

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

DYNAMIC MESH NETWORKS, INC.  
D/B/A MESH DYNAMICS

Plaintiff,

v.

CISCO SYSTEMS, INC.

Defendant.

Civil Action No. 2:25-cv-781-JRG  
(LEAD CASE)

DYNAMIC MESH NETWORKS, INC.  
D/B/A MESH DYNAMICS

Plaintiff,

v.

CISCO SYSTEMS, INC.

Defendant.

Civil Action No. 2:25-cv-783-JRG  
(MEMBER CASE)

**DYNAMIC MESH NETWORKS INC.'S OPPOSITION TO  
CISCO SYSTEMS, INC.'S MOTION TO TRANSFER OR, IN THE  
ALTERNATIVE, STAY PURSUANT TO THE FIRST-TO-FILE RULE**

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## I. INTRODUCTION

This patent dispute belongs in this Court. Dynamic Mesh filed two cases, involving eight patents, to remedy Cisco's extensive willful infringement—including *direct infringement* occurring in this District at Cisco's sprawling Richardson campus. Those actions were filed in May and June but were dismissed on July 31 to correct what Dynamic Mesh in good faith believed were standing defects. Although Dynamic Mesh was clear about its intent to refile as soon as any defects were corrected (and told Cisco it would seek to keep the scheduled trial date and asked Cisco to maintain the produced confidential documents pending refile), Cisco rushed to California and filed a declaratory judgment action to secure its preferred venue within *minutes* of the dismissal papers being docketed. And because of its rushed and hasty filing, Cisco used its amendment as of right to file an Amended Complaint just minutes later. Cisco's filing is, on its face, a classic strategic anticipatory filing. Twelve days later, with the standing defects cured, Dynamic Mesh refiled the exact same cases in this Court to resume the cases it originally filed.

The current actions in this Court should continue for several reasons. Under the circumstances present here, the case in California should not be deemed the "first-filed." Cisco's lead argument as to why it had standing to bring its California case is that Dynamic Mesh actually *did own* seven of the asserted patents the whole time. If Cisco is right, the initial cases should be reopened based on mistake or the current cases should relate back to the original filings. And even if there was a period of days between filings when Dynamic Mesh did not own the patents, the current cases are a functional extension of the original cases. Cisco has all but admitted this. In the California action, pursuant to local rules, Dynamic Mesh explained why the current cases in Texas should be deemed "first-filed." Cisco waived its opportunity to file an opposition and never challenged this assertion. And now, apparently deferring to this Court, the California court has

delayed any hearing on the pending motion and a case management conference until 2026.

In addition, there are other compelling circumstances which counsel against application of the first-to-file rule. Cisco's race-to-the-courthouse was nothing other than a desire to anticipatorily secure a preferred venue and frustrate the natural plaintiff's chosen venue. And substantial infringing activity has occurred, and continues to occur, *within* this District. Cisco admitted its substantial presence here, including over 1600 employees at the very location where infringing activity occurs. The cases should proceed here and this Court should deny Cisco's motion.

## II. STATEMENT OF FACTS

On May 5, 2025, Dynamic Mesh filed its first complaint asserting that Cisco's wireless mesh networks and products infringed five patents, with detailed claim charts demonstrating the infringement. *Dynamic Mesh Networks, Inc. d/b/a MeshDynamics v. Cisco Systems, Inc.*, No. 2:25-CV-00472 (E.D. Tex. May 5, 2025), Dkt. 1 ("the -472 Action"). On June 6, 2025, Dynamic Mesh filed a second complaint asserting infringement of three additional patents, attaching detailed claim charts of infringement by Cisco's Webex and SD-WAN products. *Dynamic Mesh Networks, Inc. d/b/a MeshDynamics v. Cisco Systems, Inc.*, No. 2:25-CV-00606 (E.D. Tex. June 6, 2025), Dkt. 1 ("the -606 Action") (together with the -472 Action, "the Initial Actions").

On July 14, 2025, Cisco answered in the -472 Action and admitted that it has a significant presence in this District, including 1600 employees in its Richardson, Texas facility. -472 Action, Dkt. 27, ¶¶ 15-20. Cisco also asserted a standing defense. *Id.*, 52. The scheduling conference was held on July 18, and the case began to progress through Local Patent Rule disclosures, with Dynamic Mesh serving its **560**-page infringement contentions, charting infringement of multiple representative products for several claims from each asserted patent. *See* Dkt. 33-05, 191-749.<sup>1</sup>

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<sup>1</sup> Docket citations herein are to the docket number in the lead consolidated case, the -781 Action.

