UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

PACT XPP SCHWEIZ AG	)	
	)	
Plaintiff,	)	C.A. No. 6:19-cv-00273-ADA
	)	
v.	)	
	)	
INTEL CORPORATION,	)	
	)	
Defendant.	)	

INTEL CORPORATION'S MOTION TO DISMISS, STAY, OR TRANSFER

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Pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(3), and 12(b)(6) and 28 U.S.C. § 1404(a), Defendant Intel Corporation ("Intel"), by and through its counsel, moves to dismiss, or in the alternative, stay or transfer this case (the "Texas Case") in favor of Intel's co-pending declaratory judgment action against PACT XPP Schweiz AG ("PACT") in the Northern District of California (the "California Case") involving the same 12 patents asserted here.

I. INTRODUCTION

This District was not PACT's preferred forum. PACT originally sued Intel in Delaware (the "Delaware Case") on the same 12 patents asserted here. Only after learning that Intel intended to move for transfer to a more convenient forum near its engineering facilities in Oregon did PACT suddenly abandon its Delaware Case to file in Texas—a transparent attempt to thwart Intel's transfer. Intel promptly filed the California Case to secure a more convenient forum, but this time near its headquarters in the Northern District of California where PACT is subject to personal jurisdiction. PACT maintains that its "first filed" Texas action—filed merely one day before the California Case—should control. But PACT's tactical end-run around convenience should not be rewarded, and the "first filed" rule it relies on does not apply in cases of forum shopping. Intel respectfully asks this Court to dismiss, stay, or transfer this case to the Northern District of California, where Intel is headquartered, and where Intel's declaratory judgment action on the same 12 PACT asserted patents is currently pending.

There is no question PACT filed this case based on an improper forum shopping motive:

- When it filed the Texas Case, PACT already had a pending case against Intel, initiated three months earlier in Delaware, alleging the exact same claims;
- Intel informed PACT that it intended to file a motion to transfer the Delaware Case to Oregon because, in part, it would be far more convenient and efficient to litigate this case near Intel's engineering facilities there and because PACT and the dispute have no connection to Delaware;

- Just hours after Intel informed PACT of its intent to move to transfer the Delaware Case, and without any prior notice to Intel, PACT filed its duplicative complaint here while its Delaware Case was pending; and

- Once its duplicative Texas complaint was on file, PACT, with no advance notice to Intel, dismissed its Delaware Case.

PACT knew that Intel's forthcoming motion to transfer the Delaware Case to Oregon had merit. PACT, a Swiss company, has no ties to Delaware (or Texas) and Intel's relevant employee witnesses and relevant documents are largely located on the West Coast, where Intel has major facilities in Oregon and California. PACT's actions in filing this case and later dismissing the Delaware Case were deliberate, undertaken for the improper purpose of preventing the Delaware court from transferring the Delaware Case to a more convenient forum.[1]

Intel has litigated other patent cases in this District without objection, as well as in other districts across the country, when appropriate under the facts of those cases. Indeed, Intel has an R&D facility in Austin, employs numerous Western District of Texas residents, pays taxes here, and it is proud of its relationship with the Western District. But for this dispute, the far more convenient forum is on the West Coast. The Federal Circuit, Fifth Circuit, and other courts, including several from this District, that have considered similar facts are clear on this point. As soon as Intel learned of PACT's improper actions, it filed a declaratory judgment action against PACT the next day—asserting non-infringement of the same patents and an additional breach of contract claim—in the Northern District of California. The Northern District of California (Judge Alsup) has set a case management conference for August 1, 2019, and entered an order indicating that Intel should be prepared to promptly provide discovery concerning its accused products as a declaratory judgment plaintiff. Intel is ready to proceed in that action and respectfully asks this Court to reject PACT's forum shopping attempt by either dismissing or

[1] PACT, as a foreign patent licensing company, has very little footprint in the United States.

staying this case, or alternatively transferring it to the Northern District of California, where Intel's declaratory judgment action is pending and where the convenience of the parties, witnesses, and the interests of justice will be served.

II. STATEMENT OF FACTS

A. PACT filed this complaint in anticipation of Intel's forthcoming motion to transfer the Delaware Case to a more convenient forum.

