

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

MEKIKI CO., LTD. and MEKIKI)	
CREATES CO., LTD.,)	
)	
Plaintiffs and)	C.A. No. 09-745 (JAP)
Counter Defendants)	
)	JURY TRIAL DEMANDED
v.)	
)	
FACEBOOK, INC.,)	
)	
Defendant and)	
Counterclaimant.)	
_____)	

**DEFENDANT FACEBOOK, INC.'S REPLY BRIEF IN SUPPORT OF ITS
MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a)**

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I. INTRODUCTION.

Defendant Facebook, Inc. (“Facebook”) respectfully requests that the Court transfer this action from the District of Delaware to the Northern District of California. As Facebook demonstrated in its opening brief, transfer of this action would best serve the interests of justice and convenience of the parties and witnesses, and would preserve both parties’ ability to put on their cases effectively. Plaintiffs Mekiki Co., Ltd. and Mekiki Creates Co., Ltd.’s (“Mekiki”) Answering Brief in Opposition to Defendant Facebook Inc.’s Motion to Transfer Venue (“Opp’n Br.”) does not demonstrate otherwise. Specifically, Plaintiffs’ Opposition fails for the following reasons:

- Neither the parties, nor any identified witness, nor any of the relevant evidence, nor any of the acts of alleged infringement are in the District of Delaware. Conversely, the connections between this case and the Northern District of California are extensive and it would be a vastly more convenient forum. *See Teleconference Sys. v. Proctor & Gamble Pharms., Inc.*, 676 F. Supp. 2d 321, 331 (D. Del. 2009) (“The convenience of the parties and witnesses, and the location of relevant evidence, are the most important factors in the § 1404(a) analysis.”).
- Plaintiffs have not presented any meaningful argument or evidence that materially distinguishes the facts of the present case with those that justified transfer in *QinetiQ Ltd. v. Oclaro, Inc.*, No 09-372 (JAP), 2009 WL 5173705 (D. Del. Dec. 18, 2009).
- Plaintiffs’ Opposition presents no facts that counterbalance the substantial weight of evidence in favor of transfer and do not meaningfully dispute the substance of Facebook’s evidence in favor of transfer.
- Finally, Plaintiffs’ Opposition concludes with nearly 20 pages of unsubstantiated, irrelevant, or essentially immaterial arguments and assertions that fail to account for recent Delaware and Federal Circuit authority to the contrary and cannot overcome the substantial undisputed evidence in favor of transfer.

In sum, Plaintiffs’ Opposition does not meaningfully dispute that the interests of justice and the convenience of the parties and witnesses would be substantially advanced by transfer of this case to the Northern District of California.

II. ARGUMENT.

Facebook's Opening Brief demonstrated that the relevant factors weigh heavily in favor of transfer. Plaintiffs' Opposition does not provide any meaningful evidence (or even argument) that the balance of convenience to the parties and witnesses and the interests of justice support proceeding with this case in Delaware instead of the Northern District of California. Instead, Plaintiffs' Opposition intentionally ignores all of the Federal Circuit's recent guidance on deciding motions to transfer under 28 U.S.C. § 1404(a) based on factors that undeniably overlap with the *Jumara* transfer factors. By intentionally disregarding this case law, Plaintiffs have presented outdated arguments that are in conflict with the Federal Circuit's precedent and recent Delaware cases.¹ See, e.g., *Teleconference Sys.*, 676 F. Supp. 2d 321 (extensively citing *In re Genentech*, 566 F.3d 1338 (Fed. Cir. 2009)).

