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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

INVT SPE LLC,

Plaintiff

v.

HTC Corporation, and

HTC America, Inc.,

Defendants.

) Civil Action No. 2:17-cv-03740-JMV-JBC

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**DEFENDANTS HTC CORPORATION AND HTC AMERICA, INC.'S
REPLY BRIEF IN SUPPORT OF THEIR MOTION TO TRANSFER**

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I. INTRODUCTION

In their Motion to Transfer, HTC Corp. and HTC America, Inc. (together, “HTC”) submitted sworn affidavits, including from third-party Qualcomm, Inc. (“Qualcomm”), demonstrating that the operative facts of this case center around California—not New Jersey. Frank Wu of HTC declared it is Qualcomm chips in the Accused Products that implement the cellular standards at issue in this case. Thus, discovery regarding Qualcomm chips will be *necessary* to prove infringement or non-infringement. Mr. Wu also confirmed that *only Qualcomm* can provide the source code and facts regarding the functionality of its chips.

Qualcomm also declared that the vast majority of its U.S. witnesses most knowledgeable of the *exact* cellular standard features and Technical Specifications recited in INVT’s Complaint are located in *California*, including: EGPRS and EGPRS2 (TS 45.001, 45.003 and 45.004); UMTS, WCDMA, HSPA (TS 25.308, 25.214, 25.319, 25.321, 25.212, 25.214); and LTE (TS. 36.211, 36.213, 36.300). HTC must be able to compel Qualcomm’s most relevant and knowledgeable witnesses to attend trial, which HTC can do only in California.

In response to HTC and Qualcomm’s evidence, INVT failed to submit any affidavits or provide any concrete evidence that New Jersey witnesses with knowledge of the *specific* cellular standard features, Technical Specifications, or Qualcomm chips at issue in this case actually *exist*. Instead, INVT provided only

uncorroborated hearsay statements and conjecture to allege there are *potential* relevant witnesses who: are “*likely* to reside in New Jersey,” are “*likely* involved” with the Accused Products, or may have *general* non-unique knowledge about wireless technology. This cannot overcome HTC’s detailed affidavits.

The fact that INVT seeks to sacrifice the convenience of the most important witnesses in this matter, including its own who are located in California, for the mere *possibility* of finding a witness in this who has only general or irrelevant knowledge, demonstrates INVT’s desire to forum shop. But such forum shopping will hamper, if not foreclose, HTC’s ability to present its key defenses at trial. Indeed, INVT cannot, and has not, given any assurance that Inventergy’s former employees will voluntarily appear at trial in New Jersey. These witnesses are vital to HTC defenses because (1) Inventergy failed to give proper pre-suit notice of the Asserted Patents and infringement contentions (relevant to damages); and (2) Inventergy’s purported offer breached INVT’s obligation to license its alleged portfolio on fair, reasonable and non-discriminatory (“FRAND”) terms.

To ensure HTC can compel trial testimony from Inventergy and Qualcomm, and given the extreme court congestion in this District, among numerous other factors, the Court should transfer this case to the Northern District of California (“CAND”).

II. ARGUMENT

A. **HTC's And Qualcomm's Detailed, Unrebutted Affidavits Show The Operative Facts On Key Issues Center Around California, Not New Jersey—Greatly Favoring Transfer.**

It is undisputed that “[t]he issues relating to [HTC’s] alleged infringement of [the Asserted Patents] require analysis of facts, documents and testimony relating to the design, development and production of the [allegedly infringing products].”

See Ricoh v. Honeywell, 817 F. Supp. 473, 483 (D.N.J. 1993) (“*Honeywell*”).

Additionally, disputes surrounding remedies relate to at least (1) when INVT allegedly gave notice of infringement to HTC, and (2) whether INVT’s alleged pre-suit offer to license the Asserted Patents was on FRAND terms. “As [HTC] has demonstrated by its submission of factually specific affidavits, . . . these facts are far more easily developed in [California] than in New Jersey.” *Id.* (See D.I. 42-1, 42-2, 42-3, 42-4, 42-5, 43-1.)

INVT’s arguments, on the other hand, are not supported by affidavits or concrete evidence. Any “[a]lleged hardship unsupported by particulars by way of proof or affidavit cannot be accorded much weight in balancing conveniences.”

Hostetler v. Baltimore & O.R. Co., 164 F. Supp. 72, 74 (W.D. Pa. 1958). INVT uses uncorroborated evidence to argue that there are “potential” witnesses and/or evidence located in New Jersey, without identifying any specific evidence. (D.I. 45 at 2, 3, 8, 11, 13, 14, 18, 19, 21, etc. (describing the alleged New Jersey witnesses and evidence as “potential”).) As shown below, the weight of HTC’s

evidence clearly favors transferring this case to CAND. *See Honeywell*, 817 F. Supp. at 482 n. 18.

