IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AGINCOURT GAMING, LLC,	)	REDACTED
Plaintiff,	)	
v.	)	Civil Action No. 11-720-RGA-SRF
ZYNGA, INC.,	)	SEALED
Defendant.	)	

MEMORANDUM OPINION[1]

I. INTRODUCTION

Presently before the court in this patent infringement action is defendant Zynga Inc.'s ("Zynga" or "Defendant") motion to transfer venue pursuant to 28 U.S.C. § 1404(a) (D.I. 14), and Plaintiff Agincourt Gaming, LLC's ("Agincourt" or "Plaintiff") motion to strike portions of the declaration of William Pringle (D.I. 32). For the following reasons, Zynga's motion to transfer and Agincourt's motion to strike are denied.

II. BACKGROUND

Zynga is a Delaware corporation headquartered in San Francisco, California. (D.I. 16 at ¶¶ 4-5, 11) Zynga produces free games, such as FarmVille and Mafia Wars, which are played on social networks like Facebook and Google Plus and other platforms like iPad, iPhone, and Android. (*Id.* at ¶¶ 4, 6) All but three of Zynga's games were developed, marketed, and sold from Zynga's San Francisco office. (*Id.* at ¶ 7) The other games were designed in Los Angeles,

[1] "[B]ecause a motion to transfer venue does not address the merits of the case[,] but merely changes the forum of an action, it is a non-dispositive matter that is within the province of a magistrate judge's authority." *Corrinet v. Burke*, 2012 WL 1952658, at *6 (D. Or. Apr. 30, 2012) (citing *Holmes v. TV-3, Inc.*, 141 F.R.D. 697, 697 (W.D. La. 1991)); *see also Control Screening, LLC v. Integrated Trade Sys., Inc.*, 2011 WL 3417147, at *6 (D.N.J. Aug. 3, 2011) (motions to transfer are considered non-dispositive motions).

California, Canada, and Baltimore, Maryland. (*Id.* at ¶¶ 8-10)

Zynga has approximately 2,300 full-time employees, seventy-five percent of whom work in the San Francisco Bay Area. (*Id.* at ¶ 12) Zynga has eleven domestic offices in California, Texas, Maryland, Massachusetts, New York, and Washington, and has multiple international locations. (D.I. 25 at ¶¶ 4-5) Zynga has no offices or employees located in Delaware. (D.I. 16 at ¶ 12)

Agincourt is a limited liability company incorporated in Delaware and headquartered in Dallas, Texas. (D.I. 1 at ¶ 1) Agincourt is a competing provider of online social network games, acting as a start-up aggregator and renovator of games. (*Id.* at ¶ 22) Agincourt's business plan is to acquire already-developed online games and repackage them in a more marketable form. (*Id.*)

Agincourt is the owner by assignment of U.S. Patent Nos. 6,758,755 ("the '755 patent") and 6,306,035 ("the '035 patent"). (D.I. 1 at ¶¶ 7-8, 10) The '755 patent, entitled "Prize Redemption System for Games Executed Over A Wide Area Network," was issued on July 6, 2004. (*Id.* at ¶ 7) On October 23, 2001, the '035 patent, entitled "Graphical User Interface For Providing Gaming And Prize Redemption Capabilities," was issued. (*Id.* at ¶ 8) Agincourt acquired a social network game called Pantheon, which practices both the '755 patent and the '035 patent. (*Id.* at ¶ 24)

Agincourt filed its complaint against Zynga on August 17, 2011, alleging infringement of the '755 patent and the '035 patent. (D.I. 1) On September 4, 2011, Zynga filed its answer and counterclaims. (D.I. 11)

III. DISCUSSION

A. Motion to Transfer

The statutory authority for transferring the case is § 1404(a) of Title 28, which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The burden of establishing the need for transfer is the movant's, *see Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 883 (3d Cir. 1995), which in this case is Zynga. The Third Circuit has set forth the framework for analysis:

> In ruling on § 1404(a) motions, courts have not limited their consideration to the three enumerated factors in § 1404(a) (convenience of parties, convenience of witnesses, or interests of justice), and, indeed, commentators have called on the courts to "consider all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." While there is no definitive formula or list of factors to consider, courts have considered many variants of the private and public interests protected by the language of § 1404(a).
>
> The private interests have included: (1) plaintiff's forum preference as manifested in the original choice; (2) the defendant's preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the convenience of the witnesses-but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum).
>
> The public interests have included: (7) the enforceability of the judgment; (8) practical considerations that could make the trial easy, expeditious, or inexpensive; (9) the relative administrative difficulty in the two fora resulting from court congestion; (10) the local interest in deciding local controversies at home; (11) the public policies of the fora; and (12) the familiarity of the trial judge with the applicable state law in diversity cases.

