



TABLE OF CONTENTS

	<u>Page</u>
I. DEFENDANTS’ MOTION TO TRANSFER VENUE TO THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA UNDER 28 U.S.C. § 1404.....	1
II. NATURE AND STAGE OF PROCEEDINGS .....	2
A. Procedural Background.....	2
B. The Parties .....	2
C. Third-Party Witnesses.....	3
III. ARGUMENT .....	4
A. Wi-LAN Could Have Brought this Action in the Southern District of California .....	5
B. The Private-Interest Factors Weigh Heavily in Favor of Transfer to the Southern District of California.....	5
1. The Southern District of California Has Significantly Greater Access to Sources of Proof .....	5
a. Access to Qualcomm Documents in San Diego, California.....	6
b. HTC Documents And Witnesses In Taiwan, California And Washington .....	7
c. First Named Inventor and R & D Documents For Subject Matter of Patents-In-Suit in the UK.....	8
2. The Southern District Of California Has The Availability Of Compulsory Process Over Witnesses That Is Lacking In The Eastern District Of Texas.....	9
3. Cost of Attendance for Willing Witnesses, Including all Inventors, Is Less in the Northern District of California .....	9
a. The Southern District Of California Is A More Convenient Forum, And May Be The Sole Forum, For Qualcomm Employees.....	11
b. The Southern District Of California Is A More Convenient Forum For HTC Witnesses Located In Taiwan.....	12

c.	The Southern District Of California Is A More Convenient Forum For The HTC Witnesses Located In Bellevue, Washington .....	13
C.	The Public Interest Factors Weigh in Favor of Transfer to the Southern District of California .....	13
1.	Practical Considerations Favor Transfer To The Southern District.....	13
2.	The Southern District Of California Has A Significant And Over-Riding Local Interest In This Dispute.....	14
IV.	CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Ennova Direct, Inc., v. LG Electronics U.S.A., Inc.</i> No. 2:08-cv-22 (E.D. Tex., Mar. 31, 2010) .....	9
<i>Fujitsu Ltd. v. Tellabs, Inc.</i> 639 F. Supp. 2d 761 (E.D. Tex. 2009).....	10
<i>Gabriel Techn. Corp. v. Qualcomm, et al.</i> 3:08-cv-01992 (S.D.Cal.).....	14
<i>In re Genentech, Inc.</i> 566 F.3d 1338 (Fed. Cir. 2009).....	4, 6, 7, 9, 10
<i>In re Hoffman-La Roche Inc.</i> 587 F. 3d .....	14
<i>In re Nintendo</i> 589 F.3d .....	10, 12
<i>Qualcomm Inc. v. Conexant Sys., et al.</i> 3:02-cv-02002-B (S.D.Cal.).....	14
<i>Software Rights Archive, LLC v. Google, Inc.</i> 2010 WL 2950351 (E.D.Tex. July 22, 2010) [hereinafter "SRA"] .....	11, 14, 15
<i>In re TS Tech USA Corp.</i> 551 F.3d 1315 (Fed. Cir. 2008).....	4, 5, 10, 13, 15
<i>Vasudevan Software, Inc. v. IBM Corp.</i> 2009 WL 3784371 (E.D. Tex. Nov. 10, 2009) .....	7
<i>In re Volkswagen AG</i> 371 F.3d 201 (5th Cir. 2004) .....	4, 5, 10
<i>In re Volkswagen of America, Inc.</i> 545 F.3d 304 (5th Cir. 2008) .....	4, 5, 6, 9, 15
<i>In re Volkswagen of America, Inc.</i> 566 F.3d 1349 (Fed. Cir. 2009).....	4
<i>Wi-LAN v. Research in Motion, et al.</i> Civil Action No. 2:08-cv-247 .....	2, 7

