

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

AGIS SOFTWARE DEVELOPMENT, LLC,	§	
	§	
Plaintiff,	§	
	§	Case No. 2:17-cv-514-JRG
v.	§	(Lead Case)
	§	
HTC CORPORATION,	§	<u>JURY TRIAL DEMANDED</u>
	§	
Defendant.	§	

**PLAINTIFF AGIS SOFTWARE DEVELOPMENT, LLC'S SUR-REPLY IN
OPPOSITION TO DEFENDANT HTC CORPORATION'S MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(B)(2), OR, IN THE ALTERNATIVE,
TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(A)
TO THE NORTHERN DISTRICT OF CALIFORNIA (DKT. 29)**

I. HTC'S MOTION TO DISMISS OR TRANSFER SHOULD BE DENIED

AGIS Software Development, LLC ("AGIS") has demonstrated that this Court's exercise of personal jurisdiction over HTC Corporation ("HTC") is both proper and fair based on HTC's conduct placing the infringing products into the stream of commerce with an expectation that they would be sold in Texas. Additionally, HTC has failed to show that transfer to the Northern District of California ("NDCal") is clearly more convenient and warranted in the interests of justice.

II. PERSONAL JURISDICTION OVER HTC IS PROPER AND FAIR

AGIS has established a *prima facie* case of personal jurisdiction over HTC, and HTC has failed to rebut it. Dkt. 40 at 11-17. HTC admits that (1) it manufactures products containing the accused devices abroad; (2) it supplies the accused devices to its subsidiary, HTC America with knowledge that HTC America imports, markets, and sells the accused devices to third party distributors and carriers in the United States; and (3) HTC's intent and purpose is to serve the United States Market. Dkt 29-2 ¶ 2; Dkt. 29 at 5, 12, 13; Dkt. 40-10 at 30, 146. HTC has not and cannot dispute that its distribution network is ongoing and continuous, and results in its products being distributed and sold nationwide, including in Texas. Thus, HTC cannot deny that it "knew, or reasonably could have foreseen, that a termination point of the channel was [the forum state]." *Beverly Hills Fan*, 21 F.3d at 1564. Indeed, HTC's United States' website identifies numerous stores in Texas that sell HTC products, including at least twenty-five (25) stores in this District. *See* Ex. 10, HTC Corporation Store Locator. In view of these uncontroverted facts, a *prima facie* case of purposeful entry into the Texas stream of commerce is established as "the defendant's products were sold into a nationwide distribution network and [] the products were available in Texas." *IDQ Operating, Inc. v. Aerospace Commc'ns Holdings*

Co., No. 6:15-CV-781, 2016 WL 5349488, at *4 (E.D. Tex. Jun. 10, 2016), *report and recommendation adopted sub nom. Armor All/STP Prod. Co. v. Aerospace Commc'ns Holdings Co., Ltd.*, No. 6:15-CV-781, 2016 WL 5338715 (E.D. Tex. Sept. 3, 2016) (Gilstrap, J.). This Court has jurisdiction over HTC because HTC places the accused products into the stream of commerce through a distribution channel it established with its wholly-owned subsidiary, with the knowledge and expectation that, through HTC's distribution, the accused products would be sold nationwide, including Texas. *See IDQ Operating*, 2016 WL 5349488, at *4 (jurisdiction proper over defendants when "the defendant's products were sold into a nationwide distribution network and [] the products were available in Texas); *MHL Tek, LLC v. Nissan Motor Co.*, No. 2:07-cv-289 (TJW), 2008 WL 910012 (E.D. Tex. Apr. 2, 2008) (jurisdiction over foreign defendant proper where defendant placed products into established distribution channel and it knew the likely destination of its products because defendant sold its products to an entity in the chain knowing that entity would distribute vehicles throughout the United States, including Texas); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994) (jurisdiction proper over defendant who, as a result of selling its products through a distribution channel developed by defendant, knew or should have reasonably foreseen that the termination point of the channel was the forum state).¹

Accordingly, HTC's motion to dismiss for lack of personal jurisdiction should be denied.²

¹ Guidance or control over the entities at the end of the distribution channel is not required for this Court to have personal jurisdiction over HTC. *IDQ Operating*, 2016 WL 5349488, at *4.

² HTC does not argue in its reply that the exercise of jurisdiction over HTC would be unreasonable. *See* Dkt. 47 at 1-2. Thus, HTC has failed to present a "compelling case" that the exercise of jurisdiction over HTC would be unreasonable. *See Beverly Hills Fan*, 21 F.3d at 1568 (*citing Burger King Corp. v. Rudzewicz*, 471 U.S.462, 477 (2003)).