Id. at 879-80 (citations omitted and numbering added).

There is no dispute that this action could have been brought in the Northern District of

California. Accordingly, the first requirement in the analysis for transfer of venue under Section 1404(a) is satisfied.

In the court's view, interest (1) supports Agincourt's position that the case should not be transferred. Interest (2), and to a lesser extent, interests (6) and (8), support Zynga's motion to transfer the case. The other interests do not add much weight to the balancing and are neutral. The twelve private and public interests are not exclusive, and in this case there are other considerations which the court takes into account.

Agincourt has chosen Delaware as a forum. That choice weighs strongly in Agincourt's favor, although not as strongly as it would if Agincourt had its principal place of business in Delaware. *See Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) ("plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request"); *Pennwalt Corp. v. Purex Indus., Inc.*, 659 F. Supp. 287, 289 (D. Del. 1986) (plaintiff's choice of forum not as compelling if it is not plaintiff's "home turf").

Zynga's forum preference is the Northern District of California, where it maintains its principal place of business and where most of its employees are located. (D.I. 15 at 7) Zynga's choice has a legitimate basis, and therefore this factor weighs in favor of transfer.

The accused products in this case are distributed nationally, including in Delaware and the Northern District of California. The court views the claim of infringement as being one that arises wherever the products are sold or distributed. *See In re Acer Am. Corp.*, 626 F.3d 1252, 1256 (Fed. Cir. 2010). Zynga agrees that determining where the claims arose is based upon where the games or products are manufactured. Zynga further agrees that the alleged infringement occurs where the games or products are used. Therefore, Zynga acknowledges that

this factor is neutral. (8/14/12 Tr. at 92:8-16) This factor has no weight in the balancing.

Zynga is a large corporation worth billions of dollars which operates on an international scale. (D.I. 16 at ¶ 12; D.I. 41, Ex. B; D.I. 1 at ¶ 19) [redacted] (D.I. 25, Ex. O at 32:13-16) Moreover, the geographical benefits of litigating in San Francisco are not compelling in light of the fact that four of the accused games are maintained and developed by employees in Zynga's Bangalore, India office. (D.I. 25, Ex. O at 53:24 - 54:6; 82:8 - 83:6) The court is not convinced that litigating in Delaware would impose an undue financial burden on Zynga. *See Cypress Semiconductor Corp.*, 2001 WL 1617186, at *4 ("[C]onvenience based on expense is uncompelling especially when the practical realities are that discovery will likely take place in [the proposed transferee forum] regardless of the trial venue.").[2] This factor is neutral.

The next factor in the *Jumara* analysis is "the convenience of the witnesses – but only to the extent that the witnesses may actually be unavailable for trial in one of the fora." *Jumara*, 55 F.3d at 879. This factor does not weigh in favor of either party. The only witnesses identified by

[2]Zynga's allegations of inconvenience are also contradicted by the fact that it voluntarily chose to incorporate in Delaware. *See Mallinckrodt, Inc. v. E-Z-Em Inc.*, 670 F. Supp. 2d 349, 357 (D. Del. 2009) (internal citations omitted) ("[W]hen a corporation chooses to incorporate in Delaware and accept the benefits of incorporating in Delaware, it cannot complain once another corporation brings suit against it in Delaware."); *ADE Corp. v. KLA-Tencor Corp.*, 138 F. Supp. 2d 565, 572-73 (D. Del. 2001) ("[A]s the judges of this court have noted, one aspect of a company's decision to incorporate in Delaware is that under our jurisdictional and venue statutes it is agreeing to submit itself to the jurisdiction of the courts in this state for the purposes of resolving this type of commercial dispute." Thus, "absent some showing of a unique or unexpected burden, a company should not be successful in arguing that litigation in its state of incorporation is inconvenient.").