On February 7, 2019, PACT filed a patent infringement suit against Intel in the District of Delaware, alleging infringement of 12 patents. *PACT XPP Schweiz AG v. Intel Corp.*, D.I. 1, C.A. No. 19-267 (RGA) (D. Del.) (the "Delaware Case"). On April 9, the parties stipulated to an extension for Intel to answer PACT's complaint by April 29, and as is typical with such extensions, Intel agreed to answer the complaint on the deadline and not further delay initiation and progress of the case on the merits with a motion to dismiss. Ex. 1 ("this email confirms our agreement to stipulate to an additional 2 weeks to answer the complaint. Michael and Brian [PACT's Delaware counsel], I [PACT's national counsel] authorized Jack [Intel's Delaware counsel] to so represent to the Court since Intel will be answering not moving in response to the Complaint.").[2] Importantly, Intel did not waive its right to file ***all*** motions in the case in exchange for an extension, including a motion to transfer for convenience, which can generally be brought at any time.

Approximately one week before Intel's deadline to answer, Intel met and conferred with PACT regarding its intent to file a motion to transfer venue to the District of Oregon pursuant to 28 U.S.C. § 1404(a), along with Intel's answer. As part of that meet and confer, Intel asked whether PACT would oppose Intel's transfer motion. PACT indicated it would oppose the

[2] All cited exhibits are to the supporting declaration of Sharre Lotfollahi, filed concurrently herewith.

motion, expressing a belief that Intel had agreed "there would be an answer filed not a motion to transfer in return for last stipulation." Ex. 2. Intel disagreed with PACT's stated understanding of the parties' agreement—because Intel had waived its right to file a motion to dismiss, not all motions—and replied that "Intel will file an answer. The motion to transfer will not be in lieu of an answer." *Id.*

Intel received no response from PACT. Instead, just hours after the meet and confer, PACT filed an identical complaint in this Court asserting the exact same claims at issue in Delaware. *See* D.I. 1 ¶ 2. Then, around 3:00 a.m. Pacific Time the next morning, before Intel could file its transfer motion and answer, PACT dismissed its Delaware Case without prejudice. Ex. 3.

Intel promptly filed a declaratory judgment action the next day in the Northern District of California—where Intel is headquartered, where a number of relevant witness are located, and where many of the previous interactions between the parties took place—on the 12 patents asserted in the now-dismissed Delaware Case (and in PACT's Texas Case). *Intel Corp. v. PACT XPP Schweiz AG*, C.A. No. 3:19-cv-02241-WHA (N.D. Cal.) (the "California Case"). Intel did not file its declaratory judgment action in Oregon because PACT—a Swiss company with no known ties to Oregon (or Texas)—may contest that it is subject to personal jurisdiction there.[3]

After filing its declaratory judgment action, Intel filed an Administrative Motion with the Northern District of California, notifying the Court of the parties' co-pending litigations and requesting a hearing on the issue. Ex. 4. PACT did not respond to Intel's motion. Judge Alsup

[3] Because PACT has no place of business or agents for service of process in the United States, serving PACT would have required going through the lengthy and complex Hague Convention process. For this reason, Intel served PACT by agreement via mail in Switzerland, in exchange for PACT receiving a 60-day extension of its time to respond to the complaint. Exs. 33, 34.

declined to schedule a hearing on the matter, noting that the Texas Case's "filed first" status, though "not dispositive," called for the case to "proceed on the normal track, at least up until the initial case management conference." Ex. 5. Judge Alsup then commenced proceedings by setting a case management conference for August 1, 2019 and ordering that—as a declaratory judgment plaintiff—Intel should be prepared to promptly provide discovery concerning the accused products. Ex. 6. Intel is preparing to promptly provide discovery on the accused products, consistent with Judge Alsup's schedule.

B. Neither PACT nor the asserted patents have any connection to Texas.

PACT is a Swiss corporation with its principal place of business in Switzerland. D.I. 1 ¶ 1. In the company's Swiss registration papers, PACT states that the purpose of the company is the "acquisition and exploitation of intellectual property." Ex. 7 at 1. PACT "does not make or sell products in the United States that implement the asserted patents, and to PACT's knowledge no PACT licensed products made or sold in the United States implement the asserted patents." D.I. 1 ¶ 15.

PACT alleges that its predecessor company was founded in Germany by Martin Vorbach, the lead inventor on all of PACT's patents. D.I. 1 ¶ 8. Mr. Vorbach is PACT's Chief Technology Officer and his LinkedIn page indicates he is currently the CTO and Founder of Hyperion-Core Inc., located in Los Gatos, California.[4] Ex. 8. The other named inventors appear to be located in Germany. D.I. 1 at Exs. A–L. Additionally, PACT's current listed prosecution counsel for the 12 patents is located in Northern California. Exs. 9-20. Thus, the evidence relating to conception and reduction to practice of the alleged inventions is likely to be located either in Northern California or Germany, not Texas.