1. The Infringement Investigation Will Center Around Qualcomm.

In an attempt to keep this case in New Jersey, INVT alleges very broad facts that it argues are material to this case. However, HTC and Qualcomm’s affidavits identified the specific issues that will be key to infringement/non-infringement in this case: Whether the Qualcomm chips’ source code implements the alleged patented technology. (*See* D.I. 42-3, ¶¶ 7-9; D.I. 45 at 5, 21.) INVT agrees that evidence and testimony related to this source code will be “*necessary*” to this case. (*See* D.I. 45-4, Ex. 24 at 12.)

Brian Bannister of Qualcomm provided a “factually specific affidavit” identifying the *exact* cellular standard features and Technical Specifications at issue, including: EGPRS and EGPRS2 (TS 45.001, 45.003 and 45.004); UMTS, WCDMA, HSPA (TS 25.308, 25.214, 25.319, 25.321, 25.212, 25.214); and LTE (TS. 36.211, 36.213, and 36.300). (D.I. 42-4, ¶¶ 6-15; D.I. 1, ¶ 17.) *Honeywell*, 817 F. Supp. at 482-84. Mr. Bannister also declared that the vast majority of Qualcomm’s U.S. witnesses most knowledgeable of the *exact* cellular standard features and Technical Specifications recited in INVT’s Complaint are located in California. (D.I. 42-4, ¶¶ 6-15.) While Mr. Bannister’s affidavit did not specify individuals by name, that is because Qualcomm could not do so at this early stage.

See Hemstreet v. Caere Corp., No. 90-cv-377, 1990 U.S. Dist. LEXIS 6782, at *17 (N.D. Ill. June 5, 1990). For Qualcomm to do so, INVT would **first** need to identify the specific portions of the source code that allegedly practice the Asserted Patents. Moreover, only Qualcomm employees with specialized knowledge of the source code at issue matter, because Qualcomm could not simply “educate” just any employee to serve as a witness on this relevant source code.

INVT did not submit any counter witness affidavits to Mr. Bannister’s declaration. Instead, INVT relies on unauthenticated hearsay sources (*e.g.*, Qualcomm recruiting webpages) to assert there may be witnesses in New Jersey with general knowledge of 3G or 4G technology and/or the accused products. (D.I. 45 at 6-14.) For example, INVT refers to Qualcomm’s **recruiting** webpages that advertise a commitment to “advance 4G and 5G knowledge,” without properly authenticating or laying foundation for these documents. (*See* D.I. 45 at 14 (Exs. 20-23).) But these webpages provide only general statements regarding “New Opportunities” and/or “job descriptions” at Qualcomm. (*Id.*) These **new** jobs in New Jersey in no way correlate to particular Qualcomm engineers who are knowledgeable about the specific functionalities identified by Mr. Bannister or the corresponding source code. Also, the mere fact that someone is familiar with 3G or 4G in general does not mean that person is sufficiently knowledgeable with respect to the technically complex and particularized pieces of source code

implicated in this case. Qualcomm already declared which employees are most knowledgeable of this highly complex and specialized topic, and they are in California. (*See* D.I. 42-4, ¶¶ 6-15.) INVT’s uncorroborated “potential” evidence is insufficient to overcome the facts established by HTC and Qualcomm.

Honeywell, 817 F. Supp. at 484-85 nn. 18, 23, 24 (faulting Ricoh for “fail[ing] to submit *by affidavit* the names of any witnesses—even employee witnesses—in New Jersey” (emphasis added)); *see also Hostetler*, 164 F. Supp. at 74.

2. The Carriers Are Not Relevant To Venue In This Case.

INVT’s argument that cellular carriers AT&T and Verizon are relevant to this case should be dismissed. (D.I. 45 at 19-21.) Unlike the *Brandywine* case cited by INVT, here, AT&T and Verizon are *not accused* of committing indirect and joint infringement with HTC. *Compare Brandywine Commc’ns. Techs., LLC v. Apple, Inc.*, No. 12-cv-262, 2012 U.S. Dist. LEXIS 198355, at *10 (M.D. Fla. Aug., 23, 2012), *with* D.I. 1.

