IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPLE INC., and NeXT SOFTWARE, INC., f/k/a NeXT COMPUTER, INC., Plaintiffs, v. HIGH TECH COMPUTER CORP., a/k/a HTC CORP., HTC (B.V.I.) CORP., HTC AMERICA, INC., and EXEDEA, INC., Defendants.	)	C.A. No. 10-166-RK **PUBLIC REDACTED VERSION**
APPLE INC., Plaintiff, v. HIGH TECH COMPUTER CORP., a/k/a HTC CORP., HTC (B.V.I.) CORP., HTC AMERICA, INC., and EXEDEA, INC., Defendants.	)	C.A. No. 10-167-RK **PUBLIC REDACTED VERSION**

APPLE INC. AND NeXT SOFTWARE, INC'S OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. NATURE AND STAGE OF PROCEEDINGS

HTC asks this Court to transfer the present cases ***despite the fact that there are two other related patent-infringement actions already pending in this District***—*Nokia Corporation v. Apple Inc.*, C.A. No. 09-791 GMS and C.A. 09-1002 GMS. These four cases share numerous overlapping patents and thus share numerous identical issues of fact and law. For example, both sets of cases will involve construction of a number of identical patent claims, a number of the same fact witnesses will need to testify in both sets of cases, and a number of the same experts will provide reports and testimony involving issues of infringement and validity of the overlapping patents. Sending these cases to another District would, as the Supreme Court has noted, be wasteful and inefficient. *See Continental Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 26 (1960) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent."). Rather than transfer the two present cases out of this District—so that different judges on opposite ends of the country will separately (and potentially inconsistently) decide common issues of fact and law—these cases should be consolidated with the related Delaware actions before the same judge.[1]

HTC's various arguments regarding the supposed "convenience" of the parties and their witnesses do not alter this conclusion. First, under Third Circuit law, Apple's choice of forum is entitled to far more deference than HTC argues. That deference only is heightened by the efficiencies resulting from Apple's choice to litigate the same patents in a single forum. Second, HTC is a large international company fully capable of litigating the present cases in the District

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[1] As a result, Apple has moved to have all four of them consolidated, at least for purposes of pretrial coordination. (*See* Ex. 1, Apple's Motion to Consolidate.) Unless otherwise noted, all exhibits referenced herein are attached to the Declaration of Richard K. Herrmann submitted with this Opposition.

of Delaware without suffering any disruption of its business activities. HTC is not based in the Northern District of California—its witnesses and personnel will have to travel regardless of the district in which these cases proceed, and relevant documents (both electronic and physical) will need to be shipped in either circumstance. Further, HTC cannot identify ***any*** potential third-party witnesses who would be unable to testify in a Delaware proceeding. For these reasons, none of the "private" factors that HTC purports to identify in support of its motion favors transferring these cases to California.

Ultimately, in light of the presence of other, related cases in this District, the convenience of the parties and the interests of judicial economy both would best be served by keeping these actions in the District of Delaware and consolidating them with the co-pending cases. As HTC previously successfully argued in related cases before the International Trade Commission, consolidation before a single judge would benefit the parties, the court, ***and*** third-party witnesses by avoiding the need for various duplicative litigation activities and by eliminating the possibility of inconsistent rulings based on the same law and facts. Transferring two of the four related cases to another district would prevent the parties and the Court from enjoying the obvious benefit of such efficiencies. Even if these cases are not consolidated, HTC has failed to meet its burden of demonstrating that convenience and the interest of justice support a transfer. Accordingly, this Court should deny HTC's motion.

II. SUMMARY OF ARGUMENTS

1. Transfer pursuant to 28 U.S.C. § 1404(a) is only appropriate if HTC can prove that the litigation would proceed more conveniently and that the interests of justice would better be served by going forward in a different forum.

2. Practical considerations related to the ease, expediency, and expense of adjudicating Apple's claims heavily favor keeping the present cases in this District, where two

related patent-infringement cases are already pending. Apple has moved to consolidate these four cases before Chief Judge Sleet, at least for pretrial coordination.