[4] Intel made several attempts to serve the California complaint on Mr. Vorbach at the Los Gatos address, but it appeared to be a residence, and no one was home. Lotfollahi Decl. ¶ 38.

C. Intel is headquartered in California and relevant evidence is located there.

Intel is the world leader in semiconductor technology and microprocessor products. Intel's worldwide headquarters is in Santa Clara, California (in the Northern District of California), where it employs over 6,600 people. Kuz Decl. ¶ 4. In total, Intel employs 15,000 people in California, including at three major sites in Santa Clara, San Jose (also in the Northern District of California), and Folsom (in the Eastern District of California), as well as thousands more at its campus in Hillsboro, Oregon. Kuz Decl. ¶¶ 4-5.

PACT accuses Intel of infringing 12 patents. D.I. 1. PACT accused Intel of infringing those patents by virtue of certain features of Intel's Core/Xeon processors including "Sandy Bridge" and newer architectures, including the Turbo Boost, ring bus, multi-level caching, and die-stacking features. *E.g.* D.I. 1 ¶¶ 32–35. Intel designs, develops, manufactures, and tests the accused products at its California and Oregon facilities, and the source code for these technologies are located there.[5] Many current and former Intel employees located on the West Coast are involved with and knowledgeable about the research, development, and design of these products. *E.g.* Kuz Decl. ¶¶ 7-13.

In addition, there are current Intel employees located in California and Oregon who are knowledgeable regarding prior interactions between Intel and PACT and/or PACT's patent brokers who offered to sell PACT's patent portfolio to Intel multiple times. *Id.* ¶¶ 12-13 (identifying Intel employees Pamela Hays and Jeff Draeger); Ex. 22 (2006 email chain between Pamela Hays, Jeff Draeger, and PACT's patent brokers). For example, in 2006, Intel employees

[5] For one of the 12 asserted patents, PACT also accuses Intel's Atom processors. D.I. 1 ¶ 135. Intel has a research and development facility located in Austin that works with aspects of Intel's Atom processors. Ex. 21. Whether the Atom processor or the Austin facility's work on it will play any role in discovery or trial in this case is highly speculative at this point, too speculative for such to play a role in either the First-to-File or the Transfer for Convenience determination.

Jeff Draeger and Pamela Hays interacted with PACT's patent brokers in their attempt to sell Intel PACT's patent portfolio. *Id.* Ron Laurie, from the patent broker group IP-Strategy, was one of the patent brokers Intel interacted with in the 2006 timeframe and is a relevant third-party witness regarding Intel's and PACT's prior interactions. Messrs. Draeger and Laurie live in Northern California and Ms. Hays lives in Oregon. Kuz Decl. ¶¶ 12-13; Ex. 27. Intel provides its employees multiple daily airplane shuttles for travel between Oregon and California, significantly reducing the burden on Intel's employees who live in Oregon to come to California as compared to attending proceedings in Texas. Kuz Decl. ¶ 6. For example, Intel's Oregon shuttle has multiple daily flights to San Jose (about five miles from Intel in Santa Clara) that are about ninety minutes in duration. *Id.* Intel also operates at least one forty-five minute flight in each direction between Folsom and San Jose. *Id.*

When PACT and Intel previously entered into a contractual relationship in October of 2007, they agreed that California was the appropriate forum to litigate their disputes. Specifically, PACT and Intel entered into a Restricted Use License Agreement ("RULA") whereby Intel would provide materials to PACT and PACT would create and distribute field-programmable gate array products—the same technology at issue in this case and in the previous PACT patent litigations concerning Xilinx and Altera. Ex. 23. The RULA was signed by PACT's former CEO, Peter Weber, a relevant third-party witness who appears to currently reside in Northern California. Exs. 23, 28. Section 11.2 of the RULA contains a forum selection clause stating that any disputes regarding the parties' agreement would be subject to the exclusive jurisdiction of California State or Federal Courts. Ex. 23 at 4.

In addition to current and former Intel employees, individuals affiliated with Xilinx and Altera Corporation (acquired by Intel in 2015) are likely to have knowledge relevant to this case.