Indeed, there can be no doubt that Plaintiffs are aware of the Federal Circuit authority regarding transfer as Plaintiffs' counsel recently advocated for the District of Delaware to adopt such Federal Circuit authority. The Court granted Plaintiffs' counsel's motion and transferred a patent infringement case from Delaware to the Northern District of California. See *Teleconference Sys.*, 676 F. Supp. 2d at 323 ("Jack B. Blumenfeld . . . for Defendants") (this case extensively cites to the Federal Circuit's grant of mandamus in *Genentech*, 566 F.3d at 1338-49); Cisco Systems, Inc.'s Open. Br. in Support of Motion to Transfer Venue to The Northern District of California in the Alternative, Case No. 1:090cv-00200-JBS-JS, D.I. 40, at 1, 6 ("Jack B. Blumenfeld . . . Attorneys for Defendant"; "They [the *Jumara* factors] overlap with those enunciated by the other regional circuits and as applied by the Federal Circuit in reviewing transfer decisions.")). Here, however, Plaintiffs' Opposition relegates the recent Federal Circuit

¹ The Court is directed to Appendix A, submitted with this brief. Appendix A provides a chart listing Plaintiffs' legally unfounded arguments and the Federal Circuit and/or Delaware precedent that states otherwise.

guidance regarding transfer to a single footnote and opposes application of such Federal Circuit authority to the present motion. (Opp’n Br. 24, n. 63.)

A. Plaintiffs Have Not Meaningfully Disputed That the Most Important Convenience and Interest Factors Strongly Support Transfer to the Northern District of California.

“The convenience of the parties and witnesses, and the location of relevant evidence, are the most important factors in the § 1404(a) analysis.” *Teleconference Sys.*, 676 F. Supp. 2d at 331. Analysis of these factors demonstrates substantial weight in favor of transferring this case to the Northern District of California.

1. There Has Been No Witness Identified That Is Located in Delaware.

Nowhere within Plaintiffs’ 34 page Opposition or 289 pages of exhibits have Plaintiffs identified a single witness who is located in Delaware. “The fact that plaintiff has not identified a single material witness who resides in Delaware rather than California is telling and weighs in favor of transfer.” *Id.* at 333 (citing *Genentech*, 566 F.3d at 1345 (“Because a substantial number of material witnesses reside within the transferee venue and the state of California, and no witnesses reside within the [transferor venue], the district court clearly erred in not determining this factor to weigh substantially in favor of transfer.”))).

2. The Northern District of California is Substantially More Convenient for the Parties and the Parties’ Witnesses.

Further, Plaintiffs’ Opposition does not dispute that the Northern District of California would be a more convenient forum for their Japanese witnesses and the Japanese inventors of the patents-in-suit than Delaware. And, Facebook’s Opening Brief demonstrated that the Northern District of California would be vastly more convenient to Facebook and its corporate witnesses because all such potential witnesses work at Facebook’s Palo Alto, California headquarters,

within the Northern District of California.² (Open. Br. at 3, 8-9. *See also* Supplemental Decl. of Michelle Cunanan in Support of Defendant’s Motion to Transfer, D.I. 25, (hereinafter “Suppl. Cunanan Decl.”) ¶¶ 2-3.) Plaintiffs’ Opposition does nothing to negate the heavy weight in favor of transfer based on the convenience of the parties.

3. In Addition to Facebook’s Corporate Witnesses, Various Anticipated Non-Party Witnesses Located in California Have Been Identified.

Also, Facebook’s Opening Brief identified nine non-party individuals and six non-party entities located within California that it anticipates will have material information relevant to the issues in this case. (Open. Br. at 9.) Importantly, nowhere in Plaintiffs’ extensive briefing do Plaintiffs claim that the identified individuals and entities *have not* made relevant contributions to the prior art. Nor can they. In fact, quick internet searches for the identified individuals easily reveal their contributions to the prior art of the patents-in-suit.³ (*See* Pivovar Decl. ¶ 3.) Moreover, as Facebook previously discussed and Plaintiffs do not dispute, it is unsurprising that there are potential witnesses located in the Northern District of California since there are a large number of individuals and entities located there that have worked on technologies related to the patents-in-suit. (Open. Br. at 9.)

² Plaintiffs’ arguments that somehow there is “no inconvenience to the parties if this case is litigated in Delaware” because Facebook is a “large international corporation” defies logic. (*See* Opp’n Br. at 21-22.) Facebook’s size does not negate the inconvenience that will result by forcing Facebook and all of its witnesses to travel cross-country to Delaware when the case could otherwise proceed without such travel if the case is transferred to California. None of the cases cited by Plaintiffs actually support their conclusory assertion otherwise.

