IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MEKIKI CO., LTD., a Japan corporation and MEKIKI CREATES CO., LTD., a Japan corporation, Plaintiffs, v. FACEBOOK, INC., a Delaware corporation, Defendant.	)	C.A. No. 09-745 (JAP)

PLAINTIFFS MEKIKI CO., LTD.'S AND MEKIKI CREATES CO., LTD.'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANT FACEBOOK INC.'S MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a)

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NATURE AND STAGE OF THE PROCEEDINGS

On October 7, 2009, Plaintiffs Mekiki Co., Ltd. and Mekiki Creates Co., Ltd. (collectively, "Mekiki") sued Defendant Facebook, Inc. ("Facebook") for infringement of two patents. On December 28, 2009, Facebook filed its answer and counterclaims against Mekiki seeking declarations of non-infringement and patent invalidity.

On February 12, 2010, Mekiki asked to schedule the initial conference of counsel required by Federal Rule of Civil Procedure 26(f). Facebook refused.

On February 26, 2010, Mekiki reiterated its request to schedule the parties' Rule 26(f) conference and sent Mekiki various discovery requests in an effort to move the case forward. Facebook did not respond.

On April 7, 2010—six months after the case was filed and one day after the Court scheduled the initial case management conference for May 17, 2010—Facebook sent a letter warning of its intent to move to transfer the case to the Northern District of California unless Mekiki agreed to stipulate to transfer within twenty-four hours. Mekiki responded that same day, asking Facebook to explain the basis for its transfer argument.

On April 9, 2010, in apparent response to Mekiki's request for information, Facebook filed its pending transfer motion.

SUMMARY OF ARGUMENT

1. Facebook has failed to carry its burden to show that transfer is warranted. The sum total of Facebook's "evidence" are unsupported assertions of a Facebook paralegal and Facebook's outside counsel claiming Facebook's lack of connection to Delaware, unidentified "sources of proof," unnamed "material witnesses," and undisclosed "potentially invalidating prior art." These declarations are neither admissible nor competent evidence as they contain no foundation for any of these assertions. Moreover, even with these declarations, Facebook's failure to identify any specific witnesses who would be inconvenienced or unavailable for trial in Delaware, or any specific documents that would be unavailable for trial in Delaware, is fatal to its motion.

2. Moreover, despite Facebook's protestations to the contrary, it is settled Third Circuit law that a plaintiff's choice of forum is the paramount consideration in the Court's analysis of a transfer motion under 28 U.S.C. Section 1404(a). Mekiki's choice to sue in Delaware—Facebook's state of incorporation—should not be disturbed on the gossamer-thin and legally insufficient showing presented here.

3. Facebook's argument that this Court should disregard Mekiki's choice of forum because Mekiki is a foreign plaintiff contradicts Third Circuit precedent. It is well-settled that a foreign plaintiff's choice of forum is entitled to the *same* substantial deference afforded a plaintiff suing in its home forum whenever a legitimate reason exists supporting plaintiff's chosen forum. On this basis, Facebook's incorporation in Delaware is sufficient to justify Mekiki's choice. Add to that Facebook's equivocation about its contacts with Delaware, its supplying of accused Facebook services to hundreds of thousands of Delaware customers, and its other ongoing Delaware patent infringement litigation, and it is clear that genuine reasons exist for Mekiki to have filed this case in Delaware. Under Third Circuit law, Mekiki's choice of Delaware for this litigation should not be disturbed.

4. Facebook has similarly failed to show that other private and public factors outweigh Mekiki's choice of forum and "strongly favor" transfer. Facebook has provided essentially no admissible evidence bearing on these factors, and what little evidence is before the Court (including a complete absence of any showing of possible unavailability of witnesses and documentary evidence at trial, and Facebook's voluntary decision to avail itself of the benefits of Delaware incorporation) demonstrates that nearly all of these factors universally weigh against transfer.

5. Finally, Facebook cannot align itself with the facts presented in *QinetiQ Limited v. Oclaro, Inc.*, Civil Action No. 09-372, 2009 WL 5173705 (D. Del. Dec. 18, 2009). Unlike the *QinetiQ* defendant, Facebook has offered no evidence regarding availability of witnesses at trial, nor can it argue that its corporate size and reach resembles that of the small defendant in *QinetiQ*, whose actions were confined largely to the Northern District of California. On the

contrary, as an enormous worldwide company with offices throughout the United States and abroad, Facebook supplies its infringing products and services to hundreds of thousands of Delaware users and over 400 million users worldwide. Given Facebook's inadequate evidentiary showing and indisputably different circumstances, there is simply no basis for comparison between the present case and the *QinetiQ* decision.

STATEMENT OF FACTS

Facebook's State of Incorporation and Delaware Registered Agent

On July 29, 2004, Facebook incorporated in Delaware.[1] Facebook has remained a Delaware corporation since that time. Additionally, Facebook's registered agent for purposes of service of process within Delaware is: Corporation Service Company; 2711 Centreville Road, Suite 400; Wilmington, DE 19808.[2]

Facebook's Other Litigation in Delaware

Facebook has been a defendant in two other recently filed District of Delaware patent infringement actions: (1) *Leader Technologies, Inc. v. Facebook, Inc.*, Civil Action No. 08-862, filed November 19, 2008 (D. Del.) ("*Leader* Action")[3] and (2) *WhoGlue, Inc. v. Facebook, Inc.*, Civil Action No. 09-705, filed September 21, 2009 (D. Del.) ("*WhoGlue* Action").[4]

According to the docket, Facebook is actively litigating the *Leader* Action and never moved to transfer venue at any point during the seventeen months that the case has been pending. Facebook continues to be engaged in extensive discovery and motion practice, including no fewer than: (1) service of four sets of requests for production, two sets of requests

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[1] *See* Declaration of Eric J. Bakewell ("Bakewell Decl."), filed concurrently herewith, at Ex. 1 (Del. Dep't of State, Div. of Corps. Website Report regarding Facebook, Inc.).

[2] *See id.*

[3] *See generally* Bakewell Decl., at Ex. 2 (*Leader* Action Docket).

[4] *See generally* Bakewell Decl., at Ex. 3 (*WhoGlue* Action Docket).

for admission, and six sets of interrogatories;[5] (2) filing of two motions to compel;[6] (3) service of five third-party subpoenas issued from districts outside of Delaware (including two subpoenas from the United States District Court for the Northern District of California);[7] (4) attendance at five in-person conferences or hearings in Delaware;[8] and (5) participation in nine telephonic conferences or hearings.[9] Additionally, Facebook has the same Delaware and California counsel in the present action as it has in the *Leader* Action.[10]

The patent infringement claims against Facebook in the *WhoGlue* Action were dismissed without prejudice on March 2, 2010, after the case had been pending for over five months, without any motion to transfer from Facebook.[11] The plaintiff was a Maryland corporation.[12] Before dismissal, Facebook filed an answer and asserted counterclaims for non-infringement and invalidity.[13] As with the *Leader* Action, the Delaware and California counsel representing Facebook in the *WhoGlue* Action also represents Facebook in the present action.[14]

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[5] *See* Bakewell Decl., at Ex. 2 (Leader Action Docket, at D.I. 17, 29, 81, 116, 117, 135, 136).

[6] *See id*. (Leader Action Docket, at D.I. 38, 54)

[7] *See id*. (Leader Action Docket, at D.I. 64 (N.D. Cal. Subpoena to Autonomy, Inc.; N.D. Cal. Subpoena to Interwoven, Inc.), 89 (D. Conn. Subpoena to Xerox Corp.), 199 (Subpoena to David Desser), 240 (S.D.N.Y. Subpoena to N.W. Patent Funding Corp.))

[8] *See id*. (Leader Action Docket, at Mar. 3, 2009 Minute Entry; Mar. 31, 2009 Minute Entry; May 28, 2009 Minute Entry; Jan. 20, 2010 Minute Entry; Mar. 12, 2010 Minute Entry).

[9] *See id*. (Leader Action Docket, at July 14, 2009 Minute Entry; Aug. 20, 2009 Minute Entry; Sept. 4, 2009 Minute Entry; Oct. 23, 2009 Minute Entry; Nov. 13, 2009 Minute Entry; Nov. 30, 2009 Minute Entry; Dec. 23, 2009 Minute Entry; Feb. 16, 2010 Minute Entry; Apr. 9, 2010 Minute Entry)

[10] *See id*. (Leader Action Docket, at 1-2)

[11] *See generally* Bakewell Decl., at Ex. 3 (*WhoGlue* Action Docket).