3. The "private" factors to be weighed when considering a motion to transfer all militate in favor of denying HTC's motion. Delaware is Apple's choice of forum. It also is a district in which infringing activity took place and thus in which Apple's patent-infringement claims arose. HTC is a large corporation that is already engaged in various litigations throughout the United States, including an ITC proceeding that it instituted against Apple in Washington, D.C., and thus it is not inconvenienced by litigating in this forum. Moreover, HTC cannot identify any third-party witnesses who would be unavailable for trial in Delaware. Further, there are no relevant documents or records that could not be produced in this District or at any site of the parties' choosing.

4. In addition to the practical considerations stemming from the presence of related cases, other relevant "public" factors, including the state of the Court's docket and the districts' relative interest in these cases, do not favor HTC's motion.

III. STATEMENT OF FACTS

A. The Instant Cases Are Just Two of Four Related Apple Patent-Infringement Litigations Currently Pending in the District of Delaware.

On October 22, 2009, Nokia filed a patent-infringement action in this District against Apple (C.A. No. 09-791 GMS, the "791 Case"). Apple filed an amended answer to Nokia's complaint on February 19, 2010, asserting counterclaims for infringement of nine Apple patents. (*See* 791 Case D.I. 21.)

On December 29, 2009, Nokia filed a second infringement suit in this District against Apple (C.A. 09-1002 GMS, the "1002 Case"). On January 15, 2010, Apple filed a complaint against Nokia at the ITC, asserting nine Apple patents. The ITC subsequently opened an

investigation (the "704 Investigation"). On February 24, Apple filed an answer and counterclaims in the 1002 Case, asserting the nine additional patents from the 704 Investigation against Nokia. (*See* 1002 Case D.I. 12.)

On March 2, 2010, Apple filed the present pair of actions for patent infringement against HTC (the "166" and "167 Cases"), asserting twenty Apple patents. Apple filed a corresponding complaint at the ITC, asserting infringement by HTC of the same patents at issue in the 166 Case, and the ITC opened an investigation (the "710 Investigation").

There are numerous commonalities of fact and law among the claims that Apple has brought against HTC and/or Nokia in the 791, 1002, 166, and 167 Cases that are now pending in this District. Significantly, of the 27 total Apple patents being asserted, Apple has asserted ***eleven*** against both HTC and Nokia.[2] Only nine patents are asserted solely against HTC, and only seven are asserted solely against Nokia (and even many of those patents are directed toward related technologies). In light of the common issues of fact and law raised by these overlapping patents—and to conserve the parties' and the courts' resources—Apple has moved to consolidate these four related cases before Chief Judge Sleet (who was assigned the initial 791 and 1002 Cases), at least for pretrial coordination. (*See* Ex. 1.)

B. The Parties to the Instant Cases

Defendant HTC Corp. is incorporated in Taiwan, and its American operations are headquartered in Bellevue, Washington. It runs an international business, conducts business throughout the United States, and is engaged in numerous litigations, including patent litigations, across the country. Defendant Exedea, Inc., upon information and belief, is incorporated and has its principal place of business in Houston, Texas. Plaintiff Apple is located in Cupertino, California.

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[2] *See* Ex. 2 for a list of the specific patents asserted in the 791, 1002, 166, and 167 Cases.

IV. ARGUMENT

Because the interests of justice would best be served by keeping the present cases in this District and because the purported "convenience" to the parties and the witnesses that HTC identifies does not support its request to transfer, HTC has failed to meet its burden, and this Court should deny HTC's motion.

A. The Law of Transfer Pursuant to 28 U.S.C. § 1404(a)

A district court may transfer a civil case to another district "[f]or the convenience of the parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). HTC bears the burden of showing the need for such a transfer, and must demonstrate that "on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." *See Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995) (internal quotations omitted). In ruling on a motion under § 1404(a), the Court must consider several factors, including the following "private" factors: (i) each party's preferred forum; (ii) where the claims arose; (iii) the convenience of the parties, as indicated by their relative physical and financial conditions; (iv) the convenience of third-party witnesses, as indicated by their availability to participate at trial in the forum; and (v) the locations of books and records, to the extent they cannot be produced in the forum. *Id.* Relevant "public" factors include: (i) practical considerations that could make a trial easy, expeditious, or inexpensive; (ii) the relative administrative difficulty in the two jurisdictions resulting from court congestion; and (iii) the local interest in deciding local controversies at home. *Id.*

