of State Office, SDH is a Washington company. AOPA has found no ties to the Oregon jurisdiction.
- Plaintiff SDH states that “members of [SDH] are located in the State of Oregon” (Complaint at ¶ 6), but the Washington Secretary of State states that Flight Prep, SDH’s only listed member, is located at the same Washington address as SDH.
- Defendant AOPA is also an out-of-state company with no ties to Oregon. The AOPA is a New Jersey corporation with a headquarters and main office in Frederick, Maryland. AOPA has association members in Oregon, but AOPA has no physical presence in Oregon, is not registered to conduct business in Oregon, and has no registered agents, employees, or sales representatives in Oregon.
- Relevant Third-Parties are also out of state with no discernible ties to Oregon. Notably, AOPA has two suppliers for the accused technology: (1) Orases, a Maryland company, and (2) Seattle Avionics, a Washington company.
- Relevant AOPA documents are located out of state with no discernible ties to Oregon. AOPA documents regarding the accused FlyQ Web tool are located in Maryland, New Jersey, Virginia, or Washington (none are located in Oregon).
- Relevant AOPA witnesses are located out of state with no discernible ties to Oregon. AOPA witnesses regarding the accused FlyQ Web tool are located in Maryland, New Jersey, Virginia, or Washington (none are located in Oregon).
- Relevant AOPA servers are located out of state with no discernible ties to Oregon. Regarding the servers for the accused FlyQ Web tool, all are located in Virginia.

Thus, applying the considerations of 28 U.S.C. § 1404(a), both the public and private factors strongly weigh in favor of transferring this case to Maryland. The threshold question is whether venue is proper in the proposed transferee court, and if a patent infringement action “could have been brought ...” “where the defendant resides, or where the defendant has [allegedly] committed action of infringement and has a regular and established place of business.” 28 U.S.C.

§ 1400(b). Unquestionably, this case could have been filed in Maryland, where AOPA resides.

A. THE PRIVATE INTEREST FACTORS FAVOR TRANSFER TO MARYLAND

1. FACTOR 1: RESIDENCE OF PARTIES & WITNESSES (FAVORS TRANSFER TO MARYLAND)

The first private interest factor is the residence of the parties and witnesses, and this factor favors transfer to Maryland. Clearly, the residence of the parties is not Oregon: Plaintiff SDH is organized in Washington and has a Washington address, and Defendant AOPA is incorporated in New Jersey and has a principal place of business and headquarters in Maryland. As for witnesses, SDH has not identified witnesses, but, presumably, at least those witnesses of SDH that are associated with the alleged office in Washington will be in Washington, not Oregon. And, the AOPA has no witnesses in Oregon. Indeed, all of the relevant AOPA witnesses are located out of Oregon and have no discernible ties to Oregon. The majority of the AOPA witnesses would be found at AOPA's headquarters in Frederick, Maryland, where the majority of its employees work. As for known-third party witnesses, they would likely be located in Maryland or Washington (AOPA's suppliers), and none are known to be in Oregon. Therefore, with one possible exception, all of the likely witnesses (the SDH witnesses, the AOPA witnesses, and third-party witnesses) are located outside of Oregon. As for that one exception, the one alleged inventor mentioned in the Complaint appears to be located in Oregon, but the Federal Circuit has said that inventor testimony is of little weight in patent cases. *Roton Barrier, Inc. v. Stanley Works*, 79 F.3d 1112, 1126 (Fed. Cir. 1996). This factor *strongly* favors transfer to Maryland.

**2. FACTOR 2: FORUM’S CONVENIENCE TO LITIGANTS
(FAVORS TRANSFER TO MARYLAND)**

The second private interest factor is the forum’s convenience to the litigants, and this factor favors transfer to Maryland. SDH is located in Spokane, Washington, which requires a 350 mile, five plus hour, drive to Portland, while AOPA is located in Frederick, Maryland, which is more than 2000 miles from Oregon. Therefore, Oregon requires travel for both parties; significant travel for one and less travel for the other, while Maryland only requires travel for one party. *Gund v. Philbrook’s Boatyard*, 374 F. Supp. 2d 909, 913 (WD Wash. 2005) (finding that this factor weighs in favor of a defendant when plaintiff must travel to either forum). This factor slightly favors transfer to Maryland.

