THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

WI-LAN INC., Plaintiff, v. ALCATEL-LUCENT USA INC.; TELEFONAKTIEBOLAGET LM ERICSSON; ERICSSON INC.; SONY ERICSSON MOBILE COMMUNICATIONS AB; SONY ERICSSON MOBILE COMMUNICATIONS (USA) INC.; HTC CORPORATION; HTC AMERICA, INC.; EXEDEA INC.; LG ELECTRONICS, INC.; LG ELECTRONICS MOBILECOMM U.S.A., INC.; LG ELECTRONICS U.S.A., INC. Defendants.	§ § § § § § § § § § § § § § § § §	Civil Action No. 6:10-cv-521-LED JURY TRIAL DEMANDED

WI-LAN INC.'S SUR-REPLY IN OPPOSITION TO HTC CORPORATION, HTC AMERICA, INC. AND EXEDEA INC.'S REPLY IN SUPPORT OF ITS MOTION TO TRANSFER VENUE TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA UNDER 28 U.S.C. § 1404(a)

Plaintiff Wi-LAN Inc. ("Wi-LAN") files this sur-reply opposing HTC's Motion to Transfer under 28 U.S.C. § 1404(a) (Dkt. No. 73 ("HTC Mot.")) and responding to HTC's Reply in support of the same (Dkt. No. 83 ("HTC Reply")).

I. INTRODUCTION

HTC urges the Court to take the unprecedented step of transferring this civil action to a venue in which no party maintains a principal place of business. HTC's request is in contradistinction to recent Federal Circuit decisions refusing to transfer venue to a forum in which no defendant maintains a principal place of business. *In re Apple, Inc.*, 374 Fed. Appx. 997, 999 (Fed. Cir. 2010) *See* ("the petitioners have not made a compelling showing that Massachusetts is a more convenient forum, particularly in light of the fact that none of the defendants is headquartered there"); *see also In re Vistaprint Ltd.*, 642 F.3d 1342, 1346-47 (Fed. Cir. 2010). HTC provides no distinguishing case law—because there is none. As such, the Court should decline to grant the extraordinary relief requested.

Moreover, it is undisputed that HTC's motion to transfer asks this Court to transfer the entire action. HTC's attempt to characterize the pending motion as requesting transfer only of the claims against HTC is flat wrong. In a desperate attempt to rewrite its motion to transfer, HTC references the motion to sever as providing the operative language supporting transfer only of the claims against HTC. (*See* HTC Reply at 1.) Such requested relief, however, does not appear within the four corners of the motion to transfer. HTC's improper attempt to rewrite the motion to transfer should be rejected.

II. ARGUMENT

HTC's Motion to Transfer should be denied because HTC requests transfer to a venue in which no party has a principal place of business. As such, the Southern District of California is not clearly more convenient for all the parties. Moreover, because HTC fails to consider the

interests of any other party while moving the Court to transfer the entire civil action, HTC does not carry its burden to show that the transferee forum is clearly more convenient for all the parties. Accordingly, the Court should deny transfer.

A. The Motion to Transfer Clearly Demands Transfer of the Entire Action

HTC does not dispute that its Motion to Transfer moves the Court only for transfer of the entire action. The motion plainly, and repeatedly, asks the Court for transfer of "this civil action" and for "[t]ransfer of this case." (*See* HTC Mot. at pp. 1 and 15; *see also* Wi-LAN's Resp. at 7, n. 5.) HTC now points to a passing statement in a separate, unrelated motion to seek the relief not requested by the transfer motion. (*See* HTC Reply at 1.) The Court, however, can only consider the motion properly before it. HTC's Motion to Transfer thus must be considered for what it is—a request to transfer this civil action to the Southern District of California.

B. Transfer Is Not Proper to a Venue Where No Party Maintains a Principal Place of Business

HTC's transfer motion must be denied because it seeks transfer to a venue in which no party maintains a principal place of business—the Southern District of California. On at least two recent occasions, the Federal Circuit has identified this fact as fatal to a request for transfer. *See*, *e.g.*, *In re Apple, Inc.*, 374 Fed. Appx. at 999 ("the petitioners have not made a compelling showing that Massachusetts is a more convenient forum, particularly in light of the fact that none of the defendants is headquartered there"); *In re Vistaprint Ltd.*, 642 at 1346-47 (refusing to overturn denial of motion to transfer based, in part, on the fact that "no defendant party is actually located in the transferee venue and the presence of the witnesses in that location is not overwhelming.").

Moreover, defendants Ericsson and Alcatel-Lucent both maintain principal places of business within the Eastern District of Texas. It turns venue law on its head to transfer a civil

action out of a jurisdiction in which multiple defendants reside and into a jurisdiction in which no defendants maintain principal operations. As such, HTC's motion to transfer must be denied.