"The Third Circuit has stated that the plaintiff's selection of a proper forum is a 'paramount consideration' and should not be 'lightly disturbed.'" *Stealth Audio Alarm & Pet Containment Sys., Inc. v. Orion Eng'g, Inc.*, No. Civ.A. 96-7931, 1997 WL 597653, at * 4 (E.D. Pa. Sept. 19, 1997) (citation omitted). For this Court to grant a motion to transfer, the

"[d]efendants brought into suit in Delaware must prove that litigating in Delaware would pose a 'unique or unusual burden' on their operations." *Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.*, 157 F.R.D. 215, 218 (D. Del. 1993); *see also Nice Sys., Inc. v. Witness Sys., Inc.*, C.A. No. 06-311-JJF, 2006 WL 2946179, at *2 (D. Del. Oct. 12, 2006) (a "transfer is not warranted simply because the transferee court is more convenient for defendants"). Transfer should be denied if the *Jumara* factors either are evenly balanced or weigh only slightly in favor of transfer. *Continental Cas. Co. v. Am. Home Assurance Co.*, 61 F. Supp. 2d 128, 131 (D. Del. 1999). Notably, the Federal Circuit recently held that "***the existence of multiple lawsuits involving the same issues is a paramount consideration when determining whether a transfer is in the interest of justice.***" *In re Volkswagen of Am., Inc.*, 566 F.3d 1349, 1351 (Fed. Cir. 2009).

B. The Existence of the Two Other Related, Co-Pending Cases in this District Strongly Supports Denying HTC's Motion to Transfer.

As noted above and in Apple's co-pending Motion for Consolidation, the instant 166 and 167 Cases share significant common issues of law and fact with the previously-filed 791 and 1002 Cases, which are pending before Chief Judge Sleet. In these four cases Apple has asserted that HTC's and Nokia's smart phones infringe a number of Apple patents. Of the 27 total patents that Apple has asserted, it has asserted ***eleven*** against both Nokia and HTC. Moreover, the remaining, individually-asserted patents still bear numerous relations to the commonly-asserted ones, as thirteen inventors named on the individually-asserted patents are also named on one or more of their commonly-asserted counterparts. Many of the individually-asserted patents also are directed to related technologies, including object-oriented programming and software architecture, user interfaces and touch screens, networking, and computer start-up procedures. Given the overlapping patents and technologies at issue in these four cases, practical considerations strongly favor consolidating these matters before the same court.

Rather than try to promote judicial economy HTC asks the Court to move in the ***opposite*** direction and transfer the 166 and 167 cases out of the District. HTC's position is unsupportable. HTC itself acknowledges that it is not efficient to have these overlapping cases be assigned to two different judges in the District of Delaware. (*See* Mot. at 14.) Apple agrees—but the proper solution is ***not*** to transfer two of the cases to a different district, thus exacerbating the problem. Instead, the best solution is to consolidate all four of them before a single judge in this District, as HTC tacitly admits when it asserts: "Presuming [the present] arrangement continues, no efficiencies are gained by keeping the HTC cases in Delaware." (*Id.*) HTC thus implicitly recognizes that if Apple's Motion for Consolidation is granted, efficiencies ***will*** be gained. Indeed, HTC cannot deny that fact, as it recently argued for the consolidation of a parallel set of investigations involving overlapping patents—including many of the same ones at issue here—before the ITC.

HTC further argues, half-heartedly, that "it would appear impractical" to have a single consolidated case proceed before one judge. (*Id.*) This position expressly contradicts the arguments HTC recently made to the ITC when it sought consolidation of the related investigations against itself and Nokia. In an almost identical set of circumstances, HTC argued that a long list of procedural advantages would be gained from fully consolidating the two ITC investigations where patents were overlapping, including that:

- Consolidation would "eliminate the waste of the parties' and [tribunal's] time and [of the] expense that would otherwise result from redundant discovery, unnecessarily repetitive briefings and duplicative hearings featuring the same exhibits, witnesses, and evidence." (Ex. 3, HTC ITC Br. at 8.)
- "Having separate ALJs assess the same patents presents substantial risk of inconsistent . . . determinations." (*Id.* at 7.)
- "There is certain to be substantial overlap . . . in the depositions of experts and fact witnesses—particularly of third parties who are expected to possess prior art critical to both respondents' defenses. . . . [C]onsolidation will reduce these redundancies and

will also relieve experts, inventors, and other deponents . . . from the burden of multiple depositions and multiple appearances during separate proceedings." (*Id.* at 6.)