Both Xilinx and Altera were previously involved in litigation with PACT relating to similar technologies at issue in this case. *See PACT XPP Techs., AG v. Xilinx,* Case No. 2:07-cv-563-RSP (E.D. Tex.) and *Altera Corp. v. PACT XPP Techs., AG,* Civil Action No. 3:14-cv-02868-JD (N.D. Cal.). Xilinx and former Altera are headquartered in San Jose, California, and their engineers are likely to have knowledge of relevant prior art. Exs. 24-25.

III. LEGAL STANDARD

A "first-filed action is preferred . . . ***unless*** considerations of judicial and litigant economy, and the just and effective disposition of disputes, require otherwise." *Serco Servs. Co., L.P. v. Kelley Co.,* 51 F.3d 1037, 1039 (Fed. Cir. 1995) (emphasis added) (citations and internal quotations omitted).[6] "Exceptions [to the first-to-file rule] . . . are not rare" and the rule should not be applied where there is a "sound reason that would make it unjust or inefficient to continue the first-filed action." *Elecs. for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1347 (Fed. Cir. 2005) (quotation omitted); *see also Raz Imports, Inc. v. Luminara Worldwide, LLC*, No. 3:15-cv-02223-M, 2015 WL 6692107, at *2 (N.D. Tex. Nov. 3, 2015). Factors that impact whether to follow the first-to-file rule include whether the filer engaged in bad faith, anticipatory filing, or forum shopping, *Serco Servs.*, 51 F.3d at 1039-40, as well as practical considerations similar to those contemplated under 28 U.S.C. § 1404, namely, "the convenience and availability of witnesses, or absence of jurisdiction over all necessary or desirable parties, or the possibility of consolidation with related litigation, or considerations relating to the real party in interest." *Elecs. for Imaging*, 394 F.3d at 1340 (citation omitted). As this Court has noted, "[i]nstead of . .

[6] Federal Circuit law governs the application of the first-to-file rule in patent infringement cases. *Elecs. for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1345-46 (Fed. Cir. 2005); *see also Raz Imports, Inc. v. Luminara Worldwide, LLC*, No. 3:15-cv-02223-M, 2015 WL 6692107, at *2 (N.D. Tex. Nov. 3, 2015) ("The applicability of the first-to-file rule in this case is therefore governed by Federal Circuit law.").

. automatically going with the first filed action, the more appropriate analysis [in cases with competing forum interests] takes account of the convenience factors under 28 U.S.C. § 1404(a)." *Valeo, Inc. v. Fed.-Mogul Corp.*, No. EP-13-CV-115-PRM, 2013 WL 8480673, at *2 (W.D. Tex. Oct. 17, 2013) (*citing Micron Tech., Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 902, 904 (Fed. Cir. 2008)); *see also PPS Data, LLC v. Diebold, Inc.*, No. 2:12:-cv-TC, 2012 WL 1884655, *2 (D. Utah May 22, 2012) ("Considering these facts as a whole, the court finds that PPS Data's actions constitute the sort of procedural fencing that merits an exception to the first-to-file rule").

When deciding whether transfer is appropriate under § 1404(a), courts in this Circuit consider both private and public interest factors. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (*en banc*). The private interest factors include "(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." *Id.* The public interest factors include "(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 of laws [or in] the application of foreign law." *Id.* In this Circuit, the plaintiff's choice of venue is not a factor in this analysis. *Id.* at 314–15. Instead, the plaintiff's choice of venue contributes to the defendant's burden of proving that the transferee venue is "clearly more convenient" than the transferor venue. *Id.* at 315. "[T]he district courts have broad discretion in deciding whether to order a transfer under § 1404(a)." *DataQuill, Ltd. v. Apple Inc.*, No. A-13-CA-706-SS, 2014 WL 2722201, at *2 (W.D. Tex. June 13, 2014) (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d at 313–15).

Thus, Courts have multiple available options to deal with a duplicative action that, while technically filed earlier than another action, is not entitled to "first-filed" precedence, including dismissing, staying, or transferring the first-filed action in favor of the proper, later-filed action. *Serco*, 51 F.3d at 1038; *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 935 F.2d 1263, 1271 (Fed. Cir. 1991) (Newman, J. concurring) (finding decision to enjoin prosecution of the duplicative suit "in full accord with the policy disfavoring duplicative litigation" (internal citations omitted)); *Valeo, Inc.*, 2013 WL 8480673, at *7. Any of these remedial measures would be appropriate in light of PACT's forum-shopping attempt.