Statutes

28 U.S.C. §§ 1391(c) and 1400(b) .....5  
28 U.S.C. § 1404 ..... 1  
28 U.S.C. § 1404(a) .....1, 4, 5

Other Authorities

Local Rule CV-7(g)'s .....17  
Texas. Rule 45(c)(3)(A)(ii) .....9

**I. DEFENDANTS' MOTION TO TRANSFER VENUE TO THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA UNDER 28 U.S.C. § 1404**

Defendants HTC Corporation ("HTC Corp."), HTC America, Inc. ("HTC America"), and Exedea, Inc. ("Exedea") (collectively "HTC"), respectfully move this Court to transfer this civil action from the United States District Court for the Eastern District of Texas to the Southern District of California under 28 U.S.C. §1404(a). In the Motion to Sever, filed concurrently herewith, HTC requests that this Court, inter alia, sever the claims against HTC from this action.

HTC seeks to have this case proceed in the forum with compulsory process over non-party Qualcomm witnesses and documents that pertain to the chipsets in the HTC devices Plaintiff Wi-LAN, Inc. ("Wi-LAN") has accused of infringing. The ability to compel Qualcomm's witnesses to attend trial and access to these witnesses and documents is integral to HTC's non-infringement defense against Wi-LAN's accusations.

Qualcomm witnesses are necessary to HTC's defense in this case and are located in San Diego, but will not attend trial absent being compelled to do so. In this case, fairness and necessity require transfer to the Southern District where the court can compel these necessary witnesses to attend trial. The unique reliance on non-party witnesses, source code, and documents for defenses against infringement makes transfer the only fair option to HTC who must rely on Qualcomm witnesses and documents to defend against Plaintiff Wi-LAN's allegations of infringement. HTC's ultimate ability to defend itself at trial is compromised by its inability to compel attendance of non-party witnesses for its defense in Texas. It is fundamentally unfair and highly prejudicial to require HTC to defend this lawsuit in Texas.

Qualcomm documents and source code central to proving non-infringement are also located in San Diego, in the Southern District of California. Qualcomm has refused to provide its documents outside of its facilities in San Diego, California. In a separate litigation underway

in this Court's Marshall division, Qualcomm documents made available *only in California*. Thus, the parties in that litigation must seek permission pursuant to a supplemental protective order in that case to have a particular individual be able to go to Qualcomm in San Diego to view source code allegedly relevant in that case. *See Wi-LAN v. Research in Motion, et al.*, Civil Action No. 2:08-cv-247 [Dkt. No. 144-2]; Larish Decl., Ex. A.

Transfer is also appropriate to the Southern District of California because it is a venue where this action could have been brought in the first instance, is where the key witnesses and evidence are found, and is a closer, more accessible and more convenient venue for individuals who will testify in this case. Finally, because the allegedly infringing technology was developed by Qualcomm in San Diego, the Southern District of California has a far greater interest in resolving this dispute than the Eastern District of Texas. Accordingly, in the interests of fairness and necessity, HTC respectfully requests transfer.

## **II. NATURE AND STAGE OF PROCEEDINGS**

### **A. Procedural Background**

Plaintiff Wi-LAN filed this patent lawsuit in this Court on October 5, 2010, alleging that HTC Corp., HTC America, and Exedeia infringe two of four patents by virtue of importing, offering to sell and selling nine different models of handsets. Wi-LAN has also accused Defendants Alcatel-Lucent USA, Inc., Sony-Ericsson Mobile Communications AB & USA, LG Electronics, Inc. & LG Electronics Mobilecomm U.S.A., Inc. LG Electronics U.S.A., Inc. and Telefonaktiebolaget LM Ericsson and Ericsson, Inc. of infringement. This case is still in the initial pleading stage, HTC has just answered as of January 3, 2011, and no discovery has occurred.

### **B. The Parties**

Plaintiff Wi-LAN is a foreign patent-holding and licensing company based in Ottawa, Ontario, Canada. Upon information and belief, Wi-LAN has not produced any products since at least 2004 and does not currently produce products, and has no offices or employees in the Eastern District of Texas, other than the offices of its counsel.