[12] *See* Bakewell Decl., at Ex. 4 (*WhoGlue* Complaint for Patent Infringement, filed Sept. 21, 2009, at ¶ 2).

[13] *See* Bakewell Decl., at Ex. 3 (*WhoGlue* Action Docket, at D.I. 8).

[14] *See id*. (*WhoGlue* Action Docket, at 1-2).

Facebook's Contacts With Delaware

Recent statistics show that there are roughly 200,000 users of Facebook's services and products in Delaware.[15] Among the more prominent Delaware customers to whom Facebook supplies its infringing products and services are: (1) the State of Delaware;[16] (2) Delaware Governor Jack Markell;[17] (3) the Delaware Tourism Office;[18] (4) the Delaware National Guard;[19] (4) the Delaware Public Archives;[20] (5) the Department of Elections for New Castle County;[21] (6) the University of Delaware;[22] and (7) numerous other governmental, educational, and private entities located in Delaware.[23]

Facebook's Presence Outside of the Northern District of California

In addition to its Palo Alto, California office, Facebook has eight other offices in the United States and ten offices outside of the United States. The other United States offices are located in: (1) Atlanta, Georgia; (2) Austin, Texas; (3) Chicago, Illinois; (4) Dallas, Texas; (5) Detroit, Michigan; (6) Los Angeles, California; (7) New York, New York; and (8)

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[15] *See generally* Bakewell Decl., at Ex. 5 ("Facebook in Delaware," published by Facebakers.com).

[16] *See* Bakewell Decl., at Ex. 6 (Official State of Delaware Facebook Page).

[17] *See* Bakewell Decl., at Ex. 7 (Delaware Governor Jack Markell's Facebook page).

[18] *See* Bakewell Decl., at Ex. 8 (Delaware Tourism Office's Facebook page).

[19] *See* Bakewell Decl., at Ex. 9 (Delaware National Guard's Facebook page).

[20] *See* Bakewell Decl., at Ex. 10 (Delaware Public Archives' Facebook page).

[21] *See* Bakewell Decl., at Ex. 11 (Department of Elections for New Castle County's Facebook page).

[22] *See* Bakewell Decl., at Ex. 12 (University of Delaware's Facebook page).

[23] *See, e.g.*, Bakewell Decl., at Exs. 13 (Delaware Office of Minority and Women Business Enterprise's Facebook page), 14 (Official Delaware National Estuarine Research Reserve Facebook page), 15 (Delaware Blue Hens' Facebook page), 16 (John Dickinson Plantation's Facebook page), 17 (Johnson Victrola Museum's Facebook page), 18 (New Castle Court House Museum's Facebook page), 19 (Old State House's Facebook page), 20 (Zwaanendael Museum's Facebook page).

Washington, District of Columbia.[24] The foreign offices are located in: (1) Dublin, Ireland; (2) Hamburg, Germany; (3) Milan, Italy; (4) London, United Kingdom; (5) Madrid, Spain; (6) Paris, France; (7) Stockholm, Sweden; (8) Sydney, Australia; (9) Tokyo, Japan; and (10) Toronto, Canada.[25]

According to Facebook, it has over 400 million active users worldwide. Approximately 70% of Facebook's users are outside the United States.[26] Additionally, "[t]here are more than 200 mobile operators in 60 countries working to deploy and promote Facebook mobile products."[27]

Facebook's Conduct in This Litigation

On February 12, 2010, after Facebook had served its answer and counterclaims, Mekiki suggested that the parties schedule the initial conference of counsel required by Federal Rule of Civil Procedure 26(f).[28] In its February 16, 2010 letter, Facebook refused to schedule the conference and stated that it preferred to wait for the Court to set a date for the initial case management conference.[29]

On February 26, 2010, Mekiki reiterated its request to schedule the parties' Rule 26(f) conference.[30] Additionally, Mekiki provided its first set of requests for production, its first set of interrogatories, and a stipulated protective order in an attempt to further the parties' discussions

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[24] *See* Bakewell Decl., at Ex. 21 (Facebook's Careers page).

[25] *See id.*

[26] *See* Bakewell Decl., at Ex. 22 (Facebook's Statistics page).

[27] *See id.*

[28] *See* Bakewell Decl., at Ex. 23 (Feb. 12, 2010 Letter from Joseph Paunovich to Heidi Keefe).

[29] *See* Bakewell Decl., at Ex. 24 (Feb. 16, 2010 Letter from Heidi Keefe to Joseph Paunovich).

[30] *See* Bakewell Decl., at Ex. 25 (Feb. 26, 2010 Letter from Joseph Paunovich to Heidi Keefe).

prior to the official Rule 26(f) conference.[31] Facebook did not respond to this request, and made no attempts to contact Mekiki to discuss this case.

On April 6, 2010, this Court set an initial status conference for this case. The next day, Facebook sent a letter demanding for the first time that Mekiki agree within 24 hours to stipulate to transfer this case to the Northern District of California.[32] Mekiki sent a responsive letter on April 7, 2010, refusing to stipulate to transfer and requesting further discussions regarding Facebook support for its transfer request.[33] Instead of engaging in any substantive discussion of the facts or law supporting transfer, Facebook sent a letter on April 8, 2010 reiterating its transfer request and threatening to move to transfer the next day unless Mekiki agreed to the transfer request.[34]

On April 9, 2010, Facebook filed its motion to transfer. In response, Mekiki sent Facebook requests for admissions, requests for production, interrogatories, and deposition notices on April 13, 2010 focused on the alleged facts and conclusions set forth in Facebook's motion to transfer and supporting papers, and other facts pertinent to a transfer motion.[35] During

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[31] *See* Bakewell Decl., at Exs. 26 (Mekiki's First Set of Requests for Production of Documents and Things to Facebook, Inc., dated Feb. 26, 2010), 27 (Mekiki's First Set of Interrogatories to Facebook, Inc., dated Feb. 26, 2010), 28 (Mekiki's draft Stipulated Protective Order, provided to Facebook on Feb. 26, 2010).

[32] *See* Bakewell Decl., at Ex. 29 (Apr. 7, 2010 Letter from Reuben Chen to Joseph Paunovich).

[33] *See* Bakewell Decl., at Ex. 30 (Apr. 7, 2010 Letter from Joseph Paunovich to Reuben Chen).

[34] *See* Bakewell Decl., at Ex. 31 (Apr. 8, 2010 Letter from Reuben Chen to Joseph Paunovich).

[35] *See* Bakewell Decl., at Exs. 32 (Apr. 13, 2010 Letter from Eric Bakewell to Reuben Chen), 33 (Mekiki's Second Set of Requests for Production of Documents and Things to Facebook, Inc., dated Apr. 13, 2010), 34 (Mekiki's First Set of Special Interrogatories to Facebook, Inc., dated Apr. 13, 2010), 35 (Mekiki's First Set of Requests for Admission to Facebook, Inc., dated Apr. 13, 2010), 36 (Mekiki's Notice of Deposition of Michelle Cunanan, dated Apr. 13, 2010), 37 (Mekiki's Notice of Deposition of Reuben Chen, dated Apr. 13, 2010), 38 (Mekiki's Notice of Deposition of Facebook, Inc., dated Apr. 13, 2010).

the subsequent meet and confer on April 16, 2010, Facebook stated it did not believe that Mekiki was entitled to any discovery, and so would not provide the requested discovery, or make witnesses available for deposition.[36] In lieu of discovery responses or depositions, Facebook offered to provide a very limited amount of information on some unspecified date.[37] The parties exchanged letters regarding transfer-related discovery on April 16 and 18, but Facebook refused to provide any discovery responses or documents unless Mekiki agreed to a series of unacceptable conditions including staying the entire litigation during the pendency of the transfer motion.[38]

In light of Facebook's refusal to accommodate any of Mekiki's discovery requests, and because neither the facts nor law support granting Facebook's Motion to Transfer, Mekiki decided not to pursue the transfer-related discovery at this time.[39]

Facebook's Failure To Identify Any Actual Witnesses or Evidence

With its motion, Facebook submitted unsupported, conclusory declarations from a Facebook in-house paralegal, Michelle Cunanan, and from its outside counsel, Reuben Chen.

