IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GENEDICS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 17-1062-CJB
	)	
META COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

Presently pending before the Court in this patent infringement case is Defendant Meta Company's ("Defendant" or "Meta") motion seeking a transfer of venue to the United States District Court for the Northern District of California ("Northern District of California"), pursuant to 28 U.S.C. § 1404(a) (the "Motion"). (D.I. 13) Plaintiff Genedics, LLC ("Plaintiff" or "Genedics") opposes the Motion. For the reasons set forth below, Defendant's Motion is DENIED.

I. BACKGROUND

A. Factual Background

Plaintiff is a limited liability company organized under the laws of Massachusetts. (D.I. 1 at ¶ 2) It has its principal place of business in Lenox, Massachusetts, (*id.*), and also appears to have an office of some kind in Camarillo, California, which is located in the jurisdiction of the United States District Court for the Central District of California ("Central District of California"), (D.I. 14, exs. 5-10; D.I. 19 at 5). Plaintiff is the owner by assignment of the six patents (the "patents-in-suit") that it accuses Defendant of infringing in this matter: United

States Patent Nos. 8,319,773; 8,477,098; 8,730,165; 8,902,225; 9,110,563; and 9,335,890. (D.I. 1 at ¶¶ 17-22)

Plaintiff is a small technology company that was co-founded by Gene Fein and Edward Merritt, who are named inventors on all six of the patents-in-suit. (*Id.* at ¶ 8) These two men are also the only two members of Plaintiff. (D.I. 20 at ¶ 2) Plaintiff was organized in 2006 and, since that time, has never grossed more than [redacted] in revenue. (*Id.* at ¶ 3) There is no evidence that Plaintiff has any physical location in, or corporate connection to, the State of Delaware. (D.I. 14, ex. 4)

Defendant is a Delaware corporation and its principal place of business is located in San Mateo, California (in the Northern District of California). (D.I. 1 at ¶ 3) It has approximately 120 full-time employees, all of whom work out of its San Mateo offices. (D.I. 15 at ¶ 2) Defendant was founded in 2012 and is a maker of augmented reality hardware and software products. (D.I. 1 at ¶ 10; D.I. 14, ex. 1) It relies upon venture investment to fund its operations; to date, it has raised approximately $73 million in two funding rounds. (D.I. 15 at ¶ 7) Defendant relies upon these monies to pay its employees and to develop future products. (*Id.*)

In these cases, Plaintiff accuses Defendant of directly and indirectly infringing the six patents-in-suit, *inter alia*, by making, selling, offering to sell, using, and/or importing the Meta 1 development kit ("Meta 1") and the Meta 2 development kit ("Meta 2," and collectively with Meta 1, the "accused products"). (D.I. 1 at ¶¶ 10, 23-383) The accused products are augmented reality head mounted displays that are employed in computer user interface systems. (*Id.* at ¶ 10) They are said to utilize, *inter alia*, "Unity 3D software engine" technology in addition to Meta-based computer systems. (*See, e.g., id.* at ¶ 25) To date, Defendant has sold [redacted] units of the

Meta 1 product (which is no longer being sold) and has fulfilled orders for [redacted] offers of the Meta 2 product; gross revenue from these sales is less than [redacted]. (D.I. 15 at ¶ 6)

Defendant's engineers developed the accused products at their various headquarters located in the Northern District of California. (*Id.* at ¶ 5) Defendant's research, development, sales, and finance operations are all located at its offices in San Mateo, as are any relevant documents in its possession that relate to the accused products. (*Id.*) It has no physical presence in Delaware. (*Id.* at ¶ 3)

Aside from Gene Fein and Edward Merritt, who are listed as inventors on each of the six patents-in-suit, there are two other inventors associated with those patents: Jackson Fein (a listed inventor on four of the six patents) and Eli Merritt (a listed inventor on two of the six patents). (D.I. 1, exs. A-F) Gene Fein and Jackson Fein appear to reside in cities located in the Central District of California, while Edward Merritt and Eli Merritt appear to be residents of Lenox, Massachusetts. (D.I. 14 at 6 & exs. 5-16)

The Unity 3D software utilized by the accused products is made by Unity Technologies ("Unity"). (D.I. 14, ex. 17) Unity is a San Francisco, California-based company. (*Id.*) It has offices in 24 cities located around the globe, including four U.S.-based offices (San Francisco; Seattle, WA; Austin, TX; and Pittsburgh, PA). (D.I. 19, ex. A)