IV. ARGUMENT

PACT's duplicative and anticipatory Texas Case should be dismissed. Even if the Texas Case is considered first-filed *vis-a-vis* the California Case,[7] the first-to-file rule does not apply because PACT improperly filed the Texas Case in an attempt to deprive the Delaware court of an opportunity to rule on Intel's well-founded motion to transfer. In addition, equitable and convenience considerations also weigh heavily against the application of the first-to-file rule here because the parties' dispute has no apparent ties to this District (PACT has none), particularly as compared to the strong ties between the parties' dispute and the Northern District of California, where Intel's California Case is pending.

A. Dismissal is warranted because PACT's bad faith, anticipatory filing, and forum-shopping negate the first-to-file rule.

The Court should not apply the first-to-file rule in this case because, as numerous courts have held, rigid application of the first-to-file rule is inappropriate where the facts reveal that the

[7] The Texas complaint should not receive "first-filed" treatment. PACT filed the same complaint in Delaware three months ago, which case was pending and would have been subject to Intel's transfer motion until PACT refiled in Texas.

first-filed case was the result of bad faith gamesmanship, anticipatory filing, and forum shopping. In other words, courts routinely decline to apply the first-to-file rule where doing so would be unjust. *See, e.g., Serco Servs.*, 51 F.3d at 1039-40; *PPS Data, LLC*, 2012 WL 1884655, *1-2 (declining to apply the first-to-file rule where Plaintiff originally filed suit in Delaware, dismissed its suit after a motion to transfer was filed, and then filed suit in a second district—Plaintiff "should not be allowed to pick a second forum for its suit simply because it filed its new complaint a day before Diebold brought its declaratory judgment action"); *Raz Imports, Inc.*, 2015 WL 6692107, at *3 (declining to apply the first-to-file rule and transferring suit where the "facts meet the definition of an anticipatory lawsuit"); *Wells Fargo Bank, N.A. Tr. for Natividad Caballero 2007 Ins. Tr. v. Principal Life Ins. Co.*, No. CV-09-00068-DDP (RZX), 2009 WL 10671947, at *3 (C.D. Cal. Apr. 22, 2009) ("The Court need not resolve this [first-to-file] issue because even if the Court were to find the Delaware Action to be the first-filed suit, the Court would be inclined to find that equitable and convenience considerations counsel heavily against the application of the first-to-file doctrine here."); *Sport Supply Grp., Inc. v. R&G Prods., Inc.*, No. 3:08-cv-02031-O, 2009 WL 10677398, at *3 (N.D. Tex. Sept. 30, 2009) (holding the plaintiff's complaint was anticipatory and resulted from forum shopping and that "[b]ased on these facts, the Court finds compelling circumstances exist to preclude application of the first to file rule"). Here, PACT's actions make it unjust to continue the Texas case, rewarding the bad-faith gamesmanship motivated by PACT's forum shopping objectives.

The holding in *PPS Data* is particularly on point. The facts at issue in that case are indistinguishable from those at issue here. 2012 WL 1884655, **1–2. There, the court refused to apply the first-to-file rule, and instead dismissed the action due to Plaintiff's forum shopping. *Id*. at *2. The plaintiff in that case first filed suit in the District of Delaware. *Id*. at *1. Then, in

response to a motion to transfer by defendant, and the night before the plaintiff's response to that motion was due, plaintiff filed an identical second suit in the District of Utah before dismissing its Delaware Case. *Id*. at *1. The *PPS Data* court held that the plaintiff's actions were improper and the first-to-file rule would not be applied:

> Considering these facts as a whole, the court finds that PPS Data's actions constitute the sort of procedural fencing that merits an exception to the first-to-file rule. While this rule generally protects a plaintiff's choice of forum, the court need not mandate a rigid application of the rule when a plaintiff uses it to protect a second choice of forum. ***PPS Data already chose Delaware as the original forum for this lawsuit. By dismissing its case there, PPS Data should not be allowed to pick a second forum for its suit simply because it filed its new complaint a day before Diebold brought its declaratory judgment action.*** Accordingly, the court grants Diebold's motion to dismiss.