Ms. Cunanan's declaration asserted that: (1) "All of Facebook's sources of proof and known witnesses relevant to this action are located in the Northern District of California"[40] and (2) "Other than being incorporated in Delaware, Facebook has no connection to the District of Delaware, and is aware of no witnesses, documents or other evidence located there."[41]

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[36] *See* Bakewell Decl., at ¶¶ 2-3.

[37] *See id.* at ¶ 3.

[38] *See* Bakewell Decl., at Exs. 39 (Apr. 16, 2010 Letter from Eric Bakewell to Reuben Chen), 40 (Apr. 16, 2010 Letter from Adam Pivovar to Mekiki's Counsel), 41 (Apr. 18, 2010 Letter from Adam Pivovar to Mekiki's Counsel).

[39] *See* Bakewell Decl., at Ex. 42 (Apr. 19, 2010 Letter from Eric Bakewell to Adam Pivovar).

[40] Declaration of Michelle Cunanan, ("Cunanan Decl."), filed with Facebook's Motion to Transfer, at ¶ 3.

[41] Cunanan Decl., at ¶ 4.

Mr. Chen's declaration claimed that nine individuals and five companies located in various California cities "have been identified as authors, inventors, owners, or custodians of potentially invalidating prior art."[42] Mr. Chen's declaration is silent as to the details of any of this prior art. When asked about this list during the parties' April 16, 2010 meet and confer regarding transfer-related discovery, Facebook conceded that: (1) Mr. Chen's list did not include all of the individuals and companies Facebook had identified as "authors, inventors, owners, or custodians of potentially invalidating prior art"; and (2) one or more of the omitted individuals and companies are located outside of California.[43] During that same meet and confer, Facebook refused to identify any of the unnamed, supposedly invalidating prior art, or explain why it believed any prior art invalidated any of the claims of the patents, claiming that this information was attorney-client privileged and protected work product.[44]

Two weeks later, on April 23, 2010, in an apparent attempt to shore up broadly worded inaccuracies in her original declaration, Facebook filed a supplemental declaration for Ms. Cunanan.[45] In this declaration, Ms. Cunanan repeats her assertion that "other than being incorporated in Delaware, Facebook has no connection to the District of Delaware."[46] The additions to her declaration appear designed to further the misimpression that Facebook has no employees or other business dealings in Delaware. For example, Ms. Cunanan reworded her original sworn statement to dance around the truth of whether Facebook does business, or has employees or other personnel, in Delaware by stating (with no foundation) that: (1) "Facebook has no connection to the District of Delaware *relevant to this case*; (2) "[Facebook] is not aware

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[42] Declaration of Reuben Chen ("Chen Decl."), filed with Facebook's Motion to Transfer, at ¶ 8.

[43] *See* Bakewell Decl., at ¶ 4.

[44] *See* Bakewell Decl., at ¶ 5.

[45] *See generally* Supplemental Declaration of Michelle Cunanan, ("Supp. Cunanan Decl."), filed Apr. 23, 2010, at ¶ 4; *see also* Bakewell Decl., at Ex. 43 (Apr. 23, 2010 Letter from Adam Pivovar to Eric Bakewell).

[46] Supp. Cunanan Decl., at ¶ 4.

of any *Facebook employee*-witnesses; and (3) "[Facebook is not aware of] other *Facebook* evidence *relevant to this case* located there."[47] Additionally, Ms. Cunanan still failed to identify a single witness or piece of evidence that Facebook intends to rely on in this litigation, or to explain how any witness or documents would be unavailable for trial in the District of Delaware.

ARGUMENT

I. FACEBOOK'S INCOMPLETE AND MISLEADING FACTUAL SUBMISSIONS DO NOT SATISFY ITS EVIDENTIARY BURDEN TO DEMONSTRATE THAT TRANSFER IS WARRANTED

Facebook, as the moving party, bears "[t]he burden of establishing the need for transfer." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). Carrying that burden of proof requires sufficient, competent evidence demonstrating that transfer from the plaintiff's preferred and proper forum is warranted. It is axiomatic that evidentiary showings falling short of this mark—either because they rely on inadequately supported evidence, or fail to bear directly on the relevant transfer factors—are insufficient to carry this burden. *See Joint Stock Soc'y v. Heublein*, 936 F. Supp. 177, 187 (D. Del. 1996) (noting that: (1) a transfer request will be rejected if a defendant fails to "show . . . that the overall balance strongly favors a transfer" and (2) a defendant always "must prove that the convenience of the parties and witnesses and the interest of justice strongly favor a transfer"). Despite taking two bites at the apple, Facebook's "evidence" falls woefully short of satisfying Facebook's burden for showing that transfer is warranted or needed.

A. Ms. Cunanan's Insufficient Declaration Submitted With The Motion

Ms. Cunanan's original declaration amounts to nothing more than a "just trust me" declaration claiming that Facebook has "no connection" to Delaware other than being incorporated here (which, of course, is a key fact in the transfer analysis), that no "relevant" evidence is located in Delaware, and that undefined "relevant" evidence is located in the Northern District of California.

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[47] Supp. Cunanan Decl., at ¶ 4. (emphasis added).

As an initial matter, Paragraphs 3 and 4 of Ms. Cunanan's declaration should be disregarded in their entirety because there is no evidence that Ms. Cunanan has personal knowledge of the statements made in these paragraphs. Under Federal Rule of Evidence 602(a), a witness may not "testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Nowhere in Ms. Cunanan's declaration does she explain the factual basis for these conclusory assertions or explain the basis for her purported knowledge of these "facts."

Even if Ms. Cunanan's declaration were admissible, it omits essential facts relevant to show transfer is warranted or needed. Specifically, Ms. Cunanan fails to: (1) identify any witnesses by name (much less witnesses who have relevant information); (2) identify any specific documents (much less relevant documents); (3) explain how any Facebook witnesses or Facebook documents would be unavailable for trial in the District of Delaware; (4) identify any documents or information she relied on for her conclusory statements; or (5) explain how she, in her role as a Facebook in-house paralegal, was able to determine what evidence would be "relevant." *See Jumara*, 55 F.3d at 879 (noting that witness inconvenience and document unavailability are only concerned with unavailability at trial); *Stored Value Solutions, Inc. v. Card Activation Techs.*, Civil Action No. 09-495, 2009 WL 4016158, at *2 (D. Del. Nov. 20, 2009) (holding that failure to establish that witnesses were unable or unwilling to testify at trial in Delaware weighed against transfer finding); *Acuity Brands, Inc. v. Cooper Indus., Inc.*, C.A. No. 07-444, 2008 WL 2977464, at *2 (D. Del. July 31, 2008) (observing that party witnesses are presumed to be able to testify at trial); *Nice Sys., Inc. v. Witness Sys., Inc.*, No. CIV A 06-311, 2006 WL 2946179, at *2 (D. Del. Oct. 12, 2006) (noting that employee witnesses are not part of a transfer analysis). Indeed, the notion that Ms. Cunanan can determine what is "relevant" evidence when the case is in its preliminary stages, no documents or discovery responses have been exchanged, no hearings have been held, and no motions other than Facebook's motion to transfer have been filed, is facially unsupportable.

B. Mr. Chen's Insufficient Declaration Submitted With The Motion

Likewise, Mr. Chen's conclusory assertion that nine individuals and five entities purportedly "have been identified as authors, inventors, owners or custodians of *potentially* invalidating prior art" cannot satisfy Facebook's burden to show that transfer is warranted or needed.

Similar to Ms. Cunanan's original declaration, Paragraph 8 of Mr. Chen's declaration should be disregarded in its entirety because the declaration contains no foundation and no evidence showing his personal knowledge for the statements made in this paragraph. *See* Fed. R. Evid. 602(a) (precluding testimony unless there is evidence showing that the witness has personal knowledge of facts). Indeed, the competency issue is even more severe for Mr. Chen than Ms. Cunanan because Facebook has flatly refused on the basis of privilege to provide any of the information bearing on Mr. Chen's competence to make these statements about the prior art, denying both Mekiki and the Court of any opportunity to probe or evaluate the factual basis for these assertions.

Additionally, Mr. Chen's declaration is misleading because while it suggests that all of the "potentially" invalidating prior art is located in California, Facebook has recently conceded that this is not true. Specifically, Facebook admitted during a telephone conversation subsequent to filing its motion that it effectively "cherry picked" only California residents from its unnamed prior art, intentionally omitting names of other *non-California residents* associated with Facebook's purported prior art. This lack of candidness with the Court should, by itself, be sufficient reason to deny its motion.