HTC Corp. is organized and existing under the laws of Taiwan and has its principal place of business in Taoyuan, Taiwan. HTC America is a wholly owned subsidiary of HTC Corp., with its principal place of business (approximately 125 employees) in Bellevue, Washington, and is a Washington corporation. HTC America is responsible for the marketing and sales of the accused phones in the United States. All or substantially all the HTC employees who would testify or be deposed in this case are located in Washington State, Taiwan, or Northern California. *See* Declaration of Jon Maron ("Maron Decl.") ¶¶ 6, 7. HTC Corp., HTC America, and Exedea have no offices or engineers in the Eastern District of Texas. Maron Decl. ¶¶ 3, 11. HTC has no offices in Texas. Maron Decl. ¶¶ 9, 11.

HTC does not sell any of the accused cell phones directly to consumers in the Eastern District of Texas. Maron Decl. ¶ 6. The accused cell phones are sold to consumers throughout the United States by carriers and distributors, not by HTC. Maron Decl. ¶¶ 4, 6. Sales of the accused products are through retail outlets and over the Internet. Maron Decl. ¶¶ 4, 6. HTC does not operate any retail outlets in Texas. Maron Decl. ¶ 4.

**C. Third-Party Witnesses**

The HTC devices accused of infringement all contain chipsets designed and made by Qualcomm. Maron Decl. ¶ 13. Because the chipsets contain the hardware and firmware that will be of primary concern in evaluating the allegations of infringement, HTC must rely on Qualcomm witnesses and documents for its non-infringement defense. Maron Decl. ¶¶ 13, 14.

These witnesses will not attend trial in Texas. Declaration of John Clifford (“Clifford Decl.”) ¶ 6. Qualcomm is based in San Diego, California, where the Southern District can compel Qualcomm witnesses to testify at trial. All Qualcomm engineering personnel and documents pertinent to this case are found in California, primarily in San Diego. Clifford Decl. ¶ 6; *see also* Maron Decl. ¶¶ 13, 14 .

### **III. ARGUMENT**

"For the convenience of parties, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The Fifth and Federal Circuits have enunciated the standard to be used in deciding motions to transfer venue. *See In re Volkswagen of America, Inc.*, 566 F.3d 1349 (Fed. Cir. 2009) [hereinafter *Volkswagen III*]; *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008) (applying the Fifth Circuit’s en banc *Volkswagen II* decision to rulings on transfer motions out of this circuit); *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008) [hereinafter *Volkswagen II*]. The moving party must show "good cause," and this burden is satisfied "when the movant demonstrates that the transferee venue is clearly more convenient." *Volkswagen II*, 545 F.3d at 315.

The initial threshold question is whether the suit could have been brought in the proposed transferee district. *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) [hereinafter *Volkswagen I*]. If the transferee district is a proper venue, then the court must weigh the relative conveniences of the current district against the transferee district. In making the convenience determination, the Fifth Circuit considers several private and public interest factors, none of which are given dispositive weight. *Id.* "The private interest factors are: ‘(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of

witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Volkswagen II*, 545 F.3d at 315 (quoting *Volkswagen I*, 371 F.3d at 203). "The public interest factors are: '(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict laws [or in] the application of foreign law.'" *Id.* (quoting *Volkswagen I*, 371 F.3d at 203).

The Federal Circuit has recently clarified the considerations relevant to transferring patent infringement actions under Section 1404(a). The fact that Wi-LAN chose to file in this District is not a sufficient basis to prevent transfer to the Northern District of California. *In re TS Tech.*, 551 F.3d at 1320 ("Fifth Circuit precedent clearly forbids treating the plaintiff's choice of venue as a district factor in the § 1404(a) analysis.") (citing *Volkswagen II*, 545 F. 3d at n. 10).

**A. Wi-LAN Could Have Brought this Action in the Southern District of California**

The prerequisite that this case be transferred to a district where it might have been brought is satisfied. Wi-LAN could have brought this action against HTC in the Southern District of California, which is a proper venue under 28 U.S.C. §§ 1391(c) and 1400(b). HTC engages in the same activity in the Southern District of California that Wi-LAN alleges HTC engages in, in Texas and thus is subject to specific jurisdiction on that basis.