While reviewing documents for production, the existence of at least one standing deficiency was discovered. Ex. 1, ¶¶ 9-10. In good faith, Dynamic Mesh disclosed it to Cisco. On July 25, Dynamic Mesh sent Cisco an email stating that it was “in the process of curing *any* possible standing deficiency” and attached its proposed Rule 41(a)(2) motion to dismiss the -472 Action without prejudice. Dkt. 33-01, 1 (emphasis added); Ex. 2. That proposed motion noted Dynamic Mesh’s plan “to refile in this Court when the appropriate assignments can be confirmed” and requested to *maintain* the current trial date. *Id.* at 2, n.1. During the July 29 meet and confer, Dynamic Mesh confirmed it would file a notice of voluntary dismissal in the -606 Action. Ex. 1, ¶¶ 14-15. At Cisco’s request, the parties also discussed a proposed stipulation to dismiss the WebEx defendants from the -606 Action (unnecessary if refiling was not imminent). *See id.* Dynamic Mesh confirmed that the parties could revisit after the refiling. *Id.* And while Dynamic Mesh did not provide an exact date for refiling, it did not “refuse[] to answer.” Dkt. 33 (“Mot.”), 2. Rather, Dynamic Mesh responded that it was working on correcting the standing deficiencies “*every day.*” Ex. 1, ¶ 14. On July 30, Dynamic Mesh asked Cisco to maintain the confidential documents already produced as if under the protective order “*until we refile* the case.” Dkt. 33-02 (emphasis added). Dynamic Mesh therefore made it abundantly clear that it would refile in this Court imminently.

At 2:03pm ET and 2:07pm ET on July 31, 2025, Dynamic Mesh filed the negotiated stipulation of dismissal in the -472 Action and the voluntary dismissal in the -606 Action, with proposed orders. -472 Action, Dkt. 32; -606 Action, Dkt. 22. Within *minutes*, Cisco filed in California, seeking declaratory judgment of noninfringement of the patents asserted in the -472 Action. *Cisco Systems, Inc. v. Dynamic Mesh Networks, Inc. d/b/a MeshDynamics*, No. 5:25-cv-06441 (N.D. Cal. July 31, 2025), Dkt. 1 (“DJ Action”). Dkt. 33-05. Having rushed to file a complaint, Cisco used its amendment as of right to file an Amended Complaint minutes later to

add the patents from the -606 Action. *Id.*, Dkt. 5. In its haste, Cisco's Amended Complaint failed to plead a *single* fact about a *single* product to support noninfringement and did not address the Cisco accused products in the Initial Actions and contentions. *See id.* Cisco named Dynamic Mesh as a defendant even though Dynamic Mesh had, only minutes earlier, sought to dismiss its claims in this District because it lacked standing. Cisco also sued a long-dissolved Delaware entity (which it had to dismiss with prejudice under clear precedent) and the two inventors (one of which it later also dismissed with prejudice). *See* Dkt. 33-09; Dkt. 33-10.

On August 4, Judge Payne entered orders dismissing the Initial Actions without prejudice. Dkt. 33-14; Dkt. 33-11. On August 12, having corrected the standing deficiencies and as it told Cisco it would, Dynamic Mesh refiled the *exact* same complaints in the above captioned -781 Action (the refiled -472 Action) and -783 Action (the refiled -606 Action) (together, "the Current Actions"). Despite seeking a 30-day extension to respond, which this Court cut to 14 days, Cisco did not file any Rule 12 motion, but answered both Current Actions, again admitting its substantial presence in this District. *See* Dkt. 28; Dkt. 29, ¶¶ 15-20; Dkt. 30, ¶¶ 15-20.

On August 20, as required by California's Civil Local Rule 3-13, Dynamic Mesh filed a notice to inform the California court of the Current Actions involving the same patents-in-suit. *See* Ex. 3. Dynamic Mesh requested the California court transfer, stay, or dismiss the DJ Action because the Current Actions are the "first-filed": (1) in view of the earlier-filed and dismissed actions; (2) because Cisco's California filing was clearly anticipatory; and (3) Dynamic Mesh filed well-pleaded complaints in Texas, as opposed to Cisco's hastily filed and facially deficient DJ Action, which supported moving forward in Texas. *See id.* Cisco did *not* file an opposition.

