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HTC filed its Motion to Transfer Venue to the Southern District of California (Dkt. No. 73) ("MTT") in connection with its Motion to Sever ("MTS"), stating that "HTC requests that this Court transfer the HTC claims to the Southern District of California." (MTS at 1). Although this Court has the discretion to do so, HTC is not seeking to transfer the entire case out of the Eastern District of Texas. Therefore, Wi-LAN's arguments concerning the interests of other defendants in this transfer motion are moot.

HTC merely seeks a fair opportunity to prepare its defenses and to call material witnesses necessary to its non-infringement defenses at trial in a venue which has subpoena power over non-party Qualcomm witnesses and evidence. This opportunity is available in the Southern District of California but not in the Eastern District of Texas. All the accused HTC devices contain Qualcomm chipsets, and HTC must rely on Qualcomm witnesses, source codes and other evidence for its non-infringement defenses. (MTT, Clifford Decl. ¶ 5; Maron Decl. ¶ 13). Qualcomm witnesses will not attend trial in Texas. (MTT, Clifford Decl. ¶ 6). All Qualcomm engineering personnel and documents pertinent to this case are found in or near San Diego. (MTT, Clifford Decl. ¶ 6; Maron Decl. ¶ 13). Wi-LAN has no presence in the Eastern District of Texas, (Opp. at 4, Hornberger Decl. ¶ 4, Ex. C), and neither has HTC. (MTT, Maron Decl. ¶¶ 2-11).¹

I. FIFTH CIRCUIT LAW ON TRANSFER OF VENUE

In reviewing transfer motions, the Federal Circuit "applies the laws of the regional circuit in which the district court sits," which in this case is the Fifth Circuit. *In re TS Tech USA Corp.*,

¹ Although Exedea is formally incorporated as a Texas corporation, it has no office and maintains no business in Texas or in the United States. (MTT, Maron Decl. ¶ 3). A party's state of incorporation should not be given much if any weight if it does not have a presence in that state. *See In re Apple Inc.*, 374 Fed.Appx. 997, 999 (Fed. Cir. 2010) (non-precedential).

551 F.3d 1315, 1319 (Fed. Cir. 2008). The transfer motion must first satisfy the threshold inquiry of whether the transferee district is "a district in which the claim could have been filed." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*Volkswagen I*"). Once the threshold inquiry is satisfied, the Fifth Circuit applies private and public interest factors, *see Volkswagen I*, 371 F.3d at 203, which have been briefed extensively in the MTT. The plaintiff's choice of venue is not an independent factor in the § 1404(a) analysis. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 n.10 (5th Cir. 2008) ("*Volkswagen II*"). Moreover, while the private and public interest factors apply to most transfer cases, "they are not necessarily exhaustive or exclusive," and no single factor is of dispositive weight. *Volkswagen II*, 545 F.3d at 315.

II. ARGUMENT

A. The Threshold Inquiry

Neither Wi-LAN nor HTC disputes that the present suit could have been brought in the Southern District of California. Therefore, the threshold inquiry is satisfied.

B. The Relative Ease Of Access To Sources Of Proof

Wi-LAN's speculation (Opp. at 10) that "Qualcomm's assistance could be unnecessary" is baseless,² although inherent in it is Wi-LAN's admission that Qualcomm's assistance could be necessary. Wi-LAN's argument that HTC's reliance on Qualcomm "is premature at best and a gross mischaracterization at worst" (Opp. at 9-10) is not supported by any declaration or evidence, whereas HTC's argument that Qualcomm's witnesses, source codes and other evidence

² Wi-LAN cites *Fujitsu Ltd. v. Netgear, Inc.*, 620 F.3d 1321 (Fed. Cir. 2010) in arguing that infringement can be proved by compliance with a standard alone. This argument is false and misrepresents the Federal Circuit's holdings in *Fujitsu*. First, Wi-LAN has not proven that its patent claims read directly on mandatory sections of the 3GGP standard. Second the defendant is free to prove that its products do not infringe by whatever means necessary, regardless of whether the asserted claims read on the standard or not. *Id.* at 1327-28.

are necessary for its defense is supported by the Declarations of Messrs. Maron and Clifford. These Declarations are unrefuted by Wi-LAN and therefore must be accepted as true. At this stage of litigation, it is Wi-LAN's position that is "premature." If HTC were not able to call Qualcomm's employee witnesses at trial and obtain source codes and other relevant evidence from Qualcomm in its non-infringement defense, HTC would be denied justice.

Wi-LAN also argues, without support, that "it is entirely possible" that Qualcomm's overseas locations such as India "house equally relevant information." (Opp. at 10). It fails to rebut Mr. Clifford's Declaration that Qualcomm documents and source codes are "located at Qualcomm's corporate headquarters in San Diego, California." (MTT, Clifford Decl. ¶ 6). Qualcomm will not allow its source codes to be copied, transported, or otherwise transmitted outside of its secured facility in San Diego. (MTT at 6-7, Larish Decl. 3, Ex. B). The relative ease of access to sources of proof factor clearly favors the transferee venue.