**B. The Private-Interest Factors Weigh Heavily in Favor of Transfer to the Southern District of California**

**1. The Southern District of California Has Significantly Greater Access to Sources of Proof**

The relative ease of access to sources of proof is the first factor to consider. In *In re Genentech*, the Federal Circuit held that "[i]n patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer.'" 566 F.3d 1338, 1345 (Fed. Cir. 2009)

(quoting *Neil Bros, Ltd. v. World Wide Lines, Inc.*, 425 F. Supp. 2d 325, 330 (E.D.N.Y. 2006)).

"That access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous." *Volkswagen II*, 545 F.3d at 316.

Notably, the functionality of the Qualcomm chipsets in HTC's accused devices is central to HTC's non-infringement defense. All the HTC devices accused of infringement use chipsets made by Qualcomm in San Diego, California. Clifford Decl. ¶¶ 5, 6. Thus, the vast majority of documents and witnesses relevant to the functionality, structure, development, engineering and sales of the chipsets for HTC devices are in San Diego, California. Clifford Decl. ¶¶ 5, 6.

The vast majority of any other physical evidence is located in Taiwan or the West Coast of the United States. Maron Decl. ¶¶ 7, 13. The majority of HTC documents relevant to engineering, product design and development, marketing and sales of the handsets themselves are in Bellevue, Washington, Taiwan, or San Francisco, California. Maron Decl. ¶¶ 7, 10.

**a. Access to Qualcomm Documents in San Diego, California**

In this case, access to documents in Qualcomm's possession, custody and control will be central to the proof of non-infringement in this case. HTC's non-infringement defense will rely heavily on Qualcomm documents for the hardware and firmware in the Qualcomm chipsets in HTC's devices. These documents are not in HTC's possession, custody or control. Maron Decl. ¶ 13.

Qualcomm has recently objected to the burden of producing documents for another Wi-LAN litigation in Marshall, Texas. *See Wi-LAN Motion to Compel Third Party Qualcomm Inc. to Produce Documents, Information and Objects & Response*, Civil Action No. 10-cv-0859 [Dkt. Nos. 1, 9] ("Wi-LAN Motion to Compel Qualcomm in SDCal"); Larish Decl., Ex. B.

Qualcomm has indicated that it will not provide documents without compulsory process and/or court order. Clifford Decl. ¶ 6. Moreover, Qualcomm has fought attempts to obtain its code and documents regarding Qualcomm chipsets. *See* Wi-LAN Motion to Compel Qualcomm in SDCal. As noted above, in litigation underway in this Court’s Marshall division, documents are made available *only in California*. Thus, the parties in that litigation must seek permission pursuant to a supplemental protective order in that case to have a particular individual be able to go to Qualcomm in San Diego to view code allegedly relevant in that case. *See Wi-LAN v. Research in Motion, et al.*, Civil Action No. 2:08-cv-247 [Dkt. No. 144-2]; Larish Decl. Ex. A, at Section E. Unlike other documents, the source code cannot be copied and viewed in its entirety outside of San Diego. In these other Texas cases, the parties, including defendants, must obtain Qualcomm approval for each individual viewing the code and that individual must physically travel to San Diego, California. If a party wants a hard copy of code, it must request specific lines and comply with limits to the quantity of code that may be printed from any one section of code. Only Qualcomm can provide a hard copy pursuant to the request process and no copies may be made of that copy –the code itself is never produced to other parties or in Texas.

As the “bulk of relevant evidence” of non-infringement is held by Qualcomm in its San Diego facility, this factor strongly favors transfer of venue. *See Genentech*, 566 F.3d at 1345; *see also Vasudevan Software, Inc. v. IBM Corp.*, 2009 WL 3784371 (E.D. Tex. Nov. 10, 2009) (Transfer to Northern California proper where no operative facts occurred in the Eastern District of Texas and accused product was designed and developed in California).