On August 22, Dynamic Mesh (and defendant Mr. daCosta) filed a motion to dismiss the DJ Action on several grounds, including because Cisco lacked subject matter jurisdiction (as no

defendant had *any* exclusionary patent rights when the case was filed) and because Cisco's DJ Action is a classic anticipatory suit. *See* Dkt. 33-08. Cisco opposed and argued, *inter alia*, that Dynamic Mesh has owned seven of the asserted patents *all along* (including when the Initial Actions were filed). Dkt. 33-13, 10-14. That is, Cisco now argues that Dynamic Mesh was mistaken to dismiss its first-filed Texas cases, Dynamic Mesh had standing for at least seven of the patents (including all three in the -606 Action), and Cisco did not have a standing defense.<sup>2</sup>

The California court originally set the motion to dismiss hearing for October 22, 2025. *See* Dkt. 33-12. But Cisco's counsel double-booked that date and sought to move it. *See* DJ Action, Dkt. 55. Dynamic Mesh opposed an extension of more than a week and alerted the California court that Cisco would seek to further delay the Current Actions. Ex. 4, 1, n.3. On October 9, the hearing was reset for October 29. Dkt. 33-12. Cisco filed this motion on October 14. On October 24, the hearing was again reset for *two-and-a-half months* later, to January 14, 2026. DJ Action, Dkt. 63.

### III. LEGAL STANDARDS

The "first-to-file" rule exists to "avoid conflicting decisions and promote judicial efficiency." *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1299 (Fed. Cir. 2012); *see also Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) (the "first-to-file" rule's purpose is to support "comity and sound judicial administration" among the courts).

The first-to-file rule, however, "is not rigidly or mechanically applied—an ample degree of discretion... must be left to the lower courts." *Merial*, 681 F.3d at 1299. Exceptions may be made if justified by "considerations of judicial and litigant economy, and the just and effective

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<sup>2</sup> Cisco now claims that the inventors own U.S. Patent No. 11,368,537 (Dkt. 33-13, 8-10), despite filing an *inter partes* review naming Dynamic Mesh as the "Patent Owner" on August 8, 2025, just eight days after filing the declaratory judgment action. *See Cisco Systems, Inc. v. Dynamic Mesh Networks, Inc. d/b/a MeshDynamics*, IPR2025-01303, Paper No. 1, 1 (PTAB Aug. 8, 2025).

disposition of disputes.” *Elecs. for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1347 (Fed. Cir. 2005) (cleaned up); *see also Mobility Elecs., Inc. v. Am. Power Conversion Corp.*, 2007 U.S. Dist. LEXIS 117271, at \*7 (E.D. Tex. Oct. 10, 2007) (“application of the first-to-file rule” may be avoided by showing “compelling circumstances”). “[E]xceptions are not rare.” *Commc’ns Test Design, Inc. v. Contec, LLC*, 952 F.3d 1356, 1362 (Fed. Cir. 2020). One such exception is when the first action was an anticipatory suit and race to the courthouse. *See Elecs. for Imaging*, 394 F.3d at 1347-48; *see also Commc’ns Test Design*, 952 F.3d at 1362 (a district court may consider “a party’s intention to preempt another’s infringement suit”). Other factors include the convenience and availability of the witnesses. *See Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 938 (Fed. Cir. 1993).

Resolution of whether the second-filed action should proceed presents a question tied to patent law and is governed by Federal Circuit law. *Futurewei Techs., Inc. v. Acacia Rsch. Corp.*, 737 F.3d 704, 708 (Fed. Cir. 2013); *see also ContentGuard Holdings, Inc. v. Google, Inc.*, 2014 U.S. Dist. LEXIS 51676, at \*8 (E.D. Tex. Apr. 15, 2014).<sup>3</sup>

#### IV. ARGUMENT

##### A. Dynamic Mesh’s Current Actions in This Court Are the “First-Filed.”

There is no dispute that the Initial Actions in this Court were the original and earliest actions seeking to resolve Dynamic Mesh’s patent infringement claims. Although those actions were voluntarily dismissed for lack of standing, Dynamic Mesh filed the identical Current Actions in this Court just twelve days later. Under the facts present here, the Current Actions should relate