³ This case is in its initial stages and Plaintiffs have not identified the claims of the patents-in-suit they are asserting against Facebook and have not provided any infringement contentions for those claims. Plaintiffs are in an equally good, if not better, position to have identified individuals they believe have prior art and who would not find the Northern District of California more convenient than Delaware. Tellingly, Plaintiffs have not done so. Nevertheless, Facebook has agreed to identify the prior art associated with these individuals at the time Facebook is required to make such disclosures in this case. (Bakewell Decl. Ex. 43 at 2.)

Plaintiffs' Opposition also alleges that there is no inconvenience to these non-party witnesses because they may voluntarily choose to travel to Delaware. (*See* Opp'n Br. at 13.) Plaintiffs are wrong. Not only is it common sense to recognize that for these individuals the Northern District of California would be substantially more convenient than Delaware, but recent cases demonstrate the importance of compulsory process and the significant weight it should be afforded in the transfer analysis.⁴ *Teleconference Sys.*, 676 F. Supp. 2d at 333 ("[t]he ability of [these] potential witnesses to be subject to compulsory process is also a factor that weighs heavily in the 'balance of convenience' analysis.") (citing *Affymetrix, Inc. v. Synteni, Inc.*, 28 F. Supp. 2d 192, 203 (D. Del. 1998) ("Traditionally, the location of potential witnesses and, thus, their ability to be subject to compulsory process has weighed heavily in the 'balance of convenience' analysis.")).⁵

4. All of Facebook's Evidence and Sources of Proof Are Associated with Its Headquarters in The Northern District of California.

Facebook's Opening Brief asserted that all of Facebook's documents and operational evidence are located in the Northern District of California, all of Plaintiffs' documents are located in Japan, and neither party has any relevant documentation in Delaware. (Open. Br. at

⁴ Plaintiffs' Opposition also contends that these non-party witnesses located in California are not relevant to the transfer analysis because their testimony can be taken by recorded depositions. (Opp'n Br. at 22-23.) Plaintiffs are wrong. *See Genentech*, 566 F.3d at 1345 ("the fact that the transferee venue is a venue with usable subpoena power here weighs in favor of transfer, and not only slightly.").

⁵ *See also Teleconference Sys.*, 676 F. Supp. 2d at 333 (rejecting argument that voluntary appearance by witnesses in Delaware negated impact of compulsory process because "[t]he fact that . . . relevant witnesses, may voluntarily appear in Delaware for trial, is not the same as them being subject to compulsory subpoena power.) (citing *Sherwood Med. Co. v. IVAC Med. Sys., Inc.*, No 960305 (MMS), 1996 WL 700261, at *5 (D. Del. Nov. 25, 1996) ("a witness's agreement to appear 'is not the same as having them amenable to the subpoena power of the trial court'"); *Ricoh Co. v. Aeroflex, Inc.*, 279 F. Supp. 2d 554, 558 n.2 (D. Del. 2003) (an assertion by plaintiff opposing transfer that a third party with relevant information would cooperate in discovery is "suspect at best"); *Genentech*, 566 F.3d at 1343 ("The convenience of the witnesses is probably the single most important factor in transfer analysis") (internal quotations omitted).

11) Plaintiffs do not dispute that they have no documents in Delaware, but instead argue that Facebook has not demonstrated that all its relevant documentation is located in the Northern District of California with none in Delaware because it has not identified any “specific” documents and fails to “describe a single document.” (*See, e.g.*, Opp’n Br. at 11, 14.) These contentions are baseless. All relevant documents that will be produced in this case by Facebook will come from Facebook’s headquarters in Palo Alto. (Suppl. Cunanan Decl.¶ 3.) Plaintiffs have been aware of this fact since the dispute regarding transfer arose; nor should it be surprising to Plaintiffs that this is the case. (*See* Bakewell Decl. Ex. 31.) *See Genentech*, 566 F.3d at 1345 (“In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant’s documents are kept weighs in favor of transfer to that location.”) (internal quotations omitted).