C. The Availability Of Compulsory Process

HTC must rely upon Qualcomm witnesses and documents for its non-infringement defense. (MTT, Maron Decl. ¶ 13). All Qualcomm engineering personnel and documents pertinent to this case are in California, primarily in San Diego. (MTT, Clifford Decl., ¶ 6; Maron Decl. ¶ 13). Qualcomm will not send its employees to attend trial in Texas without compulsory court process. (MTT, Clifford Decl. ¶ 6). Wi-LAN fails to identify a single potential witness within the subpoena power of the Eastern District of Texas. On the other hand, it is indisputable that the Southern District of California has subpoena power over Qualcomm and its employee witnesses.

The Federal Circuit stated that "[t]he fact that the transferee venue is a venue with usable subpoena power . . . weighs in favor of transfer, and not only slightly." *In re Genentech* 566 F.3d 1338, 1345 (Fed. Cir. 2009); *See also In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1336-

37 (Fed. Cir. 2009). Because the Eastern District of Texas lacks subpoena power over non-party Qualcomm, the availability of compulsory process factor clearly favors the transferee venue.

Moreover, Qualcomm witnesses are within commuting distance of the Federal Court in San Diego. As this Court pointed out in *Zoltar Satellite Sys., Inc. v. LG Elecs. Mobile Commc'ns Co.*, 402 F.Supp.2d 731, 739 (E.D.Tex. 2005), "the convenience and costs associated with non-party witnesses is more important and is given greater weight than the convenience of party witnesses." *Id.* Therefore, the cost of attendance factor clearly favors the transferee venue.

D. The Cost Of Attendance For Willing Witnesses

The comparative travel times for potential witnesses have been presented in the MTT. The Federal Circuit stated that the "100-mile" rule of *Volkswagen I* "should not be rigidly applied" to foreign witnesses since they will have to "travel a significant distance no matter where they testify." *Genentech*, 566 F.3d at 1344. Wi-LAN asserts that its witnesses in Ottawa "will suffer greater costs in traveling greater distances" (Opp. at 13) but submits no declaration to that effect. Even assuming it is true, these foreign witnesses will still be "required to travel a significant distance no matter where they testify." *Genentech*, 566 F.3d at 1344. As the Federal Circuit repeatedly emphasized, "Fifth Circuit precedent clearly forbids treating the plaintiff's choice of venue as a distinct factor in the § 1404(a) analysis." *TS Tech*, 551 F.3d at 1320; *see also Nintendo*, 589 F.3d at 1200.

E. Other Practical Problems

Contrary to Wi-LAN's argument, (Opp. at 13), transferring HTC's infringement claims against HTC does not create duplicative suits involving the same issues. Claims against base stations are separate and distinct from claims against handsets, and claims against Sony Ericsson may also involve different issues from the claims against HTC. To the extent that duplicate

issues may exist, the transferee court has the discretion to stay the HTC action pending resolution of the Eastern District of Texas case. Therefore, this factor does not weigh against transfer.

F. The Administrative Difficulties Flowing From Court Congestion

The Opposition argues that the Eastern District of Texas has a faster time to trial than the Southern District of California according to recent statistics. (Opp. at 14, Hornberger Decl. ¶ 9, Ex. H). However, the Federal Circuit expressly cautioned against using the length of time from filing to trial as a factor. *Genentech*, 566 F.3d at 1347. Because a very small percentage of federal civil actions reach trials, the speed of disposition of cases at earlier stages of litigation may be more relevant. Here, the report cited by Wi-LAN (Opp. at 14, Hornberger Decl. ¶ 9, Ex. H) also reveals the following statistics (time intervals in months):

District	All Cases	No Court Action	Before Pretrial	During/After Pretrial
E.D.Tex.	10.7	6.9	10.9	21.2
S.D.Cal.	5.9	3.1	4.4	11.0

As illustrated above, the Southern District of California is about twice as fast in the disposition of civil cases that do not reach trial, and this fact clearly favors transfer of venue.

G. The Local Interest In Having Localized Interests Decided At Home

The Southern District of California has a significant and overriding local interest in this dispute. A strong localized 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." *Hoffman-La Roche*, 587 F.3d at 1336. Here, Qualcomm's work and reputation related to the 3GPP technology are called into question. In contrast, no significant localized interest is present in the Eastern District of Texas.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 24th day of February, 2011, counsel of record who are deemed to have consented to electronic service are being served with a copy of this document by electronic mail.

/s/ Eric H. Findlay
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