- "Putting the identical patents in the Investigations . . . before the same ALJ from the start resolves the difficult issues inherent in having the Investigations proceed separately." (Ex. 4, HTC ITC Rep. Br. at 5.)
- Consolidation would "remove the significant prejudice HTC would face if forced to litigate many issues critical to its case shortly after those same key issues have been litigated and potentially decided by a different [tribunal]." (Ex. 3, HTC ITC Br. at 4.)
- "[L]egal arguments as to claim construction are likely to be similar in both Investigations." (*Id.* at 7.)
- The ITC tribunals "are highly burdened at the present time, and should not be asked to entertain redundant litigations." (*Id.* at 8.)
- "In fact, the only unique legal issue raised in the two investigations may be the respondents' technical implementation of the operating software." (*Id.*)

All of these considerations apply to the present cases. Now, however, contrary to its prior position, HTC's seeks via its motion to preclude precisely the kind of practical benefit that it argued for and obtained at the ITC.[3] That is not an efficient outcome—and HTC knows it.

Indeed, the law recognizes the vast practical advantages to be gained by keeping related cases before the same judge, and it does not support HTC's request for transfer. Although HTC cites a number of Federal Circuit cases in which transfer was approved under different circumstances (*see* Mot. at 8), it ignores the most relevant Federal Circuit case—*In re Volkswagen of Am., Inc.*, 566 F.3d 1349, 1351 (Fed. Cir. 2009). In *Volkswagen*, a patent case had been transferred to the Eastern District of Texas, where two related cases were pending, "to avoid wasting judicial resources and the risk of inconsistent rulings on the same patents." *Id.* at

[3] A granting of HTC's motion would effectively prevent the consolidation of these related cases. *See* FED. R. CIV. P. 42 (only permitting consolidation of "actions before the court"); *Swindell-Dressler Corp. v. Dumbaule*, 308 F.2d 267, 273 (3d Cir. 1962) ("a cause of action pending in one jurisdiction cannot be consolidated with a cause of action pending in another jurisdiction").

1351. The Federal Circuit subsequently denied a request to vacate the district court's denial of a second motion for transfer, holding: "In this case, the existence of multiple lawsuits involving the same issues is a paramount consideration when determining whether a transfer is in the interest of justice." *Id.* The court further noted that although the "cases may not involve precisely the same issues, there will be significant overlap and a familiarity with the patents could preserve time and resources." *Id.*

Moreover, in another case virtually identical to the present ones, the Northern District of Illinois denied transfer, stating:

> [T]he most compelling factor in determining the appropriateness of transfer is the interest of society in the efficient administration of justice. Three cases involving the same patent are pending before this Court. Each involves complex technical and legal issues. Transfer [of one case] would result in duplicative judicial effort requiring two courts to resolve some of the same issues. For these reasons, [the] motion to transfer to the Northern District of California is denied.

Magnavox Co. v. APF Electronics, Inc., 496 F. Supp. 29, 34 (N.D. Ill. 1980); *see also Avante Intern. Tech., Inc. v. Hart Intercivic, Inc.*, 08-636-GPM, 07-169-GPM, 2009 WL 2448519, at *5 (S.D. Ill. July 22, 2009) ("It is axiomatic, of course, that related suits should be concentrated in the same forum."). Indeed, if anything, Courts typically transfer cases ***to*** jurisdictions where there are related actions, not out of them.[4]

Thus, the law is clear that judicial economy is best served by keeping related patent actions before the same court. In its arguments to the ITC, HTC admitted the many advantages

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[4] *See, e.g., Telcordia Techs., Inc. v. Tellabs, Inc.*, No. 09-2089 (JAG), 2009 WL 5064787, at *3 (D.N.J. Dec. 16, 2009) (granting motion to transfer patent case to district where related cases had been heard, and noting "'in a case such as this in which several highly technical factual issues are presented and the other relevant factors are in equipoise, the interest of judicial economy may favor transfer to a court that has become familiar with the issues'") (quoting *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997)).