C. HTC Does Not Carry Its Burden Because It Neglects the Interests of All Other Parties

Also fatal to HTC's motion is its continued refusal to contemplate the interests of all parties to this litigation. In moving for transfer, the movant must demonstrate that the desired venue is more convenient for all parties. *See, e.g.*, *On Semiconductor Corp. v. Hynix Semiconductor, Inc.*, No. 6:09-CV-390, 2010 WL 3855520, at *1 n.1 (E.D. Tex. Sept. 30, 2010) ("In ruling on a motion to transfer, a court considers the convenience of all parties and witnesses relevant to all claims and controversies in a case."); *Coll v. Abaco Operating LLC*, slip op., 2009 WL 3063333 at*5 (E.D. Tex. Sept. 21, 2009) (denying motion to transfer because "[n]one of the nine transfer motions discuss, let alone demonstrate, that the venue being sought is more convenient for all parties, including their non-joining co-defendants. Each of these motions to transfer venue ask the Court to consider convenience in a vacuum, as if the other defendants were not parties to this case."). HTC makes no pretense in considering the other parties to this action, and thus its motion to transfer must be denied.

D. Qualcomm's Importance to HTC's Defense Is Overstated

HTC's exclusive and myopic focus on non-party Qualcomm improperly inflates the interests of a third party over the interests of the actual litigants involved while simultaneously minimizing HTC's knowledge of the operation of its own products. HTC would have this Court believe—without support—two crucial purported facts: (1) that HTC does not have any employees knowledgeable as to the operation of the infringing products HTC manufactures and sells; and (2) that Qualcomm is under no obligation to support or indemnify HTC.

In the first instance, HTC simultaneously complains that it "must rely upon Qualcomm . . . for its non-infringement defense" (*see, e.g.*, HTC Reply at 3) while also declaring to the Court that at least two HTC employees, Matt Tyler and Frank Wu, have technical knowledge of the operation of the infringing products (*see* HTC Mot., Maron Decl. at ¶¶ 10 and 12). This doubletalk should be rejected. Moreover, HTC's "need" to rely on Qualcomm is overstated because it designs its own portfolio of products. (*See* HTC Mot., Maron Decl. at ¶¶ 7-8.) HTC thus is not merely a reseller of Qualcomm chips, but designs its products to comply with 3GPP.

In the second instance, HTC complains that Qualcomm (apparently its chief supplier) will not come to its aid in a significant patent infringement lawsuit (*see* HTC Reply at 3), yet fails to introduce any supply contract or indemnity agreement between the two entities. HTC may have bargained for some form of indemnity from its supplier or at least for support in connection with defending against patent infringement claims. And, if not, it is not the duty of this Court to eschew precedent in order to provide HTC benefits for which it did not successfully bargain. Qualcomm's apparent refusal to aid HTC bears no weight in the transfer analysis.

E. Other Factors Weigh Against Transfer

As noted above, HTC does not carry its burden because it does not consider the interests of any other party in this lawsuit. HTC undoubtedly ignores the interests of other parties because the balance of the parties' interests clearly weighs against transfer.

1. Relative Ease of Access to Sources of Proof Is Greater in the Eastern District of Texas

The relative ease of access to sources of proof is greater in the Eastern District of Texas because defendants Ericsson and Alcatel-Lucent maintain principal places of business in the District. *See In re Genentech*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) ("In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer.").

Conversely, no defendant (or any other party) maintains principal operations in the Southern District of California. Thus, the relative ease of access to sources of proof is greater in the Eastern District of Texas.

Moreover, in an attempt to inflate the importance of Qualcomm, HTC again mischaracterizes Federal Circuit precedent regarding the use of technical standards in proving infringement. (*See* HTC Reply at 2.) The state of the law is clear: "if an accused product operates in accordance with a standard, then comparing the claims to that standard is the same as comparing the claims to the accused product." *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1327 (Fed. Cir. 2010). Thus, Wi-LAN's reliance on the 3GPP technical standard minimizes the significance of any evidence belonging solely to Qualcomm.

2. The Eastern District of Texas Has a Greater Localized Interest in the Action.

Because two defendants maintain principal places of business in the District, the Eastern District of Texas has a greater localized interest in this action than does the Southern District of California. Even if Qualcomm is a relevant non-party with respect to claims against HTC, its importance does not outweigh that attributed to both Ericsson and Alcatel-Lucent.

3. Time to Trial Is Shorter in the Eastern District of Texas

HTC does not refute the fact that federal court statistic show the time to trial is shorter in the Eastern District of Texas than it is in the Southern District of California. Wi-LAN requests a trial by jury, and thus the only relevant statistic is the time to trial—not the time to disposition irrespective of whether a trial occurs.

III. CONCLUSION

For these reasons, the Court should deny HTC's motion to transfer venue to the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1404(a).

Dated: March 7, 2011

Respectfully submitted,

By: /s/ David B. Weaver w/permission Wesley Hill

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 7th day of March, 2011.

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