Moreover, Mr. Chen's declaration also fails to articulate any reasons showing that transfer is needed or warranted. Specifically, with respect to Paragraph 8 of his declaration, Mr. Chen fails to: (1) name any prior art publication or system on which Facebook intends to rely; (2) explain how any prior art relates to (let alone invalidates) any claims of the patents-in-suit; (3) specify the particular relationship (author, inventor, owner or custodian) that anyone named on the list bears to this unnamed prior art; (4) explain how any person or documents will

be unavailable for trial in the District of Delaware; (5) identify the expected areas of testimony from any witnesses on which Facebook intends to rely; or (6) identify any documents or information he relied on for his conclusory statements. All of these omissions are highly relevant to Facebook's transfer request. *See Jumara*, 55 F.3d at 879 (stating that inconvenience of witnesses and location of evidence is only relevant to transfer analysis insofar as the witnesses and documents are unavailable for trial in Delaware); *Stored Value Solutions*, 2009 WL 4016158, at *2 (holding that no showing of witness unavailability for trial in Delaware weighed against transfer); *Alcoa Inc. v. Alcan Inc.*, Civ. No. 06-451, 2007 WL 1948821, at *4 (D. Del. July 2, 2007) (denying transfer when defendants specifically identified twelve potential non-party witnesses but only offered affidavits from four of the witnesses stating that they were unwilling to travel to Delaware for trial).

Despite Mr. Chen's presumed reliance on unidentified materials and information in making his prior art representations to the Court, Facebook refused to provide Mekiki with any of the materials or information underlying Mr. Chen's conclusory assertions, claiming protection under the attorney-client and/or attorney work product privilege.[48]

C. Ms. Cunanan's Insufficient and Misleading Supplemental Declaration

During the parties' April 13 telephone conference, Mekiki advised Facebook that both declarations submitted with its motion were deficient.[49] In an apparent attempt to "fix" the shortcomings in its evidence, Ms. Cunanan submitted a supplemental declaration.[50]

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[48] *See* Bakewell Decl., at ¶ 5.

[49] *See* Bakewell Decl., at ¶ 6.

[50] Facebook filed Ms. Cunanan's supplemental declaration one business day before Mekiki's opposition brief was due, without seeking permission from Mekiki and without offering to modify the briefing schedule for Mekiki's opposition. Mekiki is unaware of any court rule permitting late submission of a supplemental declaration in support of an already-filed motion without first: (1) seeking Mekiki's consent; (2) obtaining the Court's permission; or (3) withdrawing the motion and attempting to re-file it with the supplemental declaration. More importantly, Facebook has not identified any court rule or authority that permits this approach.

(footnote continued)

As with her earlier declaration, Ms. Cunanan's supplemental declaration contains no evidence showing her personal knowledge of any of the matters asserted in the declaration and should, therefore, be disregarded in its entirety. *See* Fed. R. Evid. 602(a) (requiring a witness to have personal knowledge). Ms. Cunanan's supplemental declaration states only that she has "been advised and understand[s]" a variety of issues relating to Facebook's connections with Delaware, the technology relevant to this litigation, and the location of Facebook evidence and witnesses. Because she omits any explanation of how she was advised or came to any of these understandings, this additional testimony is also without sufficient foundation.

Moreover, this new declaration suffers from the same deficiencies as the original declaration. For example, Ms. Cunanan now contends that the only things within the control of Facebook that are "relevant" to this action are the equipment, employees, and documents related to the operation of Facebook's Friends and Networks technologies."[51] Ms. Cunanan does not explain how knows that "Facebook's Friends and Networks technologies" is the only Facebook product or service "relevant" to this action, or how she determined what "equipment, employees, and documents" are "relevant to this action." Additionally, she fails to name a single witness or describe a single document, or explain how it would be inconvenient or impossible to bring any Facebook witnesses or documents to trial in the District of Delaware. *See Jumara*, 55 F.3d at 879 (observing that witness inconvenience and document unavailability are only relevant for trial purposes); *Stored Value Solutions*, 2009 WL 4016158, at *2 (D. Del. Nov. 20, 2009) (rejecting transfer based on witness unavailability when there was no showing that witnesses were unavailable for trial in Delaware); *Nice Sys.*, 2006 WL 2946179, at *2 (finding that party witness inconvenience is irrelevant to transfer analysis because party witnesses are presumed available to testify at trial).

As a result, the Court should ignore the Supplemental Cunanan Declaration in its entirety as procedurally improper.

[51] Supp. Cunanan Decl., at ¶ 3.

Not only does Ms. Cunanan's supplemental declaration fail to support transfer, its suggestion that Facebook has Delaware employees strongly weighs in favor of keeping the case in this forum. In place of her earlier assertion that "Facebook has no connection to the District of Delaware," Ms. Cunanan instead carefully states that "Facebook has no offices or *technical* employees in Delaware and is not aware of any Facebook *employee-witnesses*, Facebook documents, or other Facebook evidence relevant to this case located there."[52] Reading between the lines of her new statement, it is clear that Facebook does have employees in Delaware, and therefore, contrary to her earlier statement, Facebook does have a connection to Delaware other than being incorporated there.

That Facebook, in its apparent rush to file its motion, submitted and relied upon mistaken statements in Ms. Cunanan's original declaration is reason enough to deny this motion. Ms. Cunanan's strategically worded re-characterization of Facebook's Delaware connections strongly suggests that Facebook has Delaware employees that it did not want to bring to the Court's attention. Obviously, any Facebook employees located in Delaware with information relevant to this litigation would weigh in favor of keeping this case in Delaware.

D. Facebook's Evidence Is Insufficient To Support Transfer

Taken together, Facebook cannot carry its burden under 28 U.S.C. Section 1404(a) based on these three declarations. Facebook has not cited to any court within the Third Circuit that granted transfer on such a paltry evidentiary showing, and this Court should resist any temptation to be the first.[53]

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[52] Supp. Cunanan Decl., at ¶ 4.

[53] The holes in Facebook's evidence prompted Mekiki to consider seeking routine discovery relevant to the transfer analysis. *See, e.g., GJN Advisors, Inc. v. Woolrich, Inc.*, No. 3:09CV338, 2009 WL 1992965, at *1 (D. Conn. July 9, 2009) (noting that the parties conducted discovery relating to motion to transfer); *Casana Furniture Co., Ltd. v. Coaster Co. of Am.*, No. 1:08CV744, 2009 WL 783399, at *3-4 (M.D.N.C. Mar. 24, 2009) (denying motion to transfer without prejudice until after discovery because witness and document had not yet been determined); *Prell v. Columbia Sussex Corp.*, Civil No. 07-CV-2189, 2007 WL 3119852, at *1

(footnote continued)

II. MEKIKI'S FORUM CHOICE IS THE PARAMOUNT CONSIDERATION AND SHOULD NOT BE DISTURBED

A. Plaintiff's Choice Of Forum Is Accorded Substantial Deference

Facebook's request to transfer this litigation to the Northern District of California appears to be premised on two theories: (1) Facebook's only connection to Delaware is that it incorporated here;[54] and (2) it would be more convenient for the parties and potential witnesses to litigate in the Northern District of California.[55] However, in addition to basing these arguments on mischaracterizations and unsupported conclusory assertions, Facebook ignores the key consideration in analyzing a transfer request: *plaintiff's choice of forum.*

It is black letter law that plaintiff's choice of forum is the "paramount consideration" in determining whether to transfer a case under Section 1404(a). *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d 1970) (stating that "[i]t is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice . . . should not be lightly disturbed."); *see Jumara*, 55 F.3d at 879 (identifying "plaintiff's forum preference as manifested in the original choice" as important factor to consider in analysis of transfer motion). As a result, "a transfer is not to be liberally granted." *Shutte*, 431 F.2d at 25.

(E.D. Pa. Oct. 27, 2007) (observing that initial discovery was completed before filing a transfer motion). Mekiki sought discovery regarding Facebook's Delaware users, Facebook's contacts with Delaware, information regarding the "potentially invalidating prior art" and "known" proof, the factual basis for the assertions in the Cunanan and Chen declarations, and Facebook's other litigation in Delaware.