of having overlapping patent cases proceed before the same tribunal. Because its present request would bar this goal, HTC's motion should be denied.[5]

C. The Private-Interest Factors Enumerated in *Jumara* Do Not Support HTC's Request to Transfer.

1. Apple's Choice to Litigate in This District Is Entitled To Significant Weight in the Court's Analysis.

Contrary to HTC's suggestion, Third Circuit law provides that Apple's choice of forum "is a 'paramount consideration' [in the transfer analysis] and should not be 'lightly disturbed.'" *Stealth Audio* Alarm, No. Civ.A. 96-7931, 1997 WL 597653, at * 4 (citation omitted). HTC cites various cases for the supposed proposition that the moving party's burden is lowered "where [the] plaintiff chooses not to bring suit in its 'home turf' or in a forum connected to its claims." (Mot. at 9.) Delaware ***is*** connected to Apple's claims, however, because the defendants' infringing activity took place in this District, and there are co-pending related cases, as discussed above. Apple's choice of venue was not arbitrary, and it is entitled to "paramount consideration," as the law requires.[6]

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[5] A denial of HTC's motion on these grounds is appropriate even though Apple's Motion for Consolidation has not yet been granted. *Cf. Aktiengesellschaft v. Milwaukee Elec. Tool Corp.*, No. 04CV629 (ARR)(ASC), 2004 WL 1812821, at *8 (E.D.N.Y. Jul 19, 2004) (noting where one district had a related infringement case pending before it, transfer to that district was appropriate regardless of whether the transferee court ultimately chose to consolidate).

[6] The "recent decisions" that HTC cites to suggest that Apple's choice of venue should not be treated as an independent and important factor in the transfer analysis are inapposite. They include a Fifth Circuit case, a Federal Circuit case applying Fifth Circuit precedent, and a Supreme Court case addressing the common-law doctrine of *forum non conveniens*. (*See* Mot. at 9 n.2.) In the Third Circuit, the proper analysis governing motions to transfer under 28 U.S.C. § 1404(a) remains the *Jumara* factors, which indisputably include the plaintiff's choice of venue as a vital and independent factor. *See, e.g., Carnegie Mellon University v. Marvell Technology Group, Ltd.*, Civil Action No. 09-290, 2009 WL 3055300, at *1 (E.D. Pa. Sept. 21, 2009).

2. Apple's Claims Arose in this District.

HTC incorrectly contends that "[t]o the extent Apple's claims are based in any judicial district, they are based in the Northern District of California, where key evidence and witnesses are located." (Mot. at 13.) However, contrary to HTC's suggestion, "'the actions giving rise to this case'" were not Apple's development of its patents but, rather, the defendants' *infringement* of them. (Mot. at 15.) Apple's claims arose in the District of Delaware as much as in any other district, because that is where the infringement occurred. *See Carnegie Mellon Univ. v. Marvell Tech. Group, Ltd.*, No. 09-290, 2009 WL 3055300, at *2 (W.D. Pa. Sept. 21, 2009) (noting that the relevant location for this factor is "where the alleged infringing activity or other activities relevant to the claims at issue took place"); *cf. Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc.*, 707 F. Supp. 1429, 1437 (D. Del. 1989) ("While there may be other sites attributable to defendant's alleged misconduct, this district appears to be at least one 'center of gravity' of this lawsuit, since some of the defendant's customers are located in Delaware."). This factor therefore does not support transfer or, at a minimum—as infringement took place across the country—is neutral.

3. The Northern District of California Is Not a More Convenient Forum for the Parties.

HTC argues that the Northern District of California is a more convenient forum for it to litigate these cases, because it has a facility in San Francisco—that allegedly employs one potentially relevant witness—and because "[m]ost of [its] relevant . . . engineers work and live in Taiwan," which is closer to California than to Delaware. (Mot. at 12-13.) Under the *Jumara* factors, however, the "convenience of the parties" is assessed not according to their location, but "their relative physical and financial conditions." *Jumara*, 55. F.3d at 879. HTC is a corporation that does business nationwide, and it currently is involved in litigations around the country,

including in this District, as well as elsewhere on the East Coast.[7] HTC's participation in these actions confirms that it is more than capable of trying the present cases in Delaware. Indeed, the fact that HTC is not seeking to transfer these cases to its home districts indicates that proximity to the forum is not actually a concern for it.