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<sup>3</sup> If Fifth Circuit law applies, the result would not change as the DJ Action is clearly anticipatory, and the convenience factors weigh against transfer. *See* Section IV.B. This Court must determine if there are “sufficiently compelling circumstances to avoid the first-filed rule’s application.” *Mann Mfg. v. Hortex, Inc.*, 439 F.2d 403, 407 (5th Cir. 1971); *see also LifeNet, Inc. v. U.S. HHS*, 617 F. Supp. 3d 547, 556 (E.D. Tex. 2022) (finding compelling circumstances counsel against transferring the case). The *Volkswagen* convenience factors can be utilized. *See Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602-03 (5th Cir. 1983).

back to the Initial Actions and be deemed the “first-filed” actions.

Cisco’s principal argument as to why there was standing to bring the California DJ Action is that Dynamic Mesh owned seven of the eight asserted patents all along—so, Dynamic Mesh did not need to dismiss the Initial Actions. *See* Dkt. 33-13, 10-14. If Cisco is right, there are compelling legal, procedural and equitable reasons to reopen the cases under Rule 60(b) and those reopened actions would indisputably be the “first-filed.” *See* Fed. R. Civ. P. 60(b) (allowing party to reopen case for, *inter alia*, “mistake, inadvertence, surprise, or excusable neglect”); *see also* Dkt. 33-07 (“If the Plaintiff wishes to reopen the case, it may amend its motion to so move.”). Had Dynamic Mesh not mistakenly dismissed the Initial Actions and instead asserted it had standing as Cisco argues, they would have been the “first-filed” cases,<sup>4</sup> and Cisco could not challenge that standing.

If Cisco is wrong, then it should have never sued Dynamic Mesh in California, the DJ Action will be dismissed, and, again, the cases here will be unquestionably the “first-filed.” Either way, Dynamic Mesh’s Texas cases are “first-filed” and Cisco should not win the race to the courthouse. This Court should hold Cisco to its arguments in California *now*, find Dynamic Mesh’s Texas cases are the “first filed,” and proceed with these cases without further delay.

And either way, the Current Actions should be deemed to relate back to the filing dates of the Initial Actions on May 5, 2025 (the -781 Action) and June 6, 2025 (the -783 Action). A claim is considered to have been “first-filed,” even if it was not chronologically filed first, when it relates back to a claim in an original complaint that *was* chronologically filed first. *See, e.g., Cave Man Kitchens, Inc. v. Caveman Foods, LLC*, 2019 U.S. Dist. LEXIS 140135, at \*10 (W.D. Wash. Aug. 19, 2019); *Activision Blizzard Inc. v. Acceleration Bay LLC*, 2016 U.S. Dist. LEXIS 119289, at

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<sup>4</sup> Cisco argues that “Dynamic Mesh does not dispute” that the DJ Action is the first-filed action. Mot., 5. But it does, as explained in its unopposed California Local Rule 3-13 Notice (Ex. 3), its Reply in support of the motion to dismiss, and here. *See* Ex. 5, 9-10.

\*11-13 (N.D. Cal. Sept. 1, 2016); *Adobe Systems Inc. v. Bargain Software Shop, LLC*, 2014 U.S. Dist. LEXIS 169710, at \*3-5 (N.D. Cal. Dec. 8, 2014). In each of these cases, a second-filed case was functionally “first-filed” when it was dismissed but later refiled.

In *Activision*, for instance, a standing issue was raised and, before the patentee could cure it and refile, Activision filed an anticipatory declaratory judgment action. 2016 U.S. Dist. LEXIS 119289, at \*11-13. In that case, the court found that because the patentee “met constitutional standing requirements” in the initially-filed actions, “did not introduce any new parties, patents, products, or claims” in the refiled cases, and the standing mistake was in good faith, the refiled cases functionally were equivalent to amendments of the original complaints and the relation back doctrine applied. *Id.* at \*14-15. Under similar facts in *Adobe*, the relation back doctrine applied to the refiled case even though the initial and refiled actions were not co-pending. *Adobe*, 2014 U.S. Dist. LEXIS 169710, at \*3-5; *see also Cave Man Kitchens*, 2019 U.S. Dist. LEXIS 140135, at \*10 (applying *Activision* and relation back doctrine where initial complaint dismissed before refiling).