Id. at *2 (emphasis added). The facts of this case are no different. PACT first filed suit in Delaware, and then only after learning of Intel's intent to file during meet-and-confer, and mere minutes before Intel was about to file its Answer, PACT filed this identical second suit and dismissed the Delaware Case. Lotfollahi Decl. ¶¶ 34, 35. PACT's decision to file its Texas Case was plainly motivated by one thing and one thing only: avoiding Intel's forthcoming transfer motion in Delaware and depriving the Delaware court of the power to transfer to a district that is more appropriate to resolve this dispute. Such tactics should not be countenanced.

PACT's co-pending, duplicative complaints in Delaware and Texas are textbook examples of forum shopping. PACT initially chose to litigate this case in Delaware, but then changed its mind and rushed to file in Texas after learning of Intel's impending transfer motion. PACT filed the Texas Case only after realizing that its Delaware Case would face a well-founded transfer motion. To afford the Texas Case a "first-filed" preference in these circumstances would be unjust and would encourage this type of gamesmanship and forum shopping. At bottom, having originally chosen Delaware—a jurisdiction with no ties to the parties' dispute—

PACT should not be afforded a second bite at the forum-shopping apple. *Id.* at *2. PACT's Texas Case should instead be dismissed, or alternatively, stayed or transferred in favor of the parties' co-pending Northern District of California litigation. *PPS Data, LLC*, 2012 WL 1884655, at **1–2.

B. The interests of justice also favor transfer to the Northern District of California.

To the extent the Court does not dismiss or stay this case based on PACT's bad faith, anticipatory filing, and forum shopping, the Court should transfer the case to the Northern District of California where Intel's declaratory judgment action is pending before Judge Alsup for the additional reason that it is a more convenient forum for resolving this particular dispute. Courts will "relax the 'first to file' rule if the balance of convenience weighs in favor of the later-filed action." *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994). The factors considered in determining whether to apply the first-to-file rule substantially overlap with the factors considered when determining whether transfer is appropriate under 28 U.S.C. § 1404(a). *Elecs. for Imaging*, 394 F.3d at 1347–48. Here, practical considerations support a finding that the Northern District of California is a clearly more convenient venue for this dispute such that PACT's second-filed Texas Case is not entitled to deference under the first-to-file rule. This action could have been brought in the Northern District of California, and an analysis of the transfer factors establishes that this action should be transferred there for the convenience of the parties and witnesses and to promote the interests of justice. Moreover, because Delaware was PACT's first choice of venue, PACT's secondary choice should bear little on Intel's burden to prove that the Northern District of California is more convenient than the Western District of Texas. *In re Volkswagen of Am., Inc.*, 545 F.3d at 314–15 (noting that the "'good cause'" burden

reflects the appropriate deference to which the ***plaintiff's choice*** of venue is entitled" (emphasis added)).

1. PACT could have brought this case in the Northern District of California.

"The preliminary question under § 1404(a) is whether a civil action "might have been brought" in the destination venue." *In re Volkswagen of Am., Inc.*, 545 F.3d at 312. Under 28 U.S.C. § 1400(b), a patent infringement action may be brought "where the defendant has committed acts of infringement and has a regular and established place of business."

PACT unquestionably could have filed this action against Intel in the Northern District of California, where Intel is headquartered. *See DataQuill, Ltd.*, 2014 WL 2722201, at *3 ("There is no dispute this case might have been brought in the Northern District of California, where Apple is headquartered, so the preliminary hurdle in the § 1404(a) analysis is easily cleared.") (internal quotation omitted). Intel has designed, developed, and sells the accused products in Northern California, and employees knowledgeable about the accused products are located there. Kuz Decl. ¶¶ 3, 4, 7-13. Moreover, venue would be proper in the Northern District of California because Intel's Santa Clara worldwide headquarters, where over 6,600 people are employed, is unquestionably a regular and established place of business. 28 U.S.C. § 1400(b).

2. The private-interest factors favor transfer to the Northern District of California.

The private interest factors, "(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," favor transferring this case to the Northern District of California. *In re Volkswagen of Am., Inc.*, 545 F.3d at 315.

a. *The sources of proof for this case are in or near California.*

"In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer." *In re Genentech, Inc.*, 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)); *Valeo, Inc. v. Fed.-Mogul Corp.*, No. EP-13-CV-115-PRM, 2013 WL 8480673, at *2 (W.D. Tex. Oct. 17, 2013) (granting transfer and acknowledging that "the bulk of relevant evidence usually comes from the accused infringer" and finding this factor "weighs in favor of transfer"). The facts of this case are no different.