HTC's travel argument also fails. "'[P]arty witnesses are presumed to be willing to testify in either forum despite any inconvenience.'" *Carnegie Mellon*, 2009 WL 3055300, at *4 (quoting *Hillard v. Guidant Corp.*, 76 F. Supp. 2d 566 (M.D. Pa. 1999)). HTC's personnel and witnesses will have to fly from Washington or Taiwan regardless of whether a trial takes place in Delaware or California—the extra distance is not a significant burden. *See Nice Sys., Inc.*, C.A. No. 06-311-JJF, 2006 WL 2946179, at *2 ("transfer is not warranted simply because the transferee court is more convenient for defendants"). Indeed, on May 12, 2010, HTC filed a new case against Apple at the ITC, which is located in Washington, D.C., asserting two patents with named inventors who are Chinese. In light of HTC's demonstrated ability—and choice—to litigate on the East Coast, the purported added burden of having to travel to the East Coast instead of California is hardly a reason to squander the vast practical benefits that would be gained by litigating the four related cases together in Delaware.[8]

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[7] These cases include the ITC actions discussed above, as well as a patent-infringement action that HTC brought in the District of Columbia (no. 1:2008-cv-1897) and several pending patent-related litigations in the District of Delaware. (*See* Ex. 5.) HTC also is involved in numerous other patent cases around the country, including in Massachusetts, Illinois, Texas, Virginia, and Colorado. (*See id.*)

[8] *See Alcoa Inc. v. Alcan Inc.*, No. 06-451-SLR, 2007 WL 1948821, at *4 (D. Del. July 2, 2007) ("[T]he travel expenses and inconveniences incurred for trial here, by Delaware defendants conducting worldwide business, is not overly burdensome."); *Crystal Semiconductor Corp. v. OPTi Inc.*, No. A 97-CA-026 SS, 1997 WL 798357, 44 U.S.P.Q.2d 1497, 1504 (W.D. Tex. July 14, 1997) ("A measly three-hour plane ride from San Jose to Austin is not...an 'extraordinary burden and inconvenience' considering the fact that its witnesses would, in any event, have to travel half-way around the world [from Singapore] to defend the lawsuit in California.").

Moreover, upon information and belief, another of the co-defendants, Exedea, is incorporated and has its principle place of business in Houston, Texas. Because a flight from Houston to Delaware is comparable to a flight from Houston to northern California, the proposed change of forum would provide no additional convenience to Exedea. Indeed, Exedea already is participating in another patent case on the East Coast, in Massachusetts. (*See* Ex. 6.)

Finally, HTC argues that it is filing this motion for ***Apple***'s benefit, because Apple is located in the Northern District of California. (*See* Mot. at 12.) As noted above, however, Apple chose to file these actions in the District of Delaware due to the two co-pending related cases. Like HTC, Apple is capable of litigating cases on the East Coast. Ultimately, for the reasons discussed above, the conveniences and efficiencies to be gained from litigating these cases in the District of Delaware far outweigh any marginal convenience HTC might gain by slightly reducing the travel time for its personnel and witnesses. Its motion should be denied.

4. The Northern District of California Is Not a More Convenient Forum for Third-Party Witnesses.

Because party witnesses are presumed to be willing to testify in either forum, the "convenience of the witnesses" factor focuses on the convenience of non-party witnesses. *Carnegie Mellon*, 2009 WL 3055300, at *4 (citation omitted). Importantly, "[t]he Court considers this factor 'only to the extent that the witnesses may actually be *unavailable* for trial in one of the fora.'" *Id.* (quoting *Jumara*, 55 F.3d at 879).[9]