Nor does Facebook have to demonstrate that documents cannot be made available in Delaware before the fact that it is substantially more convenient for the documents to be produced in the Northern District of California adds to the weight in favor of transferring this case. *See Teleconference Sys.*, 676 F. Supp. 2d at 334. (*See* Opp’n Br. at 25-26.)

5. Plaintiffs’ Claims of Alleged Infringement Have Not Occurred in Delaware.

Plaintiffs’ Opposition does not dispute that none of the allegedly infringing acts have occurred in Delaware.⁶ This is an important fact that weighs strongly in favor of transfer to the Northern District of California, where the equipment and operation of the accused services can be found. *See, e.g., QinetiQ*, 2009 WL 5173705, at *3-4; *Affymetrix*, 28 F. Supp. 2d at 201 (“If the ‘claim arose elsewhere,’ then it seems most likely the parties, the witnesses, the documents,

⁶ Though Plaintiffs do not dispute that Facebook’s users have no relevance to its claims of infringement, their Opposition nevertheless includes other irrelevant arguments that are premised on Facebook’s users. These arguments are addressed in Section II.D.1 of this brief.

and all of the other evidence will also be located ‘elsewhere.’ . . . In this light, all other things being equal, the ‘balance of convenience’ should tip in favor of the forum which is located ‘elsewhere.’”).

B. Because Neither Plaintiffs Nor Plaintiffs’ Allegations of Infringement Have Any Connection With Delaware, Plaintiffs’ Choice of Forum Is Given Less Deference.

As explained in Facebook’s Opening Brief, Plaintiffs’ choice of forum is afforded less deference here because Delaware is not the Plaintiffs’ “home” forum and because none of the allegedly infringing acts have occurred in Delaware. *See QinetiQ*, 2009 WL 5173705, at *3. Plaintiffs’ Opposition disputes neither of these predicate facts, but nevertheless relies on a forty-year old case to support their theory that Plaintiffs’ “forum choice is the paramount consideration and should not be disturbed.” (Opp’n Br. at 16.) But, Plaintiffs’ choice cannot itself root this case in Delaware. As a long line of cases acknowledge, a plaintiff’s choice of forum can—and should—be disturbed where, as here, the balance of convenience supports the transferee forum.⁷

⁷ *See, e.g., QinetiQ*, 2009 WL 5173705, at *3 (“Thus, in cases like the instant one where a lawsuit is brought in a district that is not the Plaintiff’s home forum, Plaintiff’s choice is accorded less weight.”); *Teleconference Sys.*, 676 F. Supp. 2d at 333-34 (“Plaintiff’s choice [of forum] is an important but not determinative factor, especially where plaintiff and its claim have no significant nexus to Delaware.”); *Affymetrix*, 28 F. Supp. 2d at 199 (“[The] ‘home turf rule’ is merely a short-hand way of saying that, under the balancing test inherent in any transfer analysis, the weaker the connection between the forum and *either* the plaintiff *or* the lawsuit, the greater the ability of a defendant to show sufficient inconvenience to warrant transfer.”); *Burstein v. Applied Extrusion Techs., Inc.*, 829 F. Supp. 106, 110 (D. Del. 1992) (“When the plaintiff has chosen to bring suit in a district that is not his ‘home turf’ and which has no connection to any of the acts giving rise to the lawsuit, the convenience to the plaintiff is not as great as it would be were [he] litigating at or near [his] principal place of business or at the site of the activities at issue in the lawsuit.”) (internal quotations omitted); *Kirschner Bros. Oil., Inc. v. Pannill*, 697 F. Supp. 804, 806 (D. Del. 1988) (“If the plaintiff chooses a forum which is not his “home turf” and which has no connection to any of the acts giving rise to the lawsuit, however, the convenience to the plaintiff of litigating in his chosen forum is not as great. This reduction in convenience lessens the defendant’s burden to show that the balance of convenience favors transfer.”); *Burroughs Wellcome Co. v. Giant Food, Inc.*, 392 F. Supp. 761, 763 (D. Del. 1975) (“Where the