Nevertheless, INVT argues that HTC collaborates with Verizon and AT&T to “design, develop, test, validate, certify and distribute the Accused Products.” (D.I. 45 at 19.) INVT lists a number of allegedly “potential” witnesses who it cherry-picked from LinkedIn—chosen merely because they *may* have allegedly collaborated with HTC before this case. (D.I. 45 at 12-13.) INVT fails to corroborate any of this unauthenticated evidence with a sworn affidavit.

Regardless, there is no evidence that the carriers are involved with the design and development of the *key* Qualcomm chips or with whether or not these chips implement the cellular standard features or Technical Specifications at issue here.

Frank Wu's sworn affidavit shows that HTC's New Jersey employees are not involved with design and development of the Accused Products, and thus, any collaboration with the carriers in New Jersey is irrelevant to this case. First, Mr. Wu does not identify any carriers or HTC New Jersey employees involved in designing and developing the Accused Products. Instead, he identified HTC Corp.'s Taiwanese team. (D.I. 42-3, ¶ 6.) Likewise, Mr. Wu identified the California testing laboratories that HTC uses to test the Accused Products for compatibility with the cellular standards (*i.e.*, those accused in this case)—not the carriers or HTC's New Jersey employees. (*Id.*, ¶ 10.)

Additionally, David Wiggins's sworn affidavit confirms that HTC's small New Jersey office does not perform cellular standards compatibility testing. (D.I. 43-1, ¶¶ 10-11.) Nor does HTC make design decisions for the Accused Products in New Jersey, and thus, its New Jersey employees could not collaborate with the carriers to do so. (*Id.*, ¶ 12.) Thus, HTC has demonstrated that HTC Corp., the California testing laboratories, and Qualcomm are all far more qualified than the carriers to provide evidence relating to the design and development of the Accused Products.

Not only are Verizon and AT&T unnecessary and irrelevant in this case, INVT fails to support its assertion to the contrary with affidavits, and its attorney argument is insufficient. *See Honeywell*, 817 F. Supp. at 484-85 nn. 23, 24; *see also Hostetler*, 164 F. Supp. at 74. Given the weight of HTC's affidavits, the Court should find transfer is favored because "no witnesses with regard to the design, development, manufacture or marketing of the [Accused Products or the Qualcomm chipsets] [are] located in New Jersey." *See Honeywell*, 817 F. Supp. at 484. (D.I. 42-3, ¶¶ 6, 9; D.I. 43-1, ¶¶ 11-13.)

3. The Remedies INVT Seeks Rely On Inventergy's Actions, And HTC Asserts Defenses Based On Inventergy's Failure To Provide Notice Or Offer A License On FRAND Terms.

It is undisputed that INVT was obligated to offer HTC a license under FRAND terms and conditions. (D.I. 1, ¶¶ 34-39.) INVT also needs to show it provided proper notice of infringement to obtain pre-suit damages. To prove both of these key issues, INVT must rely on actions carried out entirely by Inventergy's former employees. HTC, on the other hand, alleges that Inventergy's former employees actually did not provide proper pre-suit "notice" of the Asserted Patents, that INVT should not get pre-suit damages, and that INVT is barred from obtaining injunctive relief because its alleged offer to license the Asserted Patents was not on FRAND terms. (D.I. 1, ¶ 34-39.) These disputed issues cannot be simply disregarded, as INVT suggests.

The operative facts related to these core issues in the case are centered in California, and have nothing to do with New Jersey—a fact that INVT does not deny. As Inventergy not a party but is merely one of INVT’s parent companies, there is *no* reason to believe that the former Inventergy employees residing in CAND will voluntarily attend trial to support HTC’s defenses. *See Audatex N. Am. v. Mitchell Int’l, Inc.*, No. 12-cv-139, 2013 U.S. Dist. LEXIS 90847, at *16 (D. Del. June 28, 2013). Tellingly, INVT failed to even argue these witness would surely show up to trial in New Jersey. Thus, the only way to compel these key witnesses to trial is to transfer the case to CAND, where they can be subpoenaed.

4. Panasonic’s U.S. Entity Has No Ties To This Case.

INVT does not, and cannot, rely on Panasonic’s U.S. entity to argue that this case has any ties to New Jersey. “It is implausible to suggest that—in a case involving the design and development of the invention which resulted in [the Asserted Patents]—[INVT] may rely on the presence of a subsidiary which did not participate in those activities and which has no apparent proprietary interest in the resulting patent.” *Honeywell*, 817 F. Supp. at 481. INVT does not even argue that Panasonic’s Japanese witnesses will cooperate with trial in New Jersey, and thus this should not weigh in favor of keeping this case here. Indeed, the fact that relevant witnesses from Panasonic are located in Japan supports HTC’s contention that INVT’s choice of a foreign forum should be given little deference.