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[9] *See also Leonard v. Stemtech Health Sciences, Inc.*, Civil Action No. 08-67-JJF, 2008 WL 5381359, at *3 (D. Del. Dec. 19, 2008) ("Stemtech has made no showing that these witnesses would in fact be unavailable in Delaware, as *Jumara* requires for this consideration to favor transfer."); *Carnegie Mellon*, 2009 WL 3055300, at *4 ("Since Defendants bear the burden of showing that inconvenience would make non-party witnesses unavailable for trial and because...they have not done so, this factor...weighs in favor of Plaintiff."); *Argos v. Orthotec LLC*, 304 F. Supp. 2d 591, 598 (D. Del. 2004) ("[T]he court notes that Orthotec has not averred in its briefing documents that witnesses would be unavailable for trial in Delaware.");

HTC argues that the Northern District of California is a more convenient forum for unidentified third-party witnesses from Google, whose Android operating system is one of the operating systems used in HTC's accused phones. (*See* Mot. at 11.) However, HTC fails to identify facts regarding any actual potential Google witnesses that would justify transferring the Delaware cases. HTC also fails to recognize that according to the declaration of Google's Brian Ong, which was submitted with HTC's motion, because Google is a Delaware corporation Google should reasonably expect to participate in litigations in this District, even if only in a testifying capacity. *Cf. R2 Tech., Inc. v. Intelligent Sys. Software, Inc.*, No. Civ.A. 02-472-GMS, 2002 WL 31260049, at *2 (D. Del. Oct. 9, 2002) (denying motion to transfer because Delaware corporation should "reasonably expect to litigate in the forum"). Significantly, HTC does not name any specific Google witnesses, let alone does it assert that any Google personnel would be unavailable to participate at a trial in Delaware.[10] In fact, given that a Google employee supplied a declaration in support of HTC's motion to transfer, there is little doubt that Google is willing to cooperate with HTC's defense of these actions, or that it would be willing to supply witnesses for trial. [redacted]

HTC also wrongly asserts that all of the Google engineers working on the Android operating system are located in the Northern District of California. (*See* Mot. at 11.) [redacted]

Tsoukanelis v. Country Pure Foods, Inc., 337 F. Supp. 2d 600, 604 (D. Del. 2004) ("This court, however, has denied motions to transfer venue when the movants were unable to identify documents and witnesses that were unavailable for trial.").

[10] Indeed, Google currently is participating in numerous patent cases that are pending around the United States, including in this District. (*See* Ex. 7.)

[redacted]

- Three engineers responsible for Android's "Web browser," located in North Carolina. (Ex. 8, Rubin 5/11/10 Dep. Tr. at 33:7–14.)
- Two engineers responsible for middleware and application development, located in Massachusetts. (*Id.* at 28:17–20, 29:17–30:6.)
- One engineer responsible for the Android "system framework"—*i.e.*, "functions and APIs available for third-party developers"—located in Texas. (*Id.* at 32:4–19.)
- "Four or five" en gineers responsible for Android "apps around communication," located in Washington State. (*Id.* at 31:20-32:3.)
- One engineer responsible for email, located in Oregon. (*Id.* at 33:16–22.)
- A team of engineers responsible for Android development, located in Japan. (*Id.* at 34:2–7.)
- As many as ten engineers responsible for camera design and back-end services, located in Taiwan. (*Id.* at 34:15–24.)

Thus, many potential Google witnesses still would have to travel to appear at trial, even if this case were transferred to California.[11] In any event, to the extent any Google witness actually is unavailable to travel to Delaware for trial, his or her testimony could easily be presented via videographic means.[12]

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11 [redacted]

12 *See, e.g.*, *Stealth Audio Alarm*, No. Civ.A. 96-7931, 1997 WL 597653, at *4 ("[A]lternative procedures for preserving the testimony of [out of state] witnesses *de bene esse*, such as videotape depositions, will allow [the movant] to present the testimony that it desires without requiring the witness to travel to Pennsylvania. Accordingly, this factor gives little weight to Orion's argument.").

HTC further cites Microsoft and Qualcomm as other potentially-relevant third parties that are located in California. (*See* Mot. at 11.) Again, however, HTC does not identify any specific Microsoft or Qualcomm employees who are potential witnesses, let alone any who would be unavailable for trial in Delaware. At any rate, Apple is not accusing any Microsoft components of infringement, so no Microsoft employees are relevant to this analysis. In addition, Qualcomm is one of HTC's suppliers, and thus, like Google, would likely be willing to voluntarily assist HTC with its defense.