Dynamic Mesh presented this “first-to-file” argument in its required California Local Rule 3-13 Notice. Ex. 3. There, Dynamic Mesh requested transfer, stay, or dismissal of the DJ Action, relying on *Activision* and *Adobe* in support of its position that the Current Actions are the “first-filed.” *Id.*, 3. Dynamic Mesh also argued that the Texas cases are “first-filed” in view of the “dictates of sound judicial administration” because Cisco filed a barebones, facially-deficient complaint to win the race to the courthouse, while Dynamic Mesh refiled well-pleaded complaints. *Id.* Cisco did not oppose, or even respond to, the notice. *See* NDCA L.R. 3-13(c) (providing Cisco the opportunity to file “a statement supporting or opposing the notice” within 14 days.). Cisco’s failure to oppose the statement provides the California court another basis to dismiss the DJ Action, NDCA L.R. 3-13(d) (assigned Judge “may make appropriate orders”), and Cisco waived any

challenge to application of the relation-back doctrine to the “first-to-file” rule based on *Activision* and *Adobe*. The Current Actions are the “first-filed” and this Court should deny Cisco’s motion.

**B. Exceptions to the “First-to-File” Rule Should Apply Here.**

Even if the Current Actions were viewed as “second-filed,” this Court should determine that the cases belong in Texas. As an initial matter, this Court has discretion to consider exceptions to the “first-to-file” rule. Cisco relies on Fifth Circuit law for the proposition that this Court has no discretion to analyze whether compelling circumstances exist. Mot., 7.<sup>5</sup> But Federal Circuit law guides the analysis here, and the “Federal Circuit now rejects any categorical rule that the first-filed court is always the appropriate court to determine which case should proceed in the context of patent infringement suits.” *Sanofi-Aventis Deutschland GmbH v. Novo Nordisk, Inc.*, 614 F. Supp. 2d 772, 775 (E.D. Tex. 2009) (citing *Micron Tech., Inc. v. MOSAID Techs., Inc.*, 518 F.3d 897 (Fed. Cir. 2008)); *see also Commc’ns Test Design*, 952 F.3d at 1362 (“[T]rial courts have discretion to make exceptions...and we have recognized that such exceptions are not rare.”).

**1. Cisco’s California DJ Action is a Classic Anticipatory Suit.**

The second-filed court may analyze whether the first-filed action was an anticipatory suit permitting an exception to the first-to-file rule. *See Sky Techs. LLC v. SAP AG*, 2007 U.S. Dist. LEXIS 101649, at \*10 (E.D. Tex. May 21, 2007) (second-filed court finding first-to-file rule “inapplicable to this case because [the first-filed cases] are anticipatory in nature”). “The basis for this exception is to avoid the circumstance where a plaintiff is deprived of its choice of forum simply because a defendant with notice of an imminent action filed suit first.” *Id.* at \*10-11.

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<sup>5</sup> See n.3. This Court’s decision in *Ramot* is inapplicable. *See Ramot at Tel Aviv Univ. Ltd. v. Cisco Sys.*, 2022 U.S. Dist. LEXIS 218602 (E.D. Tex. Dec. 5, 2022). There, the first-filed court denied Ramot’s motion to transfer. Here, the first-filed court has taken no action on Dynamic Mesh’s motion to dismiss and has further delayed action until at least January 2026. DJ Action, Dkt. 63.

Cisco's DJ Action is a classic anticipatory suit. Cisco filed it knowing Dynamic Mesh intended to refile as soon as the standing deficiencies were corrected. Dynamic Mesh had already filed two well-pleaded complaints in Texas (and, according to Cisco itself, was simply mistaken when it dismissed them). The imminency of refiling was apparent in the draft Rule 41(a)(2) motion Dynamic Mesh sent the *first day* it notified Cisco of the standing issue. Ex. 2. The motion noted the intention to refile and sought to *maintain* the scheduled trial date. *Id.* Cisco even proposed a stipulation regarding dismissal of two Webex entities after refiling, evincing its understanding refiling was imminent. Ex. 1, ¶¶ 14-15. Dynamic Mesh told Cisco it was working on the issue “*every day*” and asked Cisco to keep Dynamic Mesh's produced documents “until we refile.” *Id.*, ¶ 14; Dkt. 33-02. There was no uncertainty, only concrete indications that refiling was imminent.