Here, the bulk of relevant evidence will come from Intel as the accused infringer. That evidence is a thousand miles away, on the West Coast, where the accused technology was designed and developed. Kuz Decl. ¶¶ 3-4. The majority of Intel's documents relevant to the case, relating to the accused products, marketing, sales, and revenue, will come from Intel's Northern California headquarters or its Oregon R&D facilities. *DataQuill, Ltd.*, 2014 WL 2722201, at *3 (Finding factor favored transfer were Apple's documents, software, and engineers were located in Cupertino, where the accused products were designed, and "whatever limited amount of relevant information exists in Austin is likely to be significantly outweighed by the amount of relevant information present in Cupertino."). Additionally, PACT appears to have no documents or evidence that will come from this District. As explained above, PACT is a Swiss company, and the named inventors all appear to be in Northern California or Germany. D.I. 1 at Exs. A–L. Accordingly, this factor weighs in favor of transfer.

b. *No compulsory process exists over relevant third-party witnesses in this District.*

Intel is not aware of any third-party witnesses in this District, in Texas, or within this Court's subpoena power. By contrast, Intel is aware of several former employees in Northern California with relevant knowledge regarding prior art and the accused products (engineers at

Xilinx and Altera are also likely to have knowledge). Kuz Decl. ¶¶ 7-13. In addition, Ron Laurie, one of PACT's patent brokers that Intel interacted with in the 2006 timeframe, and Peter Weber, PACT's former CEO who also interacted with Intel, are relevant third-party witnesses who reside in Northern California. Exs. 22, 23, 27, 28. Their testimony related to PACT's prior licensing efforts is likely to be relevant to patent damages issues. If this case remains in this District, Intel will have no ability to compel those witnesses at trial, unlike it would in the Northern District of California. *In re Genentech, Inc.*, 566 F.3d at 1345 ("The fact that the transferee venue is a venue with usable subpoena power here weighs in favor of transfer, and not only slightly."); *DataQuill, Ltd.*, 2014 WL 2722201, at *3 (finding that Apple's identification of relevant former employees and prior art inventors in the Northern District of California favored transfer because of "[t]he California court's absolute subpoena power over these numerous witnesses").

c. *Costs and burdens for witnesses are significantly less in California than this District.*

Litigating this case in California will reduce the costs and burdens to witnesses of both parties. "The convenience of the witnesses is probably the *single most important factor* in transfer analysis." *Genentech*, 566 F.3d at 1343 (emphasis added). "[A]dditional distance [from home] 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." *In re Volkswagen of Am., Inc.*, 545 F.3d at 317 (citation omitted). Because the distance between the two venues is "more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." *Id.*

Litigating this case in this District would impose significant burdens on numerous Intel witnesses. The vast majority of Intel's "employees with knowledge of the design, development, and marketing of the Accused Products, who would provide testimony regarding infringement and damages, reside and work in or near" the transferee venue, not this District. *Godo Kaisha IP Bridge 1 v. Xilinx, Inc.*, No. 17-100, 2017 WL 4076052, at *4 (E.D. Tex. Sept. 14, 2017); *Godo Kaisha IP Bridge 1 v. Intel Corp.*, Case No. 2:17-CV-00676-RWS-RSP, D.I. 157, slip op. at 1 (E.D. Tex. Sept. 28, 2018) (transferring patent case against Intel from E.D. Texas to Oregon in part because "Intel has identified some party witnesses likely to testify at trial for whom Oregon would be more convenient, and [Plaintiff] has not indicated that their third-party witnesses would be willing to testify in this District"), Ex. 26. Indeed, most of Intel's likely witnesses would travel about 40 minutes from Intel's Santa Clara headquarters to testify at the District Court in San Francisco, California or would take a 2-hour Intel shuttle flight from Oregon to Santa Clara at no additional expense. Ex. 29; Kuz Decl. ¶ 6. By contrast, traveling to this Court would take nearly a full day, would add 1,000 miles of travel in each direction, and would disrupt the employees' lives and Intel's business. Exs. 30-32. And as stated above, PACT's likely witnesses, the named inventors and prosecution counsel, are either in Northern California or outside of the United States. Thus, this factor also favors transfer.

d. *No practical concerns outweigh the convenience of transfer to California.*

Because Intel moved promptly to transfer concurrently with filing its motion to dismiss, no risk of wasted work or inconsistencies would result from transfer. *Battee v. Ben E. Keith Co.*, No. 17-0161, 2017 WL 1832043, at *2 (E.D. Tex. May 5, 2017) ("[T]he Court notes that the Defendants moved for transfer promptly and no significant proceedings had yet occurred in Marshall. This factor is neutral."). To the contrary, transferring this action to the Northern

District of California where Intel's action is pending would promote efficiency and coordination and thus favors transfer. "This is a lawsuit between a foreign plaintiff and a defendant with longstanding and significant ties to the Northern District of California, both generally and specifically with regard to the issues in this case. Most of the witnesses are in California. [PACT] has no presence in Austin. There can be no question it will be more practical to try this case in California than in Texas. This factor weighs in favor of transfer." *DataQuill, Ltd.*, 2014 WL 2722201, at *4.