**3. FACTOR 3: ACCESS TO PHYSICAL EVIDENCE AND OTHER
SOURCES OF PROOF (FAVORS TRANSFER TO MARYLAND)**

The third private interest factor depends upon which forum provides more convenient access to physical evidence and other sources of proof, and this factor favors transfer to Maryland. The documents that describe the functionality of the accused technology (the FlyQ Web tool) are mostly located at AOPA’s headquarters in Maryland with some additional relevant documents possibly located with one of AOPA’s two suppliers, one of which is located in Maryland and other of which is located in Washington. But, none of the potentially relevant documents regarding the accused technology is known to be located in Oregon. In addition, the servers for the accused technology are located in Virginia, next door to Maryland. But, again, none of the servers for the accused technology are located in or anywhere near in Oregon. As for Plaintiff SDH, it is a NPE and is not expected to possess a significant number of documents, but if it did have any documents, they would presumably be located at SDH’s alleged office in Washington, not Oregon. Therefore, this factor *strongly* favors transfer to Maryland.

4. FACTOR 4: WHETHER UNWILLING WITNESSES CAN BE COMPELLED TO TESTIFY (FAVORS TRANSFER TO MARYLAND)

The fourth private interest factor is whether unwilling witnesses can be compelled to testify in the forum at issue, and this factor favors transfer to Maryland. The availability of compulsory process to secure witness attendance at trial weighs heavily in favor of transfer, when the proposed venue has “usable” subpoena power over the witness and the present venue does not. *See In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) (“The fact that the transferee venue is a venue with usable subpoena power . . . weighs in favor of transfer, and not only slightly.”). A federal court enjoys “usable” subpoena power to compel the attendance of a non-party witness when the witness is located within 100 miles of the courthouse. Fed. R. Civ. P. 45(c)(3)(B)(iii). Under such circumstances, a subpoena is generally not vulnerable to a motion to quash, and compulsory process is readily available. *See id.* Applying these considerations, this factor favors transfer to Maryland, at least based on the likely witnesses.

Because SDH is an NPE, it likely has few witnesses, making its location less important, but in contrast, almost all of the relevant witnesses for the AOPA will be located in Maryland. In fact, all of the relevant witnesses for the AOPA as well as witnesses for one of AOPA’s third-party suppliers, with knowledge about the accused FlyQ Web tool, are likely located in or within 100 miles of the District of Maryland (another AOPA supplier is in Washington). Thus, to the extent any AOPA supplier witnesses are not located within 100 miles of the courthouse in Maryland, they are certainly not within the subpoena power of the District of Oregon. As for other third-parties, SDH has identified one third-party witness, an alleged inventor in Oregon, but, as discussed above, inventor testimony is of little weight in patent cases. *Roton Barrier, Inc. v. Stanley Works*, 79 F.3d 1112, 1126 (Fed. Cir. 1996). This factor favors transfer to Maryland.

**5. FACTOR 5: THE COST OF BRINGING WITNESSES TO TRIAL
(FAVORS TRANSFER TO MARYLAND)**

The fifth private interest factor is the cost that witnesses must bear to attend trial, and this factor favors transfer to Maryland. The convenience and cost of attendance at trial, for willing witnesses, is typically “the single most important factor in transfer analysis.” *In re Genentech, Inc.*, 566 F.3d 1338, 1343. AOPA witnesses as well as some of the potentially-willing third-party witnesses with knowledge of the FlyQ Web tool, including at least one of AOPA’s suppliers, are located in Maryland. Therefore, travel time and costs will be significant if these witnesses are required to travel to Oregon, over 2000 miles from Maryland. Indeed, maintaining this case in Oregon would subject virtually all of AOPA’s witnesses to significant travel costs and lost time, as they would have to travel an entire day (in each direction), not to mention the three-hour time change from Eastern Time to Pacific Time. Due to these travel limitations, the cost of bringing all of these witnesses from the East Coast to the West Coast would be significant, in cost for airfare, the cost for hotel and food expenses, and the cost in lost time. Where “most witnesses and evidence [are] closer to the transferee venue” and “few or no convenience factors [favor] the venue chose by the plaintiff, the trial court should grant a motion to transfer.” *In re Nintendo Co. Ltd.*, 589 F.3d 1194, 1198 (Fed. Cir. 2009) (overturning the denial of motion to transfer). Therefore, this factor *strongly* favors transfer to Maryland.

**6. FACTOR 6: THE ENFORCEABILITY OF THE JUDGMENT
(FAVORS TRANSFER TO MARYLAND)**

The sixth factor is the ability of the court to enforce a judgment against the defendant. Although AOPA would certainly honor its obligations in any jurisdiction, the fact remains that a potential judgment would be more easily enforced in Maryland, where AOPA actually has

assets. AOPA has absolutely no assets in Oregon, not to mention any other type of connection to this forum (persons, property, or otherwise). Therefore, this factor favors transfer to Maryland.