Facebook resisted providing any of the discovery, stating its belief that Mekiki was not entitled to any discovery on this motion. Based on Mekiki's steadfast belief that Facebook's motion as filed did not adequately justify transfer, Mekiki decided to forego transfer-related discovery at this time. Having now refused to provide the transfer-related discovery, Facebook should not be allowed to fill the gaps in its thin evidentiary showing (as it attempted to do with its last minute supplemental Cunanan declaration). Indeed, allowing Facebook to submit new evidence on reply would be inconsistent with the District of Delaware Local Rules that provide that "[t]he party filing the opening brief shall not reserve material for the reply brief which should have been included in a full and fair opening brief." D. Del. LR. 7.1.3(c)(2).

[54] *See* Opening Br. at 3-4, 12-13.

[55] *See* Opening Br. at 7-11.

Every district court within the Third Circuit follows the settled law that elevates plaintiff's choice of forum to the "paramount consideration" in ruling on Section 1404(a) transfer motions.[56] Pursuant to this line of Third Circuit precedent, Mekiki's choice of forum should not be disturbed.

B. Mekiki's Forum Choice Is Entitled To Substantial Deference Because It Had A Legitimate Reason To Sue In The District Of Delaware

Facebook erroneously disregards clear Third Circuit law when it argues that Mekiki's choice of forum "is entitled to little, if any, weight in the transfer analysis" because Mekiki is a foreign plaintiff and the District of Delaware is not Mekiki's home forum.[57]

A foreign plaintiff's choice of forum is entitled to the same substantial deference given to a plaintiff who sues in its home forum if the foreign plaintiff selected the forum "for some legitimate reason." *See Mallinckrodt Inc.*, 670 F. Supp. 2d at 356 ("[Foreign] Plaintiffs' decision

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[56] *See, e.g.*, *Mallinckrodt Inc. v. E-Z EM Inc.*, 670 F. Supp. 2d 349, 356 (D. Del. 2009) ("Generally, a plaintiff's choice of forum is entitled to 'paramount consideration' and should not lightly be disturbed."); *Am. Envtl. Servs., Inc. v. Metalworking Lubricants Co.*, 634 F. Supp. 2d 568, 574 (W.D. Pa. 2009) ("Typically, a plaintiff's choice of venue is entitled to deference and should not be lightly disturbed."); *Nihon Tsushin Kabushki Kaisha v. Davidson*, 595 F. Supp. 2d 363, 371 (D. Del. 2009) (noting that "plaintiff's choice of forum is entitled to substantial deference"); *Benjamin v. Esso Standard Oil Co.*, 2009 WL 2601439, at *4 (D.V.I. Aug. 18, 2009) ("Considering factors of private interest in determining the equities of a motion to transfer, the Court acknowledges that a plaintiff's choice of forum is generally given deference."); *Samsung SDI Co., Ltd. v. Matsushita Elec. Indus. Co.*, 524 F. Supp. 2d 628, 631 (W.D. Pa. 2006) ("Ordinarily, a plaintiff's choice of forum is accorded great weight."); *Nat'l Prop. Investors VII v. Shell Oil Co.*, 917 F. Supp. 324, 327 (D.N.J. 1995) ("As a general matter, plaintiff's choice of forum is given great weight in the Section 1404(a) analysis."); *Long v. Quality Computers & Applications*, 860 F. Supp. 191, 194 (M.D. Pa. 1994) ("It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request and that choice . . . [and] should not be lightly disturbed."); *Schwarzkopf Techs. Corp. v. Ingersoll Cutting Tool Co.*, 820 F. Supp. 150, 151 (D. Del. 1992) (observing that "plaintiff's choice of a proper forum is a paramount consideration" and "should not be lightly disturbed"); *Leonard Da Vinci's Horse, Inc. v. O'Brien*, 761 F. Supp. 1222, 1229-30 (E.D. Pa. 1991) ("An additional factor is plaintiff's choice of forum, which is entitled to great weight, and will rarely be disturbed . . . when one or more of the parties reside in, or the operative facts occurred in, the district selected by the plaintiff.").

[57] *See* Opening Br. at 11-12.

to litigate in Delaware is still accorded significant deference because Plaintiffs' choice of Delaware relates to their legitimate, rational concerns"); *Medtronic, Inc. v. Boston Scientific Corp.*, 587 F. Supp. 2d 648, 654 (D. Del. 2008) (noting that a foreign plaintiff's choice of forum is entitled to the deference normally given to a plaintiff's choice of forum "as long as [plaintiff] has selected the forum for some legitimate reason"); *Boston Scientific Corp. v. Johnson & Johnson*, 532 F. Supp. 2d 648, 654 (D. Del. 2008) ("The deference afforded plaintiff's choice of forum will apply so long as [a foreign] plaintiff has selected the forum for some legitimate reason.").

Facebook's meaningful presence in Delaware—including incorporating there, litigating there, enabling its infringing services and products for use there, and otherwise not being burdened in any significant way by litigating in Delaware—presents numerous "legitimate reasons" for Mekiki to sue in Delaware. As Facebook acknowledges, a primary reason Mekiki sued Facebook in Delaware is that Facebook is incorporated in Delaware.[58] Choosing to sue a Delaware corporation in Delaware is a legitimate reason to select Delaware as a forum.[59] *See Personalized User Model LLP v. Google, Inc.*, Civil Action No. 09-525, 2009 WL 3460767, at *3 (D. Del. Oct. 27, 2009) (denying Google's motion to transfer to the Northern District of California because "Google is incorporated and a resident of Delaware" and "cannot complain that it is unfair or unreasonable to be sued in its home state"). Other legitimate reasons for suing Facebook in Delaware include: (1) Facebook's acceptance of Delaware as a proper venue in this action; (2) Facebook's acceptance of Delaware as a proper venue in the *Leader* Action and the *WhoGlue* Action without ever moving to transfer; (3) the hundreds of thousands of Facebook

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[58] *See* Opening Br. at 12 ("The only apparent connection this matter has to the District of Delaware is that Facebook is incorporated there.").

[59] Facebook cites a variety of cases for the proposition that a defendant's incorporation in Delaware will not, by itself, prevent transfer. *See* Opening Br. at 12. None of these cases stand for the proposition that the Court should *disregard* Facebook's Delaware incorporation in its transfer analysis, nor do these cases change the fact that Facebook's Delaware incorporation is a legitimate reason for Mekiki to have sued in Delaware.

users present in Delaware who are making use of Facebook's infringing products and services; (4) Facebook's nationwide and worldwide presence that includes over 400 million users, eight domestic offices outside of the Northern District of California, and ten offices outside of the United States; and (5) Mekiki's desire not to litigate on Facebook's "home turf."

Because of the numerous legitimate reasons for selecting the District of Delaware as the forum for this litigation, Mekiki's choice of forum is entitled to substantial deference and should not be lightly disturbed.

C. Mekiki's Forum Choice Is Always The Paramount Consideration

Even disregarding Mekiki's many legitimate reasons for suing Facebook in Delaware, Mekiki's forum choice would still be entitled to substantial deference and would remain the "paramount consideration" in determining whether transfer was appropriate. *See Medtronic*, 587 F. Supp. 2d at 654-55 (noting that a foreign plaintiff's "choice of forum is still of paramount consideration" even if transfer is considered less inconvenient for a foreign plaintiff); *Boston Scientific*, 532 F. Supp. 2d at 654 (observing that choice of forum "is still of paramount consideration" when deciding a motion to transfer involving a foreign plaintiff); *see also SAS of P.R., Inc. v. P.R. Tel. Co.*, 833 F. Supp. 450, 452 (D. Del. 1993) (stating that "the burden remains at all times on the defendants to show that the balance of convenience and the interests of justice weigh strongly in favor of transfer" even when "the plaintiff has not chosen its home turf"). Facebook has failed to present evidence sufficient to overcome the substantial deference afforded Mekiki's choice of Delaware as the venue for this litigation.

III. FACEBOOK CANNOT SHOW THAT THE BALANCE OF THE OTHER TRANSFER FACTORS STRONGLY FAVORS TRANSFER

A. A Transfer Motion Will Only Be Granted If Private Or Public Interests Other Than Plaintiff's Choice Of Forum Strongly Favor Transfer

Because of the substantial deference given to plaintiff's choice of forum, transfer will not be granted absent a showing that the other factors relevant to transfer "strongly favor" transfer. *See, e.g., Nihon*, 595 F. Supp. 2d at 371 ("[T]he burden is on the movant to establish that the balance of the interests weighs strongly in favor of the requested transfer."); *L'Athene, Inc. v.*

Earthspring LLC, 570 F. Supp. 2d 588, 592 (D. Del. 2008) ("[A] defendant has the burden of establishing that the balance of convenience of the parties and witnesses strongly favors transfer."); *Boston Scientific*, 532 F. Supp. 2d at 654 (noting that the balance of factors must "strongly" favor transfer before a transfer request is granted).