Nor does Plaintiffs' Opposition identify any legally recognized "legitimate reasons" for filing suit in Delaware beyond Facebook's incorporation there—a "reason" that is "not dispositive of a motion to transfer." *See QinetiQ*, 2009 WL 5173705, at *4. Plaintiffs' Opposition purports to list "[o]ther legitimate reasons for suing Facebook in Delaware" (Opp'n Br. at 18-19.), but Plaintiffs provide no cases that support the purported legitimacy of their "reasons." To the contrary, the listed "reasons" are a far departure from those identified in the cases that Plaintiffs' Opposition otherwise relies on. *See, e.g., Joint Stock Soc'y v. Heublein, Inc.*, 936 F. Supp. 177, 186-87 (D. Del. 1996). Indeed, Plaintiffs' allegations of legitimacy are belied by the fact that they would have this Court believe that Plaintiffs' own "desire not to litigate on Facebook's 'home turf'" is a "legitimate reason" for filing suit in Delaware. (Opp'n Br. at 19.) This contention demonstrates the illusory nature of Plaintiffs' contrived "reasons" since the vast majority of transferred cases are in fact transferred to a defendant's home forum.

C. Plaintiffs' *Ad Hominem* Attacks of Facebook's Declarants Are Unwarranted and Do Not Change the Sufficiency of the Facts in Favor of Transfer.

Perhaps recognizing that they have no legitimate grounds for opposing transfer on the facts, Plaintiffs' Opposition instead attacks Facebook's declarants. Yet, nowhere in the hyperbole and rhetoric of the 8 pages of briefing devoted to these attacks do Plaintiffs demonstrate that any of the statements in Ms. Cunanan's or Mr. Chen's declarations lack sufficient evidentiary support. (Opp'n Br. at 8-15.)

1. Ms. Cunanan's Declaration and Plaintiffs' Requested Supplemental Declaration Do Not Lack Evidentiary Support.

Ms. Cunanan's supplemental declaration was provided to Plaintiffs in direct response to Plaintiffs' alleged need for further discovery. (*See Bakewell Decl. Exs. 39, 43.*) Both her

forum selected by plaintiff is connected neither with the plaintiff nor with the subject matter of the lawsuit, meeting the burden of showing sufficient inconvenience to tip the 'balance' of convenience 'strongly in favor of defendant' will ordinarily be less difficult.").

supplemental and original declaration, clearly state her position as an employee with Facebook and her personal knowledge of the facts contained therein. (Cunanan Decl. ¶ 1; Suppl. Cunanan Decl. ¶ 1.) It should come as no surprise to Plaintiffs that an employee of Facebook has knowledge regarding the whereabouts of Facebook’s equipment, employees, and documents, and is competent to testify to such facts. (Suppl. Cunanan Decl. ¶¶ 3-4.) Nor is there any grounds for Plaintiffs to complain about Ms. Cunanan’s determination of “relevance.” (Opp’n Br. at 14.) In response to Plaintiffs’ complaints, Ms. Cunanan’s supplemental declaration explicitly describes how she assessed relevance: “I have been advised and understand 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.” (Suppl. Cunanan Decl. ¶¶ 3-4.) Importantly, Plaintiffs do not contend that such a standard for relevance is wrong, but simply contend that Ms. Cunanan hasn’t adequately “explained how” relevance was determined. (Opp’n Br. at 14.) This simply is not grounds for disregarding her declarations.