7. FACTOR 7: ANY PRACTICAL PROBLEMS OR OTHER FACTORS THAT CONTRIBUTE TO AN EFFICIENT RESOLUTION (THERE ARE NO SUCH PROBLEMS)

The seventh factor is whether there are any practical or other factors that contribute to an efficient resolution of the case, and here, there are no known “practical problems” that preclude transfer to the District of Maryland. Indeed, the Maryland courts routinely handle patent infringement actions and have even instituted local patent rules to efficiently handle patent cases. Therefore, this factor is either neutral or slightly favors transfer from Oregon to Maryland.

B. THE PUBLIC INTEREST FACTORS FAVOR TRANSFER TO MARYLAND

1. FACTOR 1: LOCAL INTEREST IN THE LAWSUIT (FAVORS TRANSFER TO MARYLAND)

The first public interest factor is the local interest in the lawsuit, and this factor favors transfer to Maryland. AOPA’s headquarters are located in Maryland, and a large number of AOPA’s activities and operations are in Washington, DC and are related to developments pertaining to aircraft owners and pilots in Washington, DC. Thus, any final judgment in this case is likely to be of significantly more interest to those in and around Maryland (located adjacent to Washington, DC) than Oregon. By contrast, Plaintiff SDH, being a Washington-based NPE has no apparent connection to Oregon or local interests. Moreover, as an NPE, and not a competitor of AOPA, or even the manufacturer of the accused technology, SDH can hardly complain about local interests. SDH simply has no basis to assert any particular public interest in the final decision of this case, especially as to Oregon. Therefore, this factor *strongly* favors transfer to Maryland.

2. FACTOR 2: THE COURT’S FAMILIARITY WITH THE GOVERNING LAW (THIS FACTOR IS NEUTRAL)

The second public interest factor is the Court’s familiarity with the governing law, and this factor is neutral. The issues currently presented in the case are related to the federal laws regarding patents. Both Maryland and Oregon are familiar with these laws, and as discussed earlier, the Maryland courts routinely handle patent infringement cases and have even enacted local patent rules to efficiently handle cases such as this. Therefore, they are at least as qualified as the Oregon courts to handle patent infringement cases. Therefore, this factor is neutral.

3. FACTOR 3: THE BURDEN ON LOCAL COURTS AND JURIES (FAVORS TRANSFER TO MARYLAND)

The third public interest factor is the burden on the local courts and juries in deciding a case that is not related to the forum, and this factor favors Maryland. This Court generally, and Oregon jurors specifically, should not be inconvenienced and have to bear the burden and costs to hear a case that involves alleged acts and alleged injury that occurred over 2000 miles away. As discussed above, the allegations against AOPA are based on method claims in the Asserted Patents and the alleged acts of patent infringement occur, if anywhere, outside of Oregon, as none of the accused technology is located in Oregon. *North Am. Philips Corp. v. American Vending Sales, Inc.*, 35 F. 3d 1576, 1578-79 (finding that patent infringement occurs where the allegedly infringing act is physically carried out); *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1378-79 (Fed. Cir. 2007) (“[t]he law of this circuit is axiomatic that a method claim is directly infringed only if each step of the claimed method is performed”). Thus, as the alleged acts and alleged injury did not occur in Oregon, there is no need burden either a Oregon court or Oregon jurors with this case. Therefore, this factor *strongly* favors transfer to Maryland.

4. FACTOR 4: CONGESTION IN THE COURT (THIS FACTOR IS NEUTRAL)

The fourth public interest factor is the relative congestion of the forums under consideration, and this factor is neutral. The case loads in the Oregon and Maryland courts are similar, particularly with respect to patent cases. And, for those patent cases that go to trial, the current difference between the times to final disposition in Oregon and Maryland is very small, with Oregon at 2.38 years and Maryland at 2.75 years. Therefore, this factor is neutral.

5. FACTOR 5: COSTS OF RESOLVING A DISPUTE UNRELATED TO A PARTICULAR FORUM (FAVORS TRANSFER TO MARYLAND)

The fifth private interest factor is the cost of resolving a dispute unrelated to a particular forum, and this factor favors Maryland. This public interest consideration is very similar to the third public interest factor regarding the burden on the local courts and juries. And, just as the third factor favors transfer to Maryland, so does this fifth factor. After all, if this case were tried in Oregon, this Court and, more importantly, its citizens would have to bear the burden of resolving a dispute that is clearly centralized elsewhere. Again, this factor favors Maryland.