These other factors can be categorized as "private" interest factors and "public" interest factors. The "private" interest factors include:

- "[T]he convenience of the parties as indicated by their relative physical and financial condition;"
- "[T]he convenience of the witnesses—but only to the extent that witnesses may actually be unavailable for trial in one of the fora;"
- "[T]he location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum);"
- "[W]hether the claim arose elsewhere;" and
- "[T]he defendant's preference."

Jumara, 55 F.3d at 879. The "public" interest factors include:

- "[T]he relative administrative difficulty in the two for a resulting from court congestion;"
- "[T]he local interest in deciding local controversies at home;"
- "[P]ractical considerations that could make the trial easy, expeditious, or inexpensive;"
- "[T]he public policies of the fora;"
- "[T]he enforceability of the judgment;" and
- "[T]he familiarity of the trial judge with the applicable state law in diversity cases."

Id.

Instead of analyzing all of these private and public interest factors, Facebook's motion only focuses on a few selected factors. Consideration of all of the factors demonstrates that the balance of factors do not strongly favor transfer.

B. The Private Interest Factors Do Not Strongly Favor Transfer

1. There Is No Inconvenience To The Parties If This Case Is Litigated In Delaware—As Indicated By The Parties' Relative Physical And Financial Condition

When evaluating the inconvenience factor, each party's overall physical and financial condition is relevant. Facebook misstates the proper analysis, arguing that transfer is warranted because litigating in California will purportedly be less expensive.[60] Even if Facebook had submitted evidence in support of this assertion (which it did not), the potential expense of the litigation is not relevant to the analysis of this factor.

In the Third Circuit, "[l]arge . . . international corporations . . . will not suffer meaningful financial hardship if required to litigate in Delaware." *Magsil Corp. v. Seagate Tech.*, No. 08-940, 2009 WL 1259043, at *1 (D. Del. Apr. 30, 2009). This is especially true when a company has previously litigated against other companies in Delaware, as Facebook has done. *Id.*; *see Boston Scientific*, 532 F. Supp. 2d at 655 (declining to transfer a case, in part, because "both parties are large corporations who have litigated in Delaware previously"). Similarly, a corporation is deemed to have sufficient resources to defend against a lawsuit in Delaware when it has the resources to support employees and products in multiple countries. *See Autodesk Canada Co. v. Assimilate, Inc.*, No. 08-587, 2009 WL 3151026, at *8 (D. Del. Sept. 29, 2009) (finding there to be no financial burden in declining a transfer request by a Delaware corporation when the corporation has the resources "to support sales efforts in multiple countries").

As a "large international corporation" similar to the defendants denied transfer in the *Magsil* litigation, Facebook will not be inconvenienced, relative to its physical and financial condition, by litigating in Delaware. Additionally, like the *Magsil* plaintiffs, Facebook has actively litigated other cases in Delaware including the *Leader* Action and the *WhoGlue* Action where Facebook asserted patent counterclaims and never moved to transfer. Moreover,

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[60] *See* Opening Br. at 13.

Facebook's resources allow it to support a worldwide staff at eight non-Northern District of California domestic offices and ten international offices, similar to the *Autodesk* defendants who were denied transfer, in part, because of their resources that allowed them to have sales efforts in multiple countries.

When properly applied, this factor weighs in favor of rejecting Facebook's request to transfer. And given Ms. Cunanan's evasive statements about the presence of unnamed Facebook employees and other contacts in Delaware, there is no reason to assume that all potential Facebook witnesses would be inconvenienced if this case proceeds in Delaware.

2. There Has Been No Showing That Trial Witnesses Will Be Unavailable If The Case Remains In Delaware

A defendant claiming that one forum is more convenient for witnesses than another must show that witnesses who will actually be called at trial will be unable or unwilling to appear at trial if the case remains in the original forum. *Stored Value Solutions*, 2009 WL 4016158, at *2 (finding that the failure to "establish that witnesses would refuse or physically be unable to attend trial in Delaware" weighed against transfer); *Mallinckrodt*, 670 F. Supp. 2d at 357 ("Defendants have failed to identify any potential witnesses who would be unable to testify in this District."); *Boston Scientific*, 532 F. Supp. 2d at 655 (denying transfer, in part, because defendant "identified no witness who is reluctant to testify and who is beyond the subpoena power of the court"); *Alcoa*, 2007 WL 1948821, at *4 (rejecting transfer when defendants offered affidavits from only four of twelve potential non-party witnesses stating that they are unwilling to travel to Delaware for trial).

Facebook argues in its motion that the Northern District of California is more convenient for both its own potential witnesses and non-party witnesses, but it has failed to offer any evidence demonstrating that any named witnesses will be unable or unwilling to testify.[61] As an initial matter, Facebook's claims relating to the convenience of its own witnesses (or Mekiki's

[61] *See* Opening Br. at 8-11.

witnesses) are irrelevant to this factor as these witnesses "are presumed willing to testify at trial" and "are not part of the analysis" of the "convenience of the witnesses" factor. *See Acuity Brands*, 2008 WL 2977464, at *2 (noting that "party-witnesses such as employees are presumed willing to testify at trial"); *Nice Sys*, 2006 WL 2946179, at *2 (noting that "[e]mployee witnesses . . . are not part of the analysis"). With respect to the third-party witnesses, not only has Facebook failed to identify any witnesses or their expected areas of testimony, it has also not "demonstrate[d] that these witnesses will either be unable or unwilling to travel to Delaware." *Acuity Brands*, 2008 WL 2977464, at *2. Instead, Facebook relies on Mr. Chen's admittedly incomplete list of potential witnesses, despite Mr. Chen's failure to state that any of these witnesses would actually be unable or unwilling to testify at trial and despite Facebook's admission that this list is incomplete.

Moreover, trial testimony "is as often comprised of recorded depositions as it is of witnesses appearing live to testify." *Alcoa*, 2007 WL 1948821, at *4. To the extent Facebook later learns that any witness it intends to offer to testify is unavailable or unwilling to testify, it can simply depose the witness. Facebook has made no showing that the testimony of any third-party witness it intends to offer at trial cannot be obtained through either a recorded deposition or by having the witness appear at trial. Indeed, in the *Leader* Action, Facebook served several subpoenas issued from other federal district courts seeking documents and deposition testimony, and there is no reason it cannot use this same device for compelling third-party testimony in this case.

Facebook also argues that the Northern District of California would be a less expensive forum because it would require less travel costs,[62] but patent litigation is expensive regardless of the forum and this does not present a legitimate reason to transfer a case. *Amgen, Inc. v. Ariad Pharms., Inc.*, 513 F. Supp. 2d 34, 46 (D. Del. 2007). The incremental transportation costs that

[62] *See* Opening Br. at 13-14.

may be incurred far down the road for those Facebook witnesses who need to appear for trial "would likely be minimal in comparison" to the cost of the rest of the litigation. *Id.*

Because Facebook failed to name any witnesses, or offer any evidence showing that any of its own or third-party witnesses will be unavailable or unwilling to come to trial, this factor weighs against transfer.[63]

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[63] Facebook cites three Federal Circuit cases—*In re Nintendo Co., Ltd.*, 589 F.3d 1194 (Fed. Cir. 2009); *In re Hoffman-LaRoche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009); *In re Genentech, Inc.* 566 F.3d 1338 (Fed. Cir. 2009)—as support for its argument that transfer is routinely granted when witnesses and evidence are nearer to another district. *See* Opening Br. at 6. Notwithstanding Facebook's contention that the Fifth Circuit transfer standard analyzed in these three Federal Circuit cases is "substantially similar" to the standard in the Third Circuit—a proposition Mekiki opposes—Facebook overlooks the evidentiary showings made in each of these other cases demonstrating why the original venue was inappropriate. For example:

- In *In re Nintendo*: (1) neither party was located or incorporated in the original forum; (2) defendant was incorporated in the forum it was moving to transfer to; (3) defendant named witnesses with some certainty and none resided in the original forum; and (4) plaintiff conceded defendant had no contacts with the original forum. *See* 589 F.3d at 1197.
- In *In re Hoffman-LaRoche*: (1) none of the parties were incorporated in or had any contacts with the original forum; (2) the specific product at issue was developed wholly within the new forum; and (3) specific individuals who had worked on developing the product resided in the new forum and had been identified by name as almost certain trial witnesses. *See* 587 F.3d at 1336.
- In *In re Genentech*: (1) none of the parties were incorporated in the original forum; (2) defendants specifically named ten witnesses, including three non-party witnesses, who had knowledge of material facts relevant to the case and resided in the district to which transfer was sought; (3) defendants stated their intention to rely on testimony from the attorneys who prosecuted the patents-in-suit, who also resided in the new district. *See* 566 F. 3d at 1345.