3. The public-interest factors also favor transfer to the Northern District of California.

The public interest factor relating to the local interest in having localized interests decided at home favors transfer.[8] *In re Volkswagen of Am., Inc.*, 545 F.3d at 315. California has a strong local interest in this case. Intel has employed thousands of people at its headquarters and throughout Northern California for decades, and California has a strong interest in resolving a dispute that involves one of the largest companies—and employers—in the state. *Valeo, Inc.*, 2013 WL 8480673, at *2 (W.D. Tex. Oct. 17, 2013) (transferring the case and stating "the location of the infringer's principal place of business is often the crucial and controlling consideration' in determining motions to transfer."). Additionally, because the accused products were primarily developed on the West Coast, and the people who are knowledgeable about those

[8] The remaining public interest factors do not apply or are neutral. Both the transferor and the transferee Courts know how to handle a patent case and will handle this case efficiently. The Northern District of California has patent-case procedures and patent expertise. So does this District and Division. Regarding court congestion, Your Honor recently took the bench and has relatively little time-to-trial data. In addition, this Court's standing orders as will likely be applied to a case of this magnitude renders this factor neutral because the pretrial process and the time to trial in each venue is appropriate. The other factors, familiarity of the forum with the law that will govern the case and avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law do not weigh for or against transfer in this patent case. *In re Volkswagen of Am., Inc.*, 545 F.3d at 315. However, to the extent the parties' license agreement comes into play, its California forum selection clause would favor transfer.

products live and work there, this case "calls into question the work and reputation of several individuals residing in or near that district and who presumably conduct business in that community." *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1336 (Fed. Cir. 2009); *DataQuill, Ltd.*, 2014 WL 2722201, at *4. This is particularly true given PACT's willful infringement allegations against Intel and its engineers.

V. CONCLUSION

Intel respectfully requests that this case be dismissed, or alternatively, stayed, or transferred to the Northern District of California, where proceedings would be clearly more convenient.

Dated: May 15, 2019

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EXHIBIT 9

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12/836,364 **MULTI-CORE PROCESSING SYSTEM** **PACT-034-DE-PCT-US-3C1** **(/pair/PAIRPrintServlet)**

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11/122,500 **PIPELINE CONFIGURATION PROTOCOL AND CONFIGURATION UNIT COMMUNICATION** **PACT-017-DE-PCT-US-C1** **(/pair/PAIRPrintServlet)**

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12/570,984 **METHODS AND DEVICES FOR TREATING AND PROCESSING DATA** **2885/128** **(/pair/PAIRPrintServlet)**

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13/289,296 **LOGIC CELL ARRAY AND BUS SYSTEM** **PACT-022-PCT-PCT-US-2C1** **(/pair/PAIRPrintServlet)**

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12/571,173 **RECONFIGURABLE ELEMENTS** **2885/129**

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12/495,465 **Data Processor Having Disabled Cores** **PACT-009-DE-PCT-US-C1-C1** **(/pair/PAIRPrintServlet)**

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12/944,068	PROCESSOR ARRANGEMENT ON A CHIP INCLUDING DATA PROCESSING, MEMORY, AND INTERFACE ELEMENTS	PACT-015-DE-PCT-US-C1-D1	(/pair/PAIRPrintServlet)

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13/653,639	METHODS AND DEVICES FOR TREATING AND PROCESSING DATA	PACT-025-PCT-US-D1-2C1	(/pair/PAIRPrintServlet)

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14/572,643	Data Processing System Having Integrated Pipelined Array Data Processor	PACT-029-030-050-CIP	(/pair/PAIRPrintServlet)

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Attorney/Agent Information

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14/318,211 **Multi-processor bus and cache interconnection system** **PACT-015-018-CIP** **(/pair/PAIRPrintServlet)**

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