**b. HTC Documents And Witnesses In Taiwan, California And Washington**

In addition to the Qualcomm witnesses, HTC witnesses may be necessary to testify regarding the technology, sales and marketing of the accused devices. HTC and HTC America

employees with information regarding technology, sales and marketing related to the accused products are in Taiwan, California and Washington. Maron Decl. ¶¶ 7, 10, 12. HTC's chief technologist, Matt Tyler, who could answer questions relating to general technical information is based in Washington. Maron Decl. ¶ 10. HTC America employees with information relating to product planning and development, finance, marketing, and sales are based in Bellevue, Washington, in the Seattle area. Maron Decl. ¶ 10. Engineers knowledgeable concerning technical information for the HTC handsets for the accused devices are based primarily in Taiwan. Maron Decl. ¶ 10. Employees with potential information regarding research, design and development of the accused handsets are based in Taiwan and in the Seattle, Washington area, but primarily in Taiwan. Maron Decl. ¶ 10. Technical documents concerning the development of the handsets are primarily at the HTC Corp. location in Taiwan. There may be additional financial records in Taiwan. Maron Decl. ¶¶ 7, 12. One employee in HTC's San Francisco office may have relevant information regarding HTC's overall product-roadmap portfolio design. Maron Decl. ¶ 8.

**c. First Named Inventor and R & D Documents For Subject Matter of Patents-In-Suit in the UK**

Upon information and belief, the majority of research and development concerning the subject matter of the '819 and '211 patents occurred on the outskirts of London, England, and documents concerning the core research and development, including inventor notebooks, are believed to be in the offices of Airspan Communications, Ltd. in England. Larish Decl. ¶ 4. Similarly, the first named inventor resides in England. Larish Decl. ¶ 4. Thus, although the second named inventor resides in Texas, the documents and primary witnesses concerning the validity of the patents-in-suit are likely to be in England.

**2. The Southern District Of California Has The Availability Of Compulsory Process Over Witnesses That Is Lacking In The Eastern District Of Texas**

In *In re Acer*, the Federal Circuit held where the subpoena powers of the transferee court are expected to be invaluable, the availability of compulsory process factor is the tipping factor in favor of transfer. 2010 WL 4911307, at \*2 (“By comparison, the subpoena powers of the Northern District of California may be expected to be invaluable, in the event process is required to hale relevant witnesses into court. This factor surely tips in favor of transfer.”).

As explained above, many Qualcomm employees whose testimony is likely integral to the Wi-LAN infringement allegations are non-party witnesses who reside within 100 miles of the courthouse in San Diego, California. Compulsory process to secure the attendance of these necessary Qualcomm non-party witnesses is available in Southern California, not the Eastern District of Texas. Rule 45(c)(3)(A)(ii) limits the court’s subpoena power within 100 miles from the courthouse. *Volkswagen II*, 545 F.3d at 316. Virtually all of the Qualcomm engineers that have information pertaining to Wi-LAN’s infringement allegations are in San Diego. Clifford Decl. ¶ 6; Maron Decl. ¶¶ 13, 14. Further, HTC has no engineers located within 100 miles of the courthouse in Tyler, Texas. Maron Decl. ¶ 11.

That so many witnesses reside in California -- who may be subject to compulsory process in California, but not in the Eastern District of Texas -- is critical to the transfer analysis. *See In re Genentech*, 566 F.3d at 1345 (“[t]he fact that the transferee venue is venue with usable subpoena power here weighs in favor of a transfer, and not only slightly.”); *see also Ennova Direct, Inc., v. LG Electronics U.S.A., Inc.*, No. 2:08-cv-22 (E.D. Tex., Mar. 31, 2010) (transfer granted where no witnesses reside within 100 miles of courthouse).