B. Procedural Background

On August 1, 2017, Plaintiff filed its Complaint. (D.I. 1) The parties thereafter jointly consented to the Court's jurisdiction to conduct all proceedings in the case, including trial, the entry of final judgment, and all post-trial proceedings. (D.I. 10)

On September 28, 2017, Defendant filed the instant Motion (as well as a still-pending motion to dismiss, which was filed pursuant to Federal Rule of Civil Procedure 12(b)(6)). (D.I. 11; D.I. 13) The parties completed briefing on the instant Motion on October 19, 2017. (D.I. 23) Thereafter, at the parties' joint request, the Court stayed case deadlines pending the resolution of the pending motions. (D.I. 24) Thus, no case schedule has yet been entered in the matter.

II. DISCUSSION

A. Legal Standard

Section 1404(a) of Title 28 provides the statutory basis for a transfer inquiry. It provides that "[f]or 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 or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a).

The party seeking a transfer has the burden "to establish that a balancing of proper interests weigh[s] in favor of the transfer[.]" *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) (citation omitted); *see also Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995).[1] That burden is a heavy one: "unless the balance of convenience of the parties is *strongly in favor* of [the] defendant, the plaintiff's choice of forum should prevail." *Shutte*, 431 F.2d at 25 (emphasis added) (internal quotation marks and citation omitted); *see also CNH Am. LLC v. Kinzenbaw*, C.A. No. 08-945(GMS), 2009 WL 3737653, at *2 (D. Del. Nov. 9, 2009).

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[1] In analyzing a motion to transfer venue in a patent case, it is the law of the regional circuit that applies. *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.*, 797 F. Supp. 2d 472, 487 n.7 (D. Del. 2011) (citing *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1331 (Fed. Cir. 2011)).

The United States Court of Appeals for the Third Circuit has observed that courts must analyze "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." *Jumara*, 55 F.3d at 879 (internal quotation marks and citation omitted). Nevertheless, it has identified a set of private interest and public interest factors that are appropriate to account for in this analysis (the "*Jumara* factors"). The private interest factors to consider include:

> [1] [The] 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)[.]

Id. (citations omitted). The public interest factors to consider include:

> [1] [T]he enforceability of the judgment, [2] practical considerations that could make the trial easy, expeditious, or inexpensive, [3] the relative administrative difficulty in the two fora resulting from court congestion, [4] the local interest in deciding local controversies at home, [5] the public policies of the fora, . . . and [6] the familiarity of the trial judge with the applicable state law in diversity cases[.]

Id. at 879-80 (citations omitted).

B. Appropriateness of Transferee Venue

The first step in the transfer analysis is to determine whether this action could have been brought in the proposed transferee venue. *Mallinckrodt Inc. v. E-Z-Em Inc.*, 670 F. Supp. 2d 349, 356 (D. Del. 2009). In the parties' briefing, there was no dispute that Plaintiff could have properly brought this infringement action in the Northern District of California, as it is not

disputed that infringement is alleged to have occurred there and that Defendant has a regular and established place of business there. (D.I. 14 at 7-8); *see also* 28 U.S.C. § 1400(b).

C. Application of the *Jumara* Factors

The Court will proceed to analyze the *Jumara* factors and their impact on whether transfer should be granted.

1. Private Interest Factors

a. Plaintiff's choice of forum

When analyzing the first *Jumara* private interest factor—the "plaintiff's forum preference as manifested in the original choice"—the court should not consider simply the fact of that choice, but the reasons behind the choice. *Pragmatus AV, LLC v. Yahoo! Inc.*, Civil Action No. 11-902-LPS-CJB, 2012 WL 4889438, at *4 (D. Del. Oct. 15, 2012) (citation omitted), *adopted by* 2013 WL 174499 (D. Del. Jan. 16, 2013); *Affymetrix, Inc. v. Synteni, Inc.*, 28 F. Supp. 2d 192, 200 (D. Del. 1998). "If those reasons are rational and legitimate[,] then they will weigh against transfer, as they are likely to support a determination that the instant case is properly venued in this jurisdiction." *Pragmatus*, 2012 WL 4889438, at *4 (internal quotation marks, brackets and citations omitted); *see also