Cisco ostensibly argues that Dynamic Mesh had to provide a time period within which it would refile, even though it was clear Dynamic Mesh would refile. Mot., 9; *see also id.*, 2 (“Cisco understood that Dynamic Mesh intended to sue Cisco at some point ...”). Not so. Cisco's knowledge of Dynamic Mesh's clear intent to refile is more than sufficient. *See Pontchartrain Partners, L.L.C. v. Tierra De Los Lagos, LLC*, 48 F.4th 603, 606 (5th Cir. 2022) (declaratory judgment action anticipatory because plaintiff knew of defendant's intent to refile). Cisco expressly acknowledged it expected the refiling—agreeing to dismissal without prejudice. *See Sally Holdings LLC v. Bd. Ams., Inc.*, 2023 U.S. Dist. LEXIS 118087, at \*11 (E.D. Tex. July 10, 2023) (“To determine whether a suit is anticipatory, courts scrutinize the parties' activities prior to [its] filing.”). If Cisco did not expect a refiling was imminent, it would not have sprinted to file a barebones California case and squander its amendment as of right just minutes later to add patents.

Cisco's cited case law does not require a different result. *Sherwin-Williams* states only the unremarkable proposition that filing a declaratory judgment action is “not *in itself* improper.” Mot.,

9 (quoting *Sherwin-Williams Co. v. Holmes Cnty.*, 343 F.3d 383, 391 (5th Cir 2003)). Of course not. It is the circumstances surrounding Cisco's filing of the DJ Action that make it anticipatory, not the filing itself. Cisco's reliance on *Harbor Freight* also misses the mark. Mot., 9. There, an infringer's declaratory judgment filing was reasonable after the patentee ***did not respond*** to an offer to discuss licensing ***for three months***. *Harbor Freight Tools USA, Inc. v. Champion Power Equip., Inc.*, 2025 U.S. Dist. LEXIS 48456, at \*8-10 (C.D. Cal. Feb. 13, 2025). Here, Cisco did not wait a ***single day*** (or for the Initial Actions to be administratively closed per District practice). Cisco knew Dynamic Mesh was working to correct standing "every day" and would refile soon. See Section II *infra*. Cisco was not in need of resolution, only a litigation advantage.<sup>6</sup>

And if Cisco was truly looking for certainty, filing in Texas would have been the logical choice since Cisco knew Dynamic Mesh intended to refile here and the cases were already proceeding here with a *Markman* and trial date. But Cisco raced to the California courthouse and filed declaratory relief solely for a perceived strategic advantage, whether it be slower time to trial (*see infra*) or simply to frustrate Dynamic Mesh's forum of choice. Cisco's improper anticipatory filing and transparent gamesmanship weighs in favor of proceeding here.

## **2. The Balance of Convenience Weighs in Favor of the Current Actions.**

A second-filed court can determine whether the balance of convenience weighs in favor of its forum as a part of the analysis. See *Micron*, 518 F.3d at 903-904 ("Instead of relying solely on

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<sup>6</sup> Cisco argues that California is the only place where the DJ Action could have been brought. Mot., 9. Not true. Cisco itself argues that Dynamic Mesh owns seven of the patents and it named Dynamic Mesh as Patent Owner of the eighth in its Patent Office filing. Cisco also (incorrectly) argues that Mr. daCosta and Dynamic Mesh are one in the same in the DJ action under an "alter ego" theory. See Dkt. 33-13, 12-14. If Cisco believed that, it could have sued here since Dynamic Mesh (under Cisco's theory, Mr. daCosta) consented to jurisdiction by filing the Initial Actions. As noted *supra*, Cisco dismissed the other defendants with prejudice and has not argued that either had any exclusionary rights in the patents-in-suit.