B. Given The Weight Of HTC's Evidence, The Balance Of Private Factors Favors Transfer To CAND.

Choice of Forum. A plaintiff's choice gets less weight if it "chose[s] a foreign forum or [if] the choice of forum has little connection with the operative facts." *Briger v. Loon Mt. Resort*, No. 2:14-cv-5374(KM)(MAH), 2015 U.S. Dist. LEXIS 189254, at *19-20 (D.N.J. May 19, 2015) (citing *Culp v. NFL Prods. LLC*, No. 1:13-cv-7815(NLH)(JS), 2014 U.S. Dist. LEXIS 137172, 2014 WL 4828189, at *4 (D.N.J. Sept. 29, 2014)). When the central facts of the lawsuit occurred outside the forum state, a foreign plaintiff's forum selection is entitled to *even less* deference. *See Honeywell*, 817 F. Supp. at 481-82 (finding the "operative facts" of the patent infringement action, which include design, development or manufacture, occurred outside of New Jersey, and disregarding minimal sales in New Jersey).¹

The Court should give little weight to INVT's forum choice because INVT is a foreign plaintiff, and the operative facts are centered around California, not New Jersey: (1) the design and development of the Qualcomm chips and source code expected to be implicated in this case, and the persons most knowledgeable

¹ The potential for carrier testimony does not create a rational or legitimate reason for choosing New Jersey, and even if it did, Plaintiff's forum preference can only be given "something more than minimal weight", but "less than the 'substantial' or 'paramount' weight that it would merit had [Plaintiff] filed suit in its home forum." *See Smart Audio Techs., LLC v. Apple Inc.*, 910 F. Supp. 2d 718, 729-30 (D. Del. 2012) (holding the Federal Circuit foreclosed "substantial[ly]" deferring to a foreign plaintiff's forum choice even if "rational and legitimate" reasons supported choosing that forum) (citing *In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1223 (Fed. Cir. 2011)).

regarding functionality of the chip; (2) the testing of the accused devices for compatibility with the allegedly infringing standards; (3) the facts and witnesses surrounding the alleged notice of the Asserted Patents and their infringement; and (4) the facts and witnesses surrounding the alleged FRAND offer. Taken together with HTC's preference to transfer to CAND, these factors strongly favor transfer.

Where the Claims Arose. At least for the reasons stated above, INVT's claims arose out of California. The Qualcomm chipsets in HTC's accused products that would perform the cellular standard functionalities INVT asserts are covered by the Asserted Patents (assuming such functionalities exist or are performed at all), were designed and developed by Qualcomm primarily in California. Additionally, the parties' pre-suit negotiations were initiated out of California. This factor favors a transfer.

Convenience of the Parties. INVT cannot deny that CAND is its principal place of business, and is clearly more convenient for its witnesses. INVT has not identified any of its employees that are in New Jersey. INVT's only argument here is that New Jersey will be more convenient because the ZTE case may remain in New Jersey. However, ZTE is not a party. Thus, this factor favors a transfer.

Convenience of Witnesses. This factor favors transfer because, as explained above, there are no relevant New Jersey witnesses from either Party or from any non-party. All of the relevant witnesses are in California, Washington, or Taiwan.

For all of these witnesses, and in particular the third-party former Inventergy employees, it would be most convenient to transfer the case to CAND.

INVT “overstates [HTC’s] burden of demonstrating that [Qualcomm witnesses] will be unavailable or unwilling to travel to [New Jersey]. [S]uch a clear statement [is not required]—it is enough that likely witnesses reside beyond the court’s subpoena power and that there is reason to believe that those witnesses will refuse to testify absent subpoena power.” *Audatex*, 2013 U.S. Dist. LEXIS 90847, at *16; *Symantec Corp. v. Zscaler, Inc.*, No. 17-cv-806, 2017 U.S. Dist. LEXIS 119528, at *7-8 (D. Del. July 31, 2017).