It is clear that Plaintiffs’ continuous complaints about perceived deficiencies with Ms. Cunanan’s declarations is more a reflection of Plaintiffs’ unwillingness to believe the facts of this case than a reflection of any shortcomings in Ms. Cunanan’s declarations. That Facebook has no operations in Delaware and all relevant aspects of Facebook’s operations, equipment, personnel, and documents are connected with Facebook’s headquarters should come as no surprise to Plaintiffs since Facebook has repeatedly informed Plaintiffs of those facts since the outset of this transfer dispute. (*see* Bakewell Decl. Ex. 31; Plaintiffs’ Open. Br. at 2; Cunanan Decl. ¶¶ 3-4.). In fact, Plaintiffs’ Opposition lists all of Facebook’s satellite offices—none of which are in Delaware. (Opp’n Br. at 5.) Nevertheless, Plaintiffs ask the Court to “[r]ead[] between the lines of” Ms. Cunanan’s statements to conclude (erroneously) that “Facebook does

have employees in Delaware.” (Opp’n Br. at 15.) That Plaintiffs resort to “reading between the lines” in order to depart with factual reality reveals much about the merits of Plaintiffs’ Opposition.

2. Mr. Chen’s Declaration Does Not Lack Foundation.

Mr. Chen’s declaration clearly states that he is an attorney, of Counsel for Facebook in this litigation, and “that he has personal knowledge of the facts contained within this declaration, and if called as a witness, could testify competently to the matters contained herein.” (Chen Decl. ¶ 1.) Contrary to Plaintiffs’ Opposition (Opp’n Br. at 12), these statements are sufficient to demonstrate Mr. Chen’s foundation and competency to make the statements contained in his declaration.

Moreover, Plaintiffs’ Opposition both mischaracterizes the contents of Mr. Chen’s declaration and misrepresents how the individuals in paragraph 8 of Mr. Chen’s declaration were determined. Plaintiffs contend that Mr. Chen’s declaration claims that all prior art to the patents-in-suit is located in California. (Opp’n Br. at 12.) It does not. Mr. Chen’s declaration merely states the proposition that certain “individuals and entities have been identified as authors, inventors, owners, or custodians of potentially invalidating prior art in this case.” (Chen Decl. ¶ 8.) Nowhere does it claim that the listed individuals and entities represent every single person or entity with information related to the prior art.⁸ The fact remains that this case is in its initial stages. Plaintiffs have not disclosed the claims they allege Facebook infringes, and have not provided any discovery, let alone contentions, related to infringement. Under such

⁸ Plaintiffs’ complaints about discovery regarding Mr. Chen’s declaration ring hollow. *See Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1170-71 (S.D. Cal. 2005) (“[N]one of the cases cited by plaintiffs [including a case from the Third Circuit] suggest that a plaintiff faced with a motion for transfer may embark on a fishing expedition in an attempt to find witnesses in support of its case or suggest that it is appropriate to allow discovery on an issue as trivial as whether witnesses will be inconvenienced by having to travel from the east coast to California for litigation.”). (Opp’n Br. at 12.)

circumstances, it is implausible for anyone to believe that a preliminary analysis of prior art for the purposes of transfer would somehow include the entire universe of prior art that will be uncovered in this case.

Rather, Facebook performed its analysis as it deemed proper under the circumstances by attempting to locate witnesses in either Delaware or California with information related to material prior art. It did this to determine whether there were any potentially relevant witnesses that would be subject to compulsory service in the respective districts. The determination for California was a resounding “yes,” and the individuals were listed in Mr. Chen’s declaration. And, like Plaintiffs, Facebook has not discovered any witnesses with material prior art in Delaware.⁹

It is also telling that while Plaintiffs make unsubstantiated challenges to Mr. Chen’s competency and personal knowledge, their Opposition brief never claims that the individuals and entities identified in paragraph 8 of Mr. Chen’s declaration *have not* contributed to the prior art of the patents-in-suit. Perhaps this is because Plaintiffs know the contributions to the prior art made by these entities and individuals. As noted above, simple internet searches of the listed individuals easily reveals their contributions to the prior art. (Pivovar Decl. ¶ 3.)

D. Plaintiffs’ Opposition Confuses the Transfer Analysis Pursuant to 28 U.S.C. § 1404(a) with Jurisdiction and Venue Under 28 U.S.C. § 1391.