**3. Cost of Attendance for Willing Witnesses, Including all Inventors, Is Less in the Northern District of California**

The court must weigh the cost for witnesses to travel and attend trial in the Eastern District of Texas versus the Northern District of California. The Fifth Circuit has explained:

[T]he factor of inconvenience to witnesses increases in direct relationship with the additional distance to be traveled. Additional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment.

*Volkswagen I*, 371 F.3d at 205-206. The court must consider the convenience of both party and non-party witnesses. *See id.* at 204 (requiring courts to "contemplate consideration of the parties and witnesses"); *Fujitsu Ltd. v. Tellabs, Inc.*, 639 F. Supp. 2d 761, 765-66 (E.D. Tex. 2009).

The Federal Circuit found a clear abuse of discretion in denying transfer in *In re Genentech*, where, inter alia, a "substantial number of material witnesses reside [d] within the transferee venue [the Northern District of California] and California and no witnesses" resided in the district in which it was filed. 566 F.3d at 1345 (Fed. Cir. 2009).

Most recently, in *In re Nintendo*, witness convenience weighed heavily in the Federal Circuit's decision to grant mandamus where witnesses residing in Asia and on the West Coast would be forced to travel significantly farther if the case proceeded in Texas instead of Washington State. 589 F.3d 1194, 1199 (Fed. Cir. 2009). Here, as in *TS Tech*, *Genentech* and *Nintendo*, there is a stark contrast in relevance, convenience, and fairness between the Northern District of California and the Eastern District of Texas.

An analysis of expected travel times for third-party witnesses and employees of HTC, universally favors the Southern District of California over Tyler, Texas.

<b>Origin</b>	<b>One-Way Travel to Courthouse in Tyler, Texas</b> (Total Air Travel Time + Driving = Total)	<b>One-Way Travel to Courthouse in San Diego, California</b> (Total Air Travel Time + Driving = Total)
Seattle	3:53 + 1:56 = 5:48	2:37 + 0:07 = 2:44
San Diego	3:00 + 1:56 = 4:56	N/A
Taipei	19:30 + 1:56 = 21:26	11:25 + 1:50 = 13:25
Seoul	19:25 + 1:56 = 21:25	10:40 + 1:50 = 12:30
London	9:55 + 1:56 = 12:01	11:15 + 1:50 = 13:15

See Larish Decl., Ex. G.

Although this chart shows longer approximate travel times to Tyler, it still underestimates the true cost and inconvenience to witnesses. Witnesses traveling from the West coast cannot travel for court hearings on the morning of the hearing – they must travel the day prior to the hearing, thus often losing an entire additional day from their offices and jobs and requiring the additional expense of an overnight hotel room. If the case was transferred to the Southern District in San Diego, Qualcomm witnesses would already be in San Diego. Other HTC witnesses traveling from Seattle or Northern California, would incur minimal travel time and could generally take an early flight the morning of a hearing if their attendance was required at a hearing. Thus, the location of sources of proof, the cost of attendance of willing witnesses, and the availability of compulsory process, all strongly favor transfer of venue. *See Software Rights Archive, LLC v. Google, Inc.*, 2010 WL 2950351 (E.D.Tex. July 22, 2010) [hereinafter "SRA"].

**a. The Southern District Of California Is A More Convenient Forum, And May Be The Sole Forum, For Qualcomm Employees**

As discussed above, Qualcomm, which designs, manufactures and sells the processing chips used in all nine of the HTC accused devices and most of the accused handset devices, is

based in San Diego, California, in the Southern District of California. See Maron Decl. ¶10. See also Larish Decl., Ex. H (Qualcomm witnesses would have to travel approximately 1271 more miles to Tyler, Texas, assuming Qualcomm would agree to provide them in Texas, which it has declared it will not). Significantly cheaper and more convenient travel to Southern California for Qualcomm witnesses favors transfer. See *In re Nintendo*, 589 F.3d at 1199 (finding the cost and convenience for witness attendance clearly favors transfer where "[e]ven without including the four Japanese witnesses who would each have to travel an additional 1,756 miles or 7 hours by plane to Texas as compared with Washington State, the average travel required for each of the remaining six identified witnesses to Texas is approximately 700 miles more than to Washington").