III. TRANSFER TO THE NORTHERN DISTRICT OF CALIFORNIA IS NOT WARRANTED

Despite making a bald statement that all factors weigh in favor of transfer, in its reply, HTC ignores three factors (judicial economy, localized interest, and court congestion) that AGIS has shown weigh against transfer. *Compare* Dkt. 40 at 27-30, *with* Dkt. 47 2-10. HTC's arguments regarding the other three factors fail to show that transfer is "clearly more convenient" for all parties, witnesses, and in the interest of justice. *See Aloft Media*, 2008 WL 819956, at *3. HTC's attacks on AGIS's ties to this District (Dkt. 47 at 10) do not discharge HTC of its burden to show that the transferee district is clearly more convenient. *See In re Apple, Inc.*, 456 Fed. App'x 907 (Fed. Cir. 2012) (denying defendant's petition for a writ of mandamus seeking a transfer of venue noting that the district court did not give any weight to defendant's arguments about the plaintiff's "ephemeral connections to the [initial choice of] forum").

A. Convenience of the Parties and Witnesses and Cost of Attendance for Willing Witnesses Weigh Against Transfer

The convenience factors weigh against transfer for numerous reasons. First, HTC failed to identify a single party witness. Each of these "potential witnesses" live in Taiwan. Dkt. 29 at 21; Dkt. 47 at 9. This is insufficient. *Mohamed v. Volvo Corp.*, 90 F. Supp. 2d 757, 775 (E.D. Tex. 2000) (movant must do more than make "a general allegation that the key witnesses are inconveniently located"). Rather, HTC is required to provide evidence as to the "relevance and materiality" of the information these individuals might have and provide "evidence (e.g., a declaration from the [employees]) indicating that travel to Marshall would constitute an inordinate inconvenience or expense." *Sanger Ins. Agency, Inc. v. HUB Int'l, Ltd.*, No. 2:13-cv-528, 2014 WL 5389936, at *2 (E.D. Tex. Mar. 2, 2014 (Gilstrap, J.)). Any witness living in Taiwan will be required to travel to testify, and may consider it more convenient to travel to

Texas than to California. *See MHL Tek, LLC v. Nissan Motor Co.*, No. 2:07-cv-289, 2009 WL 440627, at *4 (E.D. Tex. Feb. 23, 2009).

Second, HTC's argument that NDCal is more convenient for third party witnesses, HTC America, prosecuting attorney Daniel Burns, and Google, also fails. Dkt. 47 at 3-8. HTC identifies two "potential witnesses" employed by HTC America (Dkt. 29 at 21; Dkt. 47 at 6); however, only after AGIS argued that such a perfunctory identification is not sufficient to carry HTC's burden, HTC, for the first time in reply, sets forth the purported relevance of these individuals (Dkt. 47 at 6-7). Nonetheless, these "potential witnesses" are located outside of NDCal and will be required to travel to testify. *See MHL Tek*, 2009 WL 440627, at *4.³ Similarly, HTC failed to explain the relevance and materiality of Mr. Burns in its opening brief and attempts to argue his relevance now in reply. Dkt. 29 at 6, 18; Dkt. 47 at 7.⁴ Prosecuting attorneys are not relevant, especially given that no party has pled an inequitable conduct defense.

With regard to Google, HTC's attempt to overcome deficiencies in its opening brief regarding the identity, relevance, materiality, and purported inconvenience of Google's witnesses in its reply (Dkt. 47 at 5) falls short. In HTC's initial motion, HTC generally references "[p]rimary" or "critical" Google witnesses and provided a vague parenthetical citation to a declaration in another case, without any explanation as to why such a declaration may be relevant here, listing four employees and titles for three. Dkt. 40 at 6, 22. Even if such identification is sufficient—it is not—HTC did not discuss, let alone set forth evidence of, the relevance, materiality, or purported inconvenience of these individuals. Dkt. 40 at 6, 22. Now, again relying on declarations submitted in a different case, HTC lists four additional Google

³ HTC's general statement that "all of third-party HTC America's employees with relevant information are in Washington" (Dkt. 47 at 7) is not sufficient for HTC to meet its burden. *Sanger*, 2014 WL 5389936, at *2.

⁴ HTC also ignored that other prosecuting attorneys of the Patents-in-Suit are located in Florida (Dkt. 29 at 6), who, if called to testify, will likely find Texas more convenient than California (*MHL Tek*, 2009 WL 440627, at *4).

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