In contrast, Facebook: (1) is incorporated in Delaware; (2) is a worldwide company who supplies its infringing services and products to Delaware customers; (3) has not identified a single witnesses it intends to call at trial; and (4) has not made any showing that trial witnesses would be unwilling or unable to appear in the Delaware. As a result, the *In re Nintendo*, *In re Hoffman-La Roche*, and *In re Genentech* decisions are simply inapposite.

3. There Has Been No Showing That Documents And Records Relevant To This Action Will Be Unavailable In Delaware

For Facebook to show that the "availability of documents" factor weighs in favor of transfer, it must demonstrate that relevant evidence will be unavailable for trial in Delaware. *See Jumara*, 55 F.3d at 879. As with the factor regarding witness availability, Facebook misapprehends this factor, basing the entirety of its argument on its assertion that some undefined group of documents and evidence are located in the Northern District of California.[64] This is not the test.

Although neither Facebook nor its declarants state their intention one way or the other, it is highly probable that a computer technology-based company such as Facebook will produce the vast majority of its documents in electronic form. In this age of electronic discovery, it will therefore be difficult for Facebook to show that there are relevant documents that will be more difficult to produce in Delaware than in California. *See Pfizer Inc. v. Sandoz Inc.*, Civil Action No. 09-742, 2010 WL 256548, at *4 (D. Del. Jan. 20, 2010) (denying transfer and noting that defendant would be able to produce its records with equal ease in either forum); *Mallinckrodt*, 670 F. Supp. 2d at 357 (finding there was no identification of books or records that could not be produced in Delaware); *Quantum Loyalty Sys., Inc. v. TPG Rewards, Inc.*, Civ. No. 09-022, 2009 WL 890644, at *2 n.3 (D. Del. Apr. 2, 2009) (observing that the prevalence of electronic discovery renders arguments about the inconvenience of obtaining or producing documents in one forum unpersuasive); *see also Nihon*, 595 F. Supp. 2d at 372 (discounting location of relevant documents "in light of the current state of technology"); *Boston Scientific*, 532 F. Supp. 2d at 655 (finding it unlikely that documents would be unavailable in Delaware "especially in this age where document production is typically done electronically"); *Alcoa*, 2007 WL 1948821, at *4 (giving virtually no weight to the location of documents because "defendants

[64] *See* Opening Br. at 10-11.

have not identified any documents that would be too burdensome to ship to Delaware" and "document production may be in electronic format").

With respect to third-party documents, Facebook has not identified any specific third-party documents that might be unavailable for use at trial in Delaware. This failure is unsurprising given that Facebook can subpoena these documents in the districts where the documents are located, as it has done repeatedly in the *Leader* Action.

Facebook has made no showing of document unavailability. Additionally, it has not identified any documents that it intends to produce or that it intends to seek from third parties that can only be produced or obtained in the Northern District of California. In the absence of any showing from Facebook on this factor, the factor weighs in favor of maintaining this case here in Delaware.

4. Mekiki's Claim Arises From Facebook's Offering Of The Accused Products And Services To Its Users Around the World Including In Delaware

Mekiki is currently accusing certain Facebook social networking products and services of infringement. Although it may be true that a portion of Facebook's computer equipment used to offer these services is located in the Northern District of California, it is equally true that Facebook's infringing products and services are supplied to and used by hundreds of thousands of Facebook users in Delaware (and elsewhere in the world). This makes the District of Delaware a proper forum and weighs against transfer.

At best for Facebook, this factor is neutral and entitled to little weight because there is no one location for Mekiki's patent infringement claims. *See Mallinckrodt*, 670 F. Supp. 2d at 357 (finding that no weight should be given to the potential location of the claim when infringement claim may have arisen in multiple districts). Therefore, the factor cannot support Facebook's transfer request.

5. Facebook's Preference For The Northern District Of California Is Afforded Little Weight

The only private interest weighing in favor of transfer is Facebook's preference to litigate in the Northern District of California. However, "Defendant's preference is entitled to considerably less weight than Plaintiff's, as the purpose of a venue transfer is not to shift inconvenience from one party to another." *See EVCO Tech. & Dev. Co., LLC v. Precision Shooting Equip., Inc.*, 379 F. Supp. 2d 728, 730 (E.D. Pa. 2001).

C. The Public Interests Do Not Strongly Favor Transfer

1. The Relative Court Congestion Favors Keeping The Case In The District Of Delaware

Facebook ignores the court congestion factor, conceding that it does "not appear to either favor or disfavor transfer."[65] However, not only does this factor not support transfer, it counsels for keeping the case in the District of Delaware.

Statistics published by the Administrative Office of the United States Courts for the year ending September 30, 2009 demonstrate that there is less court congestion and more patent experience in both the Districts of Delaware and of New Jersey than the Northern District of California. Specifically:

Court Congestion Factor	D. Del.	D.N.J.	N.D. Cal.	Advantage
Weighted filings per judgeship[66]	478	511	607	D. Del. or D. N.J.
Unweighted filings per judgeship[67]	306	457	554	D. Del. or D. N.J.
Median time interval (in months) from filing to termination[68]	8.3	7.6	9.4	D. Del. or D. N.J.

[65] *See* Opening Br. at 8 n.2.

[66] *See* Bakewell Decl., at Ex. 44 ("Judicial Business of the United States Courts, 2009 Annual Report of the Director," produced by the Statistics Division, Office of Judges Programs, Administrative Office of the United States Courts, Table X1-A, U.S. District Courts—Weighted and Unweighted Filings per Authorized Judgeship During the 12-Month Period Ending September 30, 2009 at 404, 406).

[67] *See id.*

Median time interval from filing to completion of trial[69]	33.1	28.9	26.2	N.D. Cal.
Percentage of cases reaching trial[70]	3.4	1.1	0.9	D. Del. or D. N.J.

Patent Expertise Factor	**D. Del.**	**D.N.J.**	**N.D. Cal.**	**Advantage**
Number of patent cases filed[71]	214	189	181	D. Del. or D. N.J.
Number of patent cases terminated[72]	158	165	154	D. Del. or D. N.J.
Number of patent cases pending[73]	362	226	207	D. Del. or D. N.J.

The Districts of Delaware and of New Jersey win nearly every comparison with the Northern District of California regarding court congestion and judicial expertise with patent litigation. The Districts of Delaware and of New Jersey have: (1) significantly fewer cases filed per judgeship; (2) a quicker median time from filing to termination; and (3) a higher percentage of patent cases on their docket, showing greater patent expertise. The only factor on which the Northern District of California has a slight advantage is the median time to trial for its cases going to trial. However, the median time in all of the districts exceeds two years, and this one factor will not trump all of the other court congestion and expertise factors. *See Alcoa*, 2007 WL 1948821, at *4 ("[T]he court affords little weight to defendants' arguments relating to the

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[68] *See id.* (Table C-5, U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending September 30, 2009 at 169, 171).

[69] *See id.*

[70] *See id.* (Table C-4A, U.S. District Courts—Civil Cases Terminated, by District and Action Taken, During the 12-Month Period Ending September 30, 2009).

[71] *See id.* Decl., (Table C-11, U.S. District Courts—Intellectual Property Cases, Securities/Commodities/Exchanges Cases, and Bankruptcy Appeals Filed, Terminated, and Pending During the 12-Month Period Ending September 30, 2009 at 189, 196).

[72] *See id.*

[73] *See id.*

comparative expeditiousness of the courts in this district, insofar as the median trial time from filing to disposition in both districts differs by only a few months.").

Taking into account all of these statistics, the District of Delaware is a better district for this litigation. Therefore, this factor weighs against transfer to the Northern District of California.