**b. The Southern District Of California Is A More Convenient Forum For HTC Witnesses Located In Taiwan**

Most of HTC's engineers who work on cell phone manufacturability are located in Taiwan, ROC. Maron Decl. ¶ 7. Travel from Taipei, Taiwan to San Diego, California takes less time and is more convenient than travel to Tyler, Texas via DFW. Direct flights from Taipei to Los Angeles take approximately 11 hours, followed by a drive of less than two hours to San Diego for a total time of a little over 13 hours. No direct flights exist from Taipei to DFW. Additionally, the drive from DFW to Tyler is about two hours. Larish Decl., Ex. I. The approximate travel time from Taipei to Tyler, including at least one layover and driving time from Dallas to Tyler, is approximately 21:25 hours. In short, travel from Taiwan to Texas requires essentially another business day of travel, is thousands of miles greater and is much more costly and disruptive to HTC's witnesses who have to deal with an additional day of travel. This is further exacerbated by the addition of another day of travel for these witnesses to attend a day-time hearing traveling from the West Coast. These inefficiencies can be avoided by transfer

to the Southern District of California. *See In re TS Tech*, 551 F. 3d at 130 (holding that transfer was proper where most of the witnesses would have had to travel an additional 900 miles to attend trial in Texas rather than Ohio).

**c. The Southern District Of California Is A More Convenient Forum For The HTC Witnesses Located In Bellevue, Washington**

The Southern District of California is a more convenient forum for HTC witnesses located in HTC America's headquarters, which are also HTC's principal U.S. operations, in Bellevue, Washington. Maron Decl. ¶¶ 3,7, 10. There are multiple, daily direct flights from Seattle, Washington, to San Diego, California generally taking about two and a half hours. Larish Decl., Ex. J. There are no time zone changes and virtually no driving, as the airport in San Diego is located in downtown San Diego within minutes of the courthouse and major hotels. There is an early flight from Seattle, that arrives in San Diego at 9:33 AM, making it possible for witnesses from Seattle to attend a hearing without necessitating an extra travel day to make a 10 am or 1 PM court hearing. *See Larish Decl.*, Ex. J.

Although there is a direct flight from Seattle to DFW, there are no direct flights to Tyler, Texas from San Diego. The fastest travel time is 4 hours 40 minutes and the flight does not arrive until after 1 PM in the afternoon. Larish Decl., Ex. K at p. 2. Seattle, Washington is, therefore, significantly more conveniently located to the Southern District of California than to the Eastern District of Texas.

**C. The Public Interest Factors Weigh in Favor of Transfer to the Southern District of California**

**1. Practical considerations favor transfer to the Southern District**

Practical considerations that could make the trial easier, quicker, more fair, and less expensive favor the Southern District of California given its greater convenience to the

witnesses, parties, and access to proof. There are also no administrative difficulties flowing from court congestion or issues with forum familiarity with U.S. patent laws. The Southern District of California is familiar with Qualcomm technology as there have been numerous matters pending in the Southern District involving Qualcomm technology. *See e.g., Qualcomm v. Broadcom*, 05-cv-01958-B (BLM) (S.D. Cal.); *Gabriel Techn. Corp. v. Qualcomm, et al.*, 3:08-cv-01992 (S.D. Cal.); *Qualcomm Inc. v. Conexant Sys., et al.*, 3:02-cv-02002-B (S.D. Cal.).

Because this motion to transfer of venue is filed so early in these proceedings, the expected timeline for claim construction and trial renders this factor neutral to the transfer analysis. *See, e.g., SRA*, 2010 WL 2950351.