Moreover, INVT’s cited cases are distinguishable in view of HTC and Qualcomm’s detailed declarations regarding the Qualcomm witnesses. *Quintiles IMS, Inc. v. Veeva Sys.* did not concern the specificity used to identify third-party witnesses because no such witnesses were identified. No. 2:17-cv-177(CCC)(MF), 2017 U.S. Dist. LEXIS 97905 (D.N.J. June 23, 2017); Declaration of Ericka J. Schulz (“Schulz Dec.”), Ex. A at 8. In *Smart Audio Techs., LLC v. Apple Inc.*, Apple did not explain why testimony from its former employees was necessary or why they would refuse to testify. 910 F. Supp. at 732. In *Core Wireless Licensing, S.A.R.L. v. Apple, Inc.*, an Eastern District of Texas case, Apple only generally pointed third-party chip supplier Qualcomm and referenced Qualcomm’s

headquarter location. No. 6:12-cv-100, 2013 U.S. Dist. LEXIS 24922, at *12 (E.D. Tex. Feb. 22, 2013); Schulz Dec., Ex. B at 5, 8, 10-11.

Location of Records. INVT does not deny the fact that INVT and Inventergy's records, and alleged evidence of "notice" and offering a "FRAND license" are located in California. Moreover, Qualcomm confirmed that it typically offers its source code for review in California. (D.I. 42-4, ¶ 8.) Additionally, records of the relevant testing laboratory for the accused products are likely in California. (D.I. 42-3, ¶ 10.) As described above, the records related to AT&T and Verizon are likely not relevant, or are duplicative of what HTC can produce. Therefore, this factor favors transfer because the majority of the evidence is in California, and there are *no* relevant, non-duplicative records in New Jersey.

C. The Public Factors Favor Transfer To CAND.

This District Is Significantly More Congested Than CAND. This District is far more congested than CAND. *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1336 (Fed. Cir. 2006) ("[T]he [transferee] district's less congested docket suggests that [it] may be able to resolve this dispute more quickly."). INVT does not dispute that this District has almost 400 more pending cases *per judge* than CAND (a **67% difference**) or that the median time to trial in all civil cases is almost **15 months** longer here (a **54% difference**). Instead, INVT lists statistics that differ by

only a few percent, or a few weeks at most. (D.I. 45 at 36 (listing differences of 0.7 months, 1.7%, 5.7 cases per judge, and 0.3 months).)

INVT seeks to sidestep the overwhelmingly lopsided court congestion by conflating court congestion with judicial economy, arguing the latter requires keeping Apple and HTC in this District merely because INVT has a case pending against ZTE here. But INVT's case against ZTE does not demonstrate a lack of congestion in this District. If anything, transferring INVT's cases against Apple and HTC would reduce the congestion in this Court. *Spathos v. Payment Plan, LLC*, No. 3:15-cv-8014(MAS)(DEA), 2016 WL 3951672, at *5 (D.N.J. July 21, 2016) (finding disparity in court congestion, lack of substantial events occurring in New Jersey, and plaintiff's status as a non-resident strongly favored transfer).

INVT's Serial Litigation Does Not Require Denial of Transfer. INVT alleges it would be inefficient to transfer Apple and HTC but not ZTE to CAND. But INVT should not be able to use its serial litigation strategy to deprive HTC of key evidence and defenses that rely on Inventergy's and Qualcomm's California witnesses. In any event, judicial economy is "just one relevant consideration in determining how administration of the court system would best be served by deciding a transfer motion." *In re Apple, Inc.*, F. App'x 886, 889 (Fed. Cir. 2014) (transferring some but not all related cases). INVT also ignores procedures available to mitigate any purported inefficiencies that would arise from transferring

Apple and HTC but not ZTE, such as coordinated or consolidated pretrial proceedings for multidistrict litigations involving “one or more common questions of fact.” 35 U.S.C. § 1407. *Hemstreet*, 1990 U.S. Dist. LEXIS 6782, at *16-17 (“While the Court is aware of the realities of the difficulty in maintaining numerous similar actions in different districts, plaintiff’s recourse is to proceed pursuant to section 1407 which addresses multi-district litigation.”).

The Local Interest Favors Transfer. “New Jersey jurors should not be burdened with adjudicating a matter concerning decisions and[/]or conduct which occurred predominately outside the State of New Jersey.” *Tischio v. Bontex, Inc.*, 16 F. Supp. 2d 511, 526 (D.N.J. 1998). Here, the relevant decisions and/or conduct occurred almost entirely *outside* of this District. This District has no local interest with respect to INVT because—other than filing lawsuits—it has shown zero contacts here. And HTC’s suit-specific contacts here are minimal and unrelated to the merits of the case. Because of CAND’s significant connections with INVT and the events that “that gave rise to [this] suit, this factor should be weighed in [CAND]’s favor.” *Hoffmann-La Roche*, 587 F.3d at 1338.

III. CONCLUSION

HTC respectfully requests the Court grant its motion and transfer this action to CAND for the reasons contained in its motion and herein.

Dated: April 2, 2018

Respectfully submitted,

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