1. Facebook’s Users Have No Relevance to The Transfer Analysis of This Patent Infringement Case.

Though Plaintiffs do not assert that their claims of infringement have any connection to anything in Delaware, they make numerous vague, ambiguous, and potentially misleading

⁹ The critical analysis for transfer is the identification of witnesses within the transferor and transferee forum. Where there are no witnesses located within the transferor venue, as here, it is improper for a court to perform a “central location” analysis to determine the distribution of all potential witnesses. *Teleconference Sys.*, 676 F. Supp. 2d at 334; *see also Genentech*, 566 F.3d at 1344.

statements alleging “contacts” between Facebook and Delaware.¹⁰ While these statements may be relevant to establishing that jurisdiction and venue may be had in Delaware, they are not relevant to a transfer analysis under §1404(a).

Instead, the Court’s transfer analysis must remain focused on the “real underlying dispute”—that of Plaintiffs’ claims of infringement against Facebook. *See Teleconference Sys.*, 676 F. Supp. 2d at 331 (“No matter how much plaintiff focuses on [other issues], at bottom the focus of the case is on [defendant’s] alleged infringement of plaintiff’s patent.”). Here, Plaintiffs’ complaint alleges only that “*Facebook* has infringed and is infringing the Mekiki patents by making, using, selling . . . the inventions claimed in the Mekiki patents” and that “Facebook has had made and operates. . . inventions claimed in the [patents-in-suit].” (Compl. ¶ 15.) Plaintiffs have not asserted any claims of indirect infringement against Facebook and do not allege that any individuals outside of Facebook’s control, such as users of Facebook’s services, are in any way related to Plaintiffs’ allegations of infringement. Indeed, Plaintiffs have conceded that they do not intend to call any of these individuals as witnesses in this case. (*See Bakewell Decl. Ex. 41, Page Two, ¶ 4.*) Thus, since none of Plaintiffs’ allegations related to individuals that use Facebook’s services have any bearing on the issues to be resolved in this case, they cannot provide any weight in the transfer analysis.¹¹

¹⁰ For example, Plaintiffs uses the terms “supplying,” “providing,” “offering,” or “relating to technology” in connection with its allegations regarding individuals that use Facebook’s services. (*See, e.g.,* Opp’n Br. at 24, 26.) None of these terms reflect infringement under 35 U.S.C. § 271—“makes, uses, offers for sale, or sells. . . or imports.”

¹¹ Indeed, even where a plaintiff had asserted direct infringement claims against a defendant’s customers, this Court nevertheless refused to weigh the circumstances related to the customers in the transfer analysis because doing so would “vault form over substance” regarding the key parties and issues relevant to the patent infringement action. *Teleconference Sys.*, 676 F. Supp. 2d at 332. It further bears noting that there are approximately 13.5 million Facebook users in California, which represents over 70 California users for each user located in Delaware. (*See Pivovar Decl. ¶ 2.*) Thus, any balancing of the user’s interests demonstrates that California has a

2. Facebook’s Size and the Location of Its Satellite Offices Are Not Relevant to The Transfer Analysis.

Plaintiffs’ Opposition makes extensive mention of Facebook’s status as a “large international corporation” and the location of its satellite offices as purported grounds for denying transfer. (*See, e.g.*, Opp’n Br. at 21-22.) These arguments are not relevant for two reasons. First, as repeatedly noted by Facebook, all of the equipment, witnesses, and documentation related to this case are associated with Facebook’s headquarters—none is associated with its satellite offices. (Suppl. Cunanan Decl. ¶ 3.) Second, the recent Federal Circuit grants of mandamus to transfer cases of undeniably “large international corporations”—Genentech, Hoffmann-La Roche, Nintendo—completely undermines Plaintiffs’ contentions.¹²

E. Plaintiffs’ Litany of Minor and Misguided Technical Arguments Are Irrelevant, Legally and Factually Unsubstantiated, and Provide No Weight In the Transfer Analysis.