## **2. The Southern District Of California Has A Significant And Over-Riding Local Interest In This Dispute**

The Southern District of California has a significant and over-riding local interest in this dispute. This is an infringement action and includes accused technology developed, manufactured and sold in Southern California. *See Maron Decl.* ¶¶ 13, 14. The Federal Circuit ruled in *In re Hoffman-La Roche Inc.*, 587 F. 3d at 1336, that a strong local interest exists when the "cause of action calls into question the work and reputation of several individuals residing in or near that district who presumably conduct business in that community." Such is the case in the Southern District of California, where the work of Qualcomm is in question. There is no similar or comparable compelling local interest present in the Eastern District of Texas.

Although Wi-LAN alleges that HTC America is a Texas corporation, HTC America has its principal headquarters in Bellevue, Washington. It also has recently reincorporated in Washington State because it does not have direct sales in Texas. The Federal Circuit has repeatedly explained that in patent cases, where the accused products can be found all over the country (as Plaintiff here alleges), no specific venue has a dominant interest in resolving a claim

for patent infringement. See *In re TS Tech*, 551 F. 3d at 1321; see also *Volkswagen II*, 545 F. 3d at 318 (more availability of the allegedly infringing product in the district does not create a local interest in the dispute, as such a rational "could apply virtually to any judicial district or division in the United States"). Further, in *In re Microsoft Corp.*, the Federal Circuit reiterated that the place of incorporation is not controlling, citing the Supreme Court explanation in *Koster v. Lumbermens Mutual Casualty Co.*: "Under modern conditions corporations often obtain their charter from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far from the chartering state." The "[p]lace of corporate domicile in such circumstances might be entitled to little consideration' under the doctrine of forum non conveniens, 'which resists formalization and looks to the realities that make for doing justice.'" 2010 WL 4630219, at \*4 (Fed. Cir. 2010).

In sum, the Southern District of California has a strong interest in deciding this case, while the Eastern District of Texas has "no relevant connection [to] the actions giving rise to this case." *In re TS Tech*, 551 F. 3d at 1321. Maintaining the case in this District adds unnecessary burden on local citizens in performing jury duty for a matter having no relevant connection to the forum. *SRA*, 2010 WL 2950351. Thus, this factor weighs in favor of transfer.

#### **IV. CONCLUSION**

HTC seeks to have this case proceed in the more convenient forum that has compulsory process over Qualcomm witnesses integral to its non-infringement defense rather than a forum where lack of compulsory process may limit its defense at trial. Transfer of this case to the Southern District of California thus will serve the interests of justice as transfer has heightened importance to Defendants' ability to produce witnesses to support their defenses at trial.

Dated: January 26, 2011

Respectfully submitted,

By: /s/ Eric H. Findlay

Eric H. Findlay

State Bar No. 00789886

**Findlay Craft LLP**

6760 Old Jacksonville Highway, Suite 101

Tyler, Texas 75703

Telephone: (903) 534-1100

Facsimile: (903) 534-1137

Email: efindlay@findlaycraft.com

Stephen S. Korniczky (*Admitted Pro Hac Vice*)

**Sheppard Mullin Richter & Hampton LLP**

12275 El Camino Real, Suite 200

San Diego, California 92130

Telephone: (858) 720-8900

Facsimile: (858) 509-3691

skorniczky@sheppardmullin.com

**Attorneys for Defendants**

**HTC CORPORATION, HTC AMERICA, INC.,**

**EXEDEA, INC.**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served with a copy of this **HTC CORPORATION, HTC AMERICA, INC. AND EXEDEA'S MOTION TO TRANSFER VENUE TO UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA UNDER 28 U.S.C. §1404(a)** , *via* the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 26th day of January 2011.

*/s/ Eric H. Findlay* \_\_\_\_\_

Eric H. Findlay

**CERTIFICATE OF CONFERENCE**

The undersigned certifies that the parties complied with Local Rule CV-7(g)'s meet and confer requirement. On January 10, 2011, Inge Larish, counsel for Defendants, conducted a telephonic conference with David Weaver, counsel for Wi-LAN, Inc. The parties attempted to resolve the issue in this motion but reached an impasse.

*/s/ Inge Larish* \_\_\_\_\_