Zynga are either employed by Zynga or have consented to testify on Zynga's behalf in Delaware.[3] This court has recently held that the availability of non-party witnesses residing outside the subpoena power of the court is not a factor that weighs in favor of transfer where, as here, the majority of those witnesses submit declarations to voluntarily appear at trial. *See Tessera, Inc. v. Sony Elecs., Inc.*, C.A. No. 10-838-RMB, 2012 WL 1107706, at *6 (D. Del. Mar. 30, 2012) (holding that it would be inappropriate for the court to conclude that four non-party witnesses, three of whom submitted declarations to voluntarily appear at trial, would be unavailable at trial simply because they were not within the court's subpoena power). In sum, neither party has presented evidence that any of the witnesses would be unwilling or unable to testify at trial, as required under *Jumara*. This factor is neutral.

Likewise, there is no reference in the record that any records of any party are only available in a particular location. (8/14/12 Tr. at 30:8 - 31:22) Zynga does not deny that it will produce all relevant records electronically regardless of where the case proceeds. However, the bulk of the evidence will likely come from Zynga as the accused infringer,[4] and Agincourt does not dispute that most of the relevant documents are located in the Northern District of California. This factor weighs slightly in favor of transfer.

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[3]The five named inventors submitted affidavits stating that they are willing to appear in Delaware to testify at hearings and trial even though they are not subject to subpoena by this court. (D.I. 27, 28, 29, 30, 31) One inventor will testify for a prior assignee of the patents. (D.I. 27) [redacted] (D.I. 26, Ex. A at ¶ 2)

[4]"In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant's documents are kept weighs in favor of transfer to that location." *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) (internal quotation marks and citations omitted).

Enforceability of the judgment is not an issue.

Practical considerations that could make the trial easy, expeditious, or inexpensive weigh in favor of transfer. Agincourt does not deny the fact that it will be more expensive and less convenient for Zynga to litigate in Delaware, and does not contend that it would be substantially more convenient and less expensive for Agincourt to litigate in Delaware. This factor weighs in favor of transfer.

The relative administrative difficulty due to court congestion is not disputed and is therefore neutral.

This Court has previously held that "patent issues do not give rise to a local controversy or implicate local interests." *TriStrata Tech., Inc. v. Emulgen Labs., Inc.*, 537 F. Supp. 2d 635, 643 (D. Del. 2008). This is particularly true in the present matter. While Zynga has its primary operations in the Northern District of California, "it is by no means a local or regional company." *Signal Tech, LLC v. Analog Devices, Inc.*, C.A. No. 11-1073-RGA, 2012 WL 1134723, at *4 (D. Del. Apr. 3, 2012). Moreover, Delaware's interests in adjudicating disputes involving Delaware corporations are "substantial and must be afforded at least equal weight to those of the Northern District of California." *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.*, 797 F. Supp. 2d 472, 486 (D. Del. 2011). This factor is neutral.

The parties do not address the public policy of the forum. This factor is therefore neutral.

This is not a diversity case. Therefore, familiarity with state law is irrelevant. This factor is neutral.

Under Third Circuit law, considerable deference is given to the plaintiff's choice of forum. In considering all the transfer factors identified in *Jumara*, Zynga has not shown that the

balance of convenience tips strongly enough in its favor to warrant transfer. This case is distinguishable from the situation before the Federal Circuit in *In re Link_A_Media* because both parties in the present matter are Delaware corporations. *See In re Altera Corp.*, 494 F. App'x 52 (Fed. Cir. July 20, 2012) (denying mandamus and distinguishing *In re Link_A_Media* when all of the parties were Delaware corporations); *see also Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1332 (Fed. Cir. 2011) ("Given that both parties were incorporated in Delaware, they had both willingly submitted to suit there, which weighs in favor of keeping the litigation in Delaware."). Therefore, Zynga's motion to transfer venue is denied.