2. The Local Interest In Having A Delaware Court Decide Patent Infringement Issues Relating To Technology Used By Hundreds Of Thousands Of Delaware Residents Favors Keeping The Case In The District Of Delaware

Facebook is a company that has become ubiquitous in the social networking industry. It is a worldwide company with over 400 million users to whom it supplies its infringing services and products (including hundreds of thousands of Delaware users), eight United States offices outside of the Northern District of California, ten foreign offices, 200 mobile operators in more than sixty countries, and ongoing active litigation outside of the Northern District of California (including in the District of Delaware). Moreover, as a Delaware corporation, Facebook should neither be surprised to be sued in Delaware nor find it a burden to litigate in Delaware. *See Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.*, 157 F.R.D. 215, 218 (D. Del. 1993) ("Absent some showing of a unique or unexpected burden, these corporations [that incorporate in Delaware] should not be successful in arguing that litigation in their state of incorporation is inconvenient.").

This case involves technology used regularly by Delaware residents relating to fundamental features of Facebook's website. Applying traditional legal concepts to technology that affects so many Delaware residents is something in which Delaware courts would have a substantial local interest. *See Autodesk*, 2009 WL 3151026, at *9 (Sept. 29, 2009) (observing that "Delaware clearly has a substantial interest in addressing lawsuits brought against Delaware corporations."); *see also Ace Capital v. Varadam Found.*, 392 F. Supp. 2d 671, 676 (D. Del. 2005) (noting Delaware's substantial interest in handling lawsuits brought against Delaware corporations).

Facebook also ignores the traditional rule that patent disputes are generally considered to be matters of national interest. *See, e.g.*, *Personalized User Model*, 2009 WL 340767, at *2 ("Patent cases are national cases and seldom open to a local interest analysis."); *Magsil*, 2009 WL 1259043, at *2 (holding that a patent infringement case is governed by federal law and that California does not have a distinct public interest in that type of case). As a result, Facebook's preferred forum has no special interest that makes it more worthy of hearing a patent infringement matter than Delaware.

Mekiki contends this factor weighs against transfer given the interest the case and the technology involved present to Delaware and Delaware residents. At best for Facebook, this factor is neutral given that a patent infringement case generally does not contribute to a balance of factors that "strongly favors" transfer.

3. Practical Considerations Favor Keeping The Case In The District Of Delaware

Other than its general (and unsupported) theme that the Northern District of California is a more convenient forum, Facebook does not address this public interest factor. However, the practical considerations favor keeping the case here in Delaware.

Nearly seven months after filing, this case is finally moving forward. The parties have filed their pleadings including Facebook's counterclaims regarding the patents-in-suit. The Court has set its initial Rule 16 conference, and the parties have held their Rule 26(f) conference. Additionally, Mekiki has provided Facebook with proposed merits-based discovery and a proposed protective order relating to the treatment of confidential information that is modeled after a protective order Facebook entered in other Delaware litigation, such as in the *Leader* Action.

Facebook waited over six months before filing its transfer motion. Transferring the case now would further delay the onset of this case, and effectively stay the litigation until such time as a Northern District of California court addressed the matter. A transfer at this point would, therefore, be prejudicial to Mekiki and weighs against granting Facebook's request.

4. Enforceability Of The Judgment, Public Policy, And The Familiarity Of The Trial Judge With State Law Issues Are Not Applicable And Do Not Support Transfer

Facebook concedes that "enforceability of the judgment . . . and the public policies of the District of Delaware and the Northern District of California, do not appear to either favor or disfavor transfer."[74] Additionally, the familiarity of the trial judge with state law is irrelevant in this case involving alleged violations of federal patent laws.

Therefore, none of these factors support Facebook's request for transfer. Given that Facebook bears the burden of showing that the factors "strongly favor" transfer, the fact that several of the factors courts consider are either neutral or irrelevant further underscores the meritless nature of Facebook's request.

D. On Balance, Mekiki's Choice Of Forum And The Private And Public Interests Weigh In Favor Of Rejecting Facebook's Transfer Request And Certainly Do Not "Strongly Favor" Transfer

As summarized in the chart below, the private and public factors relevant to the transfer analysis generally weigh in favor of rejecting Facebook's transfer request and, in any event, do not strongly support transfer:

Transfer Factor	**Favors / Disfavors Transfer**
Plaintiff's forum choice	Paramount consideration
Convenience of the parties as measured by physical and financial condition	No showing and, therefore, disfavors
Convenience of witnesses in terms of trial availability	No showing and, therefore, disfavors
Location of books and records	No showing and, therefore, disfavors
Whether the claim arose elsewhere	Disfavors or is neutral and, therefore, disfavors
Defendant's preference	Favors
Court congestion	Disfavors
Local interest	Disfavors or is neutral and, therefore, disfavors
Practical considerations	Disfavors

[74] *See* Opening Br. at 8 n.2.

Transfer Factor	Favors / Disfavors Transfer
Enforceability of judgment	Neutral and, therefore, disfavors
Public policies	Neutral and, therefore, disfavors
Familiarity of trial judge with applicable state law in diversity cases	Neutral and, therefore, disfavors

There can be no dispute that Facebook has failed to carry its burden to show that the majority of these factors "strongly favor" transfer. In light of this, Facebook's transfer request should be rejected.

IV. THIS COURT'S DECISION IN *QINETIQ LIMITED V. OCLARO* IS DISTINGUISHABLE AND DOES NOT SUPPORT TRANSFER

Facebook attempts to characterize the present case as being "materially indistinguishable" from, and "virtually identical" to, *QinetiQ Limited v. Oclaro, Inc.*, Civil Action No. 09-372, 2009 WL 5173705 (D. Del. Dec. 18, 2009), a patent infringement action that this Court transferred from the District of Delaware to the Northern District of California.[75] The decision to transfer the *QinetiQ* case was based on an entirely different facts and a far superior evidentiary showing than are presented here.

First, unlike Facebook, the moving party in *QinetiQ* submitted meaningful evidence bearing on the convenience of trial witnesses and location of evidence. *See* 2009 WL 5173705, at *1, *4. The *QinetiQ* defendant relied on a declaration that discussed specific categories of expected testimony from named individuals located in California, and identified the specific area and testimony the defendant intended to rely on from a key third-party witness who was undoubtedly relevant to the litigation and who also resided in California. In contrast, Facebook has offered nothing more than vague pronouncements and conclusory assertions that its "known" witnesses and sources of proof are in California, and that it has located individuals who, while

[75] *See* Opening Br. at 5-6, 15.

not potential witnesses, may have "potentially invalidating prior art."[76] Facebook's quantum of "evidence" does not compare to the detailed evidence presented by the *QinetiQ* defendant.

Second, the *QinetiQ* defendant sold a product that was not available or manufactured in Delaware. *See* 2009 WL 5173705, at *3. Here, there is no dispute that Facebook is a worldwide company that supplies the allegedly infringing services and products to all of its 400 million worldwide users (including its hundreds of thousands of Delaware users).

Third, the *QinetiQ* defendant was a small company with offices and transactions largely confined to the Northern District of California and the United Kingdom. *See* 2009 WL 5173705, at *3-*4. But Facebook has numerous foreign and domestic offices, supports its worldwide staff, supplies its infringing services and products to its Delaware users, and apparently has employees and other contacts in Delaware.

Finally, the only connection in *QinetiQ* to Delaware was defendant's incorporation there.[77] In contrast, Facebook's choice to incorporate in Delaware—which is enough by itself to sustain Mekiki's choice of forum—is but one of multiple contacts Facebook has with Delaware. Facebook has also actively engaged in ongoing patent infringement litigation in Delaware and supplies its infringing services and products to Delaware residents.

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[76] *See* Cunanan Decl., at ¶ 3; Cunanan Decl., at ¶ 8.

[77] Despite Facebook's mischaracterizations, this Court in *QinetiQ* recognized that plaintiff's forum choice and defendant's state of incorporation were highly relevant to the transfer analysis even though it ultimately granted transfer. *See* 2009 WL 5173705, at *2-*4.

CONCLUSION

For all the foregoing reasons, Mekiki respectfully requests that the Court deny Defendants' Motion to Transfer Venue Under 28 U.S.C. § 1404(a).

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2010 I electronically filed the foregoing with the Clerk of the Court using CM/ECF, which will send notification of such filing to:

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I further certify that I caused copies of the foregoing document to be served on April 26, 2010 upon the following in the manner indicated:

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