Plaintiffs ignore recent Delaware and Federal Circuit case law deciding motions to transfer under § 1404(a) in order to posit a series of irrelevant and legally unfounded arguments throughout the last half of their Opposition brief. (Opp’n Br. at 19-34.) None of these trivialities supply any weight even remotely close to the weight of evidence in favor of transfer.

1. That Facebook Has Been Sued as a Defendant in Delaware Is Irrelevant to This Motion to Transfer.

Plaintiffs’ Opposition claims that Facebook is not inconvenienced by this case proceeding in Delaware because it has “previously litigated against other companies in Delaware.” (*See, e.g.*, Opp’n Br. at 21.) Beyond that, Plaintiffs fail to disclose, however, that Facebook has only ever been a *defendant* in Delaware. (*See* Pivovar Decl. ¶ 5.) This is a critical distinction because every case cited by Plaintiffs that notes previous litigation in Delaware as a

much greater interest than does Delaware.

¹² *See, e.g., Nintendo Co.*, 589 F.3d 1194; *Hoffmann-La Roche Inc.*, 587 F.3d 1333; *Genentech*, 566 F.3d 1338.

factor in the transfer analysis refers to parties that have previously availed themselves of the District of Delaware as a patent infringement *plaintiff*. Being involuntarily haled into a venue is much different than voluntarily seeking a court's authority to press claims as a plaintiff. *See Teleconference Sys.*, 676 F. Supp. 2d at 335. Regardless, without any indication that the facts are identical between a previous and subsequent lawsuit, it is improper to give any weight to prior litigations in the transfer analysis because it conflicts with the "individualized, case-by-case consideration of convenience and fairness" required of a transfer analysis. *Id.* The Federal Circuit has held that it is "clear error" for a district court to consider prior litigation as a transfer factor. *Genentech*, 566 F.3d at 1346 (holding it was "clear error" for District Court to consider prior litigation as a transfer factor); *see also Teleconference Sys.*, 676 F. Supp. 2d at 335.

2. There Is No Time Limit For Filing a Motion to Transfer.

There is no formal deadline placed on when a party can move for transfer pursuant to 28 U.S.C. § 1404(a). Plaintiffs' Opposition nevertheless alleges that the timing of Facebook's motion to transfer somehow factors into the transfer analysis. (Opp'n Br. at 6-8, 30.) However, the parties have not completed any discovery and this case has not otherwise become rooted in the District of Delaware. In fact, contrary to Plaintiffs' allegations, once Facebook became aware of the existence of the clear dispositive legal and factual grounds for transfer under *QinetiQ*, 2009 WL 5173705, it expeditiously filed its motion to transfer within four days. (Pivovar Decl. ¶ 4.)

3. Plaintiffs' Remaining Allegations Regarding the Private and Public Interests of This Case Are Not Legally Recognized, Conclusory, and Ignore Common Sense.

Plaintiffs' Opposition spends its last 15 pages making conclusory assertions about the balancing of the interests in this case. (Opp'n Br. at 19-34.) Plaintiffs' conclusions, however, are divorced from the actual facts in this case and rely extensively on selective, non-contextual

case law, much of which is outdated. (*See* Appendix A.) As such, perhaps it is not surprising that despite the facts that (1) neither party has any meaningful connection to Delaware, (2) there are a number of non-party witnesses located in California, (3) there has not been a single identified witness located in Delaware, (4) none of the operative facts of the case occurred in Delaware, (5) there are extensive contacts between this case and California, and (6) California is undeniably a more convenient forum for all involved, Plaintiffs have nevertheless “concluded” that the only interest in favor of transfer to the Northern District of California is Facebook’s preference. (*See* Opp’n Br. at 31-32.) An objective evaluation of the facts easily disproves Plaintiffs’ contentions and, accordingly, such contentions can be summarily disregarded.

III. CONCLUSION.

For the reasons set forth in Facebook’s opening brief and herein, Facebook respectfully requests that the Court grant its motion to transfer this case to the Northern District of California.

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