B. Motion to Strike

Agincourt asks the court to strike portions of William Pringle's declaration because they are not based on personal knowledge and are not otherwise admissible.[5] (D.I. 32 at 1) Specifically, Agincourt contends that Paragraph 7 of the declaration indicates that Pringle did not select the five employees slated to testify at trial based on his personal knowledge. (*Id.*) In response, Zynga contends that Pringle has personal knowledge regarding the employees' responsibilities at Zynga, their knowledge of the accused products, whether they are likely to testify at trial, and where they live, even though he did not personally select them. (D.I. 39 at 2) Zynga further contends that Pringle was designated as a Rule 30(b)(6) witness, and Agincourt's personal knowledge objections directed at Pringle are irrelevant because Pringle's Rule 30(b)(6)

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[5]Agincourt does not identify the Federal Rule under which its motion to strike is brought, instead citing *Parker v. Learn Skills Corp.* for the proposition that statements in affidavits must be based on the affiant's personal knowledge or some other admissible ground. 530 F. Supp. 2d 661, 670 (D. Del. 2008). The Third Circuit generally disfavors the exclusion of evidence. *See WebXchange Inc. v. FedEx Corp.*, C.A. No. 08-133-JJF, 2010 WL 299240, at *3 (D. Del. Jan. 20, 2010).

deposition offers additional admissible evidence regarding the Zynga employees who are likely to testify at trial. (*Id.*)

Agincourt's motion to strike Paragraph 7 of Pringle's declaration is denied. Nothing in the record suggests that Pringle did not have personal knowledge of the responsibilities of the five listed witnesses, their knowledge of the accused products, whether they would testify at trial, and whether they lived in the San Francisco Bay area. Moreover, Zynga offered additional evidence regarding which Zynga employees will testify at trial, and where those employees live and work, in the form of Pringle's Rule 30(b)(6) deposition testimony.

Agincourt next objects to Pringle's statement in Paragraph 13 of the declaration that he "ha[s] been informed" of matters relating to the content of possible trial testimony. (D.I. 32 at 2) According to Agincourt, this constitutes hearsay and is therefore inadmissible. (*Id.*) Zynga responds that the statements are not hearsay because they are not offered to establish that Zynga witnesses will have to testify at trial or that any particular issue is in dispute in the litigation. (D.I. 39 at 3) According to Zynga, these statements are offered only to provide a foundation for Pringle's subsequent statements regarding the witnesses who are likely to testify on those issues. (*Id.*)

Agincourt's motion to strike Paragraph 13 of Pringle's declaration is denied. The statements that allegedly constitute hearsay are not intended to establish the issues in dispute in the litigation. Rather, Paragraph 13 is intended to show that the previously identified Zynga employees are capable of testifying on topics including how Zynga's products operate, Zynga's knowledge of the patented invention, the royalty, Zynga's patent licensing practices, and the value of the patent.

Finally, Agincourt objects to Paragraph 15 of Pringle's declaration because Pringle lacked knowledge on which to base his assessment at his deposition regarding how burdensome and expensive it would be to litigate in Delaware. (D.I. 32 at 2) In response, Zynga contends that Pringle declared that it would be burdensome and expensive to transfer all documents pertaining to the suit to Delaware, and although Pringle did not know the precise proportion of relevant documents stored in a particular format, or the number of relevant documents, no person could have such knowledge at this stage of the litigation. (D.I. 39 at 3-4) Zynga again reiterates that Pringle was designated as a Rule 30(b)(6) witness and testified as to the burden and expense of litigating in Delaware. (*Id.* at 4)

Agincourt's motion to strike Paragraph 15 of Pringle's declaration is denied. Pringle had personal knowledge, based on the number of games at issue in the suit, that the production of documents could be substantial and costly. Pringle's inability to identify the exact number of documents and the exact cost of the production goes to the weight, rather than the admissibility of the declaration.

For the foregoing reasons, Agincourt's motion to strike Pringle's declaration is denied.

V. CONCLUSION

For the foregoing reasons, Zynga's motion to transfer venue (D.I. 14) is denied; and Agincourt's motion to strike (D.I. 32) is denied.

This Memorandum Opinion is filed pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72(a), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Memorandum Opinion. Fed. R. Civ. P. 72(a). The objections and responses to the objections are limited to ten (10) pages each.

The parties are directed to the court's Standing Order In Non Pro Se Matters For Objections Filed Under Fed. R. Civ. P. 72, dated November 16, 2009, a copy of which is available on the court's website, www.ded.uscourts.gov.

Because this Memorandum Opinion may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Memorandum Opinion. Any such redacted version shall be submitted no later than **June 25, 2013** for review by the court. The court will subsequently issue a publicly-available version of its Memorandum Opinion.

Dated: June 18, 2013

Sherry R. Fallon
UNITED STATES MAGISTRATE JUDGE