At bottom, HTC fails to identify even a ***single*** witness who allegedly would be unwilling or unable to attend a trial in Delaware. Mr. Wada's declaration identifies numerous purported locations of inventors of the asserted patents, but never contends that any of these individuals would be unavailable for trial.[13] Similarly, the declaration by Google's People Analytics Manager, Mr. Ong, does not identify a single Google employee who could not attend trial in Delaware. Accordingly, HTC's motion should fail.

5. The Location of Records Also Does Not Support Transfer.

HTC also argues that the Northern District of California is a more convenient forum because it stores documents in Taiwan and in Washington State, which are closer to California than to Delaware. (*See* Mot. at 13.) Under the *Jumara* factors, "the location of books and records" is only relevant "to the extent that the files could not be produced" in the forum. *Jumara*, 55 F.3d at 879; *see also Carnegie Mellon*, 2009 WL 3055300, at *4. As HTC is aware, most of the documents in this case are likely to be produced electronically—and even if they are

[13] Indeed, it is highly unlikely that HTC would call every inventor to testify at trial—it is uncommon for an alleged infringer to call *any* named inventors. Nevertheless, to the extent HTC seeks to call one or more of the inventors who are not employed by Apple, Apple would make every effort to obtain those witnesses for trial. If for some reason it were unable to do so, a videotaped deposition should suffice. *See, e.g.*, *Stealth Audio Alarm*, No. Civ.A. 96-7931, 1997 WL 597653, at *4.

not, physical copies would still need to (and can readily) be shipped from Taiwan and Washington State, regardless of in which district the cases are pending. [redacted] Ultimately, the physical location of documents does not support HTC's request that the Delaware cases be transferred.[15]

D. The Remaining Public-Interest Factors Do Not Support Transfer.

As noted above, in light of the related cases that are co-pending in the District of Delaware, practical considerations related to the ease, expediency, and expense of adjudicating Apple's claims overwhelmingly favor keeping the instant cases in this forum, where they can be consolidated with the related litigations. The other relevant public-interest factors enumerated in the Third Circuit's *Jumara* opinion also do not support granting HTC's motion.

1. Court Congestion Does Not Mandate Transferring The Cases Out of This District.

HTC argues that time-to-trial statistics for the Northern District of California versus the District of Delaware indicate that a transfer is warranted to help alleviate court congestion in this District. (*See* Mot. at 13-14 & n.4.) As an initial matter, HTC grossly overstates the disparity in the average time to trial between the two districts—while HTC asserts that cases in the Northern

14 [redacted]

15 *See Carnegie Mellon*, 2009 WL 3055300, at *4 ("Since Defendants have not carried their burden of showing that files discoverable in this matter could not be produced in this District, this factor weighs in favor of Plaintiff.").

District of California take "nearly a full year less" to reach trial than cases in this District, its own statistics indicate that the difference is less than seven months. (*See id.* at 13 & n.4.) Moreover HTC has requested—and been granted—***two*** extensions of time to answer Apple's complaint, so it cannot credibly argue that time-to-trial is a real concern for it in litigating these cases. Further, in any event, the purely statistical difference that HTC cites carries little weight, especially when considering the more-than-offsetting efficiencies that would be gained by consolidating the four related cases in this District. *Cf. Carnegie Mellon*, 2009 WL 3055300, at *5 (noting that "the Court need not engage in statistical speculation" regarding this factor, and that a purported four-month time-to-trial advantage was unpersuasive where the act of transfer itself was likely to produce its own inefficiencies). Here, any concern over judicial congestion is best addressed by consolidating the four Delaware cases, with their common issues of law and fact, rather than transferring half the cases to another jurisdiction and creating a set of largely duplicative proceedings.

2. The Northern District of California's Interest in These Cases Does Not Outweigh This District's.

HTC contends that the Northern District of California has "a strong local interest in resolving this dispute" because Apple is a California company. (Mot. at 15.) However, third-party Google, on which HTC bases a significant portion of its argument for transfer, is a Delaware company. Thus, under HTC's own analysis, this factor is at most neutral, and does not support HTC's motion.

V. CONCLUSION

For the foregoing reasons, Apple respectfully requests that this Court deny HTC's Motion to Transfer Venue.

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