[other] considerations... or automatically going with the first filed action, the more appropriate analysis takes account of the [§ 1404(a)] convenience factors.”). Both private and public interest factors are considered, “none of which are given dispositive weight individually.” *Sanofi*, 614 F. Supp. 2d at 776 (citing *In re Volkswagen*, 545 F.3d 304, 315 (5th Cir. 2008)). The private interest factors are: (1) relative ease of access to proof; (2) “availability of compulsory process to secure the attendance of witnesses;” (3) “cost of attendance for willing witnesses;” and (4) “all other practical problems that make trial of a case easy, expeditious, and inexpensive.” *Sanofi*, 614 F. Supp. 2d at 776.<sup>7</sup> The only non-neutral public interest factor is “the administrative difficulties caused by court congestion.”<sup>8</sup> *Id.* Here, the balance of factors weighs against transfer given Cisco’s admitted presence, its infringing activity, and its regular appearances, within this District.

***Relative ease of access to proof.*** Dynamic Mesh expects the parties will continue to produce documents electronically in this case as was ongoing in the Initial Actions. Dynamic Mesh made its source code available on the East Coast, and Cisco will make its source code available for review on the East Coast where both parties’ lead counsel are located.

Cisco emphasizes the ties of the inventors and certain witnesses from years ago to the Northern District of California but does not address that Dynamic Mesh has made clear accusations against Cisco for recent ***and*** continuing patent infringement in this District. *See Datamize, Inc. v. Fid. Brokerage Servs., LLC*, 2004 U.S. Dist. LEXIS 29100, at \*24-25 (E.D. Tex. Apr. 22, 2004) (rejecting transfer where there were “clear accusations against Defendants in the present action for

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<sup>7</sup> The Fifth Circuit does not give weight to the plaintiff’s choice of forum as a separate factor, but it is considered as the Fifth Circuit places a significant burden on the movant to show good cause for the transfer. *See In re Volkswagen*, 545 F.3d at 315. But Cisco did not address any of the factors.

<sup>8</sup> Since this is a patent case, the public interest factors of familiarity with the law and avoidance of conflict of laws issues are neutral. *Sanofi*, 614 F. Supp. 2d at 781. Both districts have an interest in the case given the Cisco employees in this District and in California, so, that factor is also neutral.

patent infringement in this District”). Dynamic Mesh’s contentions identified Cisco’s significant presence in Richardson, Texas, including *specific acts of direct infringement* at those facilities, including with respect to Cisco’s mesh network and its Meraki cloud-based mesh network. Dkt. 33-05, 204, 251, 286, 339, 365, 424; Ex. 1, ¶¶ 32, 35. Dynamic Mesh will inspect those premises and question the involved employees. The first private interest factor *weighs against transfer*.

*Availability of witnesses.* Dynamic Mesh is founded and owned by Mr. Francis daCosta, with no additional employees that could be witnesses in California. Cisco, as it admitted, maintains a large office in Richardson, Texas with approximately 1600 employees and regularly conducts business here. *See, e.g.*, Dkt. 29, ¶¶ 15-20. Several of those employees work on the accused mesh technology. Ex. 1, ¶¶ 31-36. And employees knowledgeable about Cisco’s direct infringement in Texas (described *supra*) are also located here. Other employees with relevant knowledge about Webex are located on the East Coast, closer to this District. *Id.*, ¶ 37. Given the number of relevant witnesses in this District, the second and third private interest factors *weigh against transfer*.

As to any non-party witnesses, none were identified as unwilling to testify in Texas.<sup>9</sup> Even so, Cisco can offer no reason “why their testimony could not be obtained via discovery mechanisms,” *Plexxikon Inc. v. Novartis Pharms. Corp.*, 2017 U.S. Dist. LEXIS 201984, at \*10-11 (N.D. Cal. Dec. 7, 2017), or whether they would be unwilling to testify at trial. *R2 Sols. LLC v. Databricks Inc.*, 2024 U.S. Dist. LEXIS 217380, at \*11-12 (E.D. Tex. Dec. 2, 2024) (finding factor neutral without indication of witness willingness). The fact that the parties were already proceeding with litigation in this District in the Initial Actions also demonstrates that the private interest factors weigh against transfer. Cisco admitted it brings cases in this District as a patentee (Dkt. 29, ¶ 19;

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<sup>9</sup> Dynamic Mesh has confirmed that Mr. daCosta will be an available witness for trial in Texas.

Dkt. 30, ¶ 19). Cisco also frequently defends against infringement actions here, without filing motions to transfer to California. There is no reason that this case should not proceed in Texas.