C. SDH, A WASHINGTON LIMITED LIABILITY COMPANY, FILED THIS LAWSUIT IN OREGON - PLAINTIFF'S CHOICE OF FORUM IS ENTITLED TO LITTLE WEIGHT IN DETERMINING THE APPROPRIATE FORUM

Of course, Plaintiff SDH did choose to file this case in Oregon, but that choice is given little weight, at least because SDH chose not to file in its home forum of Washington but in Oregon. The United States Supreme Court has made clear that a plaintiff's choice of form is given less weight when it fails to choose its home forum. *Sinochem Intern. v. Malaysia Intern. Shipping*, 127 S. Ct. 1184 1191 (2007). Taking all of the factors into consideration, the burden

on AOPA to defend this case in Oregon rather than Maryland clearly and greatly outweighs SDH's preference for Oregon, and if not dismissed, this case should be transferred to Maryland.

D. DEFENDANT'S LOCATION IS BEST FOR PATENT CASES; IF PLAINTIFF DOES NOT FILE THERE, TRANSFER IS PREFERRED

As a final consideration regarding AOPA's alternative request for transfer of this case from Oregon to Maryland, it is noted that, in general, the Federal Circuit has recognized that the defendant's forum is generally the best location for a patent case. Indeed, the Federal Circuit has explained: "In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant's documents are kept weights in favor of transfer to that location." *In re Nintendo Co. Ltd.*, 589 F.3d 1194, 1199 (Fed. Cir. 2009) (citing *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009)). Here, clearly, the bulk of the relevant evidence will come from AOPA, making Maryland the best forum.

IV. AOPA RESPECTFULLY REQUESTS DISMISSAL OR TRANSFER

SDH's Complaint is quite familiar in the current-day slew of patent cases, as it generally alleges patent infringement based merely on generalities and an inadequate factual investigation. For the reasons noted, above, the Complaint is fatally flawed in numerous ways, by (1) failing to state a claim upon which relief may be granted in violation of Rule 12(b)(6), by (2) failing to demonstrate jurisdiction in violation of Rule 12(b)(3), and by (3) failing to establish venue in violation of Rule 12(b)(4). For all of these reasons, the Complaint should be dismissed.

Alternatively, if the Court should decline to dismiss, then as an alternative AOPA respectfully requests that the Court transfer the case from Oregon to Maryland, the more appropriate forum.

And, as a final note, AOPA respectfully requests that the Court take into account the factual circumstances of SDH's lawsuit. For example, note that SDH is an NPE that only

recently organized in Washington that appears to have been formed with no purpose but to file patent lawsuits. And, SDH has only filed a lawsuit against one entity - the AOPA, an association of general aviation aircraft owners, pilots and enthusiasts, which provides the accused flight planning tool for free to its members. AOPA submits that, by filing a baseless lawsuit in Oregon, SDH is testing the limits of the system. Indeed, Chief Judge Randal Radar of the United States Court of Appeal for the Federal Circuit has lamented this type of behavior as the acts of a “patent troll” in the following way:

[Patent] trolls have an important strategic advantage over their adversaries: they don’t make anything. So in a patent lawsuit, they have far fewer documents to produce, fewer witnesses and a much smaller legal bill than a company that does make and sell something.

Because they don’t manufacture products, they need not fear a counterclaim for infringing some other patent. They need not be concerned with reputation in the marketplace or with their employees being distracted from business, since litigation is their business.

Trolls, moreover, often use lawyers to represent them on a contingent-fee basis (lawyers get paid only when they win), allowing trolls to defer significant legal costs that manufacturers, who generally must pay high hourly fees, cannot.

With huge advantages in cost and risk, trolls can afford to file patent-infringement lawsuits that have just a slim chance of success.

Rader, R. et al, Make Patent Trolls Pay in Court, available at:

<http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-court.html>. Given that the AOPA faces the same disparities here, in this dispute with SDH, an NPE with few witnesses, few documents, and a lawsuit with a slim chance of success, AOPA respectfully requests a dismissal of this case or at least transfer to Maryland.

Dated: October 7, 2013.

**OGLETREE, DEAKINS, NASH, SMOAK &
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 7th day of October, 2013, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system which will issue an electronic notification of filing to all counsel of record.

/s/ Leah C. Lively

Leah C. Lively

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