***Time to trial.*** The only non-neutral public interest factor *weighs against transfer* and in favor of this District since time to trial here is 8 months faster than in California.<sup>10</sup> Because the California court has put off all case activities until 2026, that differential may be even greater.

Cisco does not address these factors or the balance of the convenience in its motion, which favors keeping the cases in this District and supporting denial of Cisco’s motion.<sup>11</sup>

### **3. Cisco’s Actions Confirm It Filed the DJ Action in Bad Faith.**

Cisco argues that because “there were no ongoing settlement negotiations or other indicia of bad faith litigation,” the exception does not apply. Mot., 9-10. To the extent relevant to the analysis here, Cisco’s actions demonstrate bad faith. Dynamic Mesh, in good faith, told Cisco it lacked standing to maintain the Initial Actions and dismissed them to fix the issue; yet Cisco filed a case against Dynamic Mesh the *same day*. Cisco knew it did *not* have standing to sue Dynamic Mesh; yet it did so to defeat Dynamic Mesh’s choice of forum. Dynamic Mesh provided Cisco with a draft motion to dismiss, informing the Court that the Initial Actions would be refiled and requesting the Court keep the February 2027 trial date. Ex. 2, 3. Instead of letting Dynamic Mesh file that motion (as it would have if it knew Cisco’s real intentions), Cisco feigned agreeability and stipulated to dismissal *without* prejudice, concealing its plan to race to the courthouse in California to preempt the refiling that the stipulation was intended to ensure. *All* these actions are bad faith.

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<sup>10</sup> See Table T-3, Federal Judicial Caseload Statistics, at <https://www.uscourts.gov/data-news/data-tables/2025/03/31/federal-judicial-caseload-statistics/t-3>, last accessed on Oct. 28, 2025.

<sup>11</sup> Cisco should not be permitted to address the factors in its reply. *Wantou v. Wal-Mart Stores Tex.*, 2020 U.S. Dist. LEXIS 147595, at \*47 (E.D. Tex. Mar. 12, 2020) (“It is black-letter law that arguments raised for the first time in a reply brief are waived...”).

Cisco's attempt to shift blame for its bad faith to Dynamic Mesh because "it was *Dynamic Mesh*, not Cisco, that chose to dismiss the '472 and '606 Actions" (Mot., 10 (emphasis in original)) is disingenuous. Dynamic Mesh dismissed the Initial Actions in good faith, consistent with its ethical obligations, when it (mistakenly, according to Cisco) discovered possible standing defects. Dynamic Mesh was upfront and straightforward with Cisco and did not allow the cases to proceed but worked on fixing the issue. Cisco's ill-informed anticipatory filing was its *own* choice.

Nor is Cisco's reliance on *Quest Medical* availing. Mot., 10 (citing *Quest Med., Inc. v. Acclarent, Inc.*, 2006 U.S. Dist. LEXIS 96826 (E.D. Tex. Oct. 24, 2006)). There, patentee's case was dismissed after it failed to serve the complaint within the 120-day limit. The Court held patentee's "failure to pursue its claims or serve process... does not translate into bad faith on" the infringer's part. *Id.* at \*5. Here, Dynamic Mesh did not delay. It has consistently and vigorously pursued its claims and informed Cisco in good faith it would refile as soon as the standing issues were corrected. Here, Cisco cannot blame its bad faith actions on anybody but itself.

**C. The Current Actions At Most Should be Stayed and Not Transferred.**

If the Court finds that the Current Actions are not "first-filed" and no exception to the general "first-to-file" rule applies, the threshold jurisdictional issue pending in the DJ Action cannot be ignored. Since it is unclear whether the California court has subject matter jurisdiction or will exercise its double-dose of discretion to decline declaratory judgment jurisdiction, these circumstances counsel against transfer. *See Traxxas, L.P. v. Sunny Days Entm't, LLC*, 2018 U.S. Dist. LEXIS 236433, at \*3-4 (E.D. Tex. May 29, 2018). The California court has several routes that lead to dismissal of the DJ Action and, as a result, these cases at most should be stayed.

**V. CONCLUSION**

For all of these reasons, Cisco's motion to transfer should be denied, or at most, the Current Actions should be stayed.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on October 28, 2025.

*/s/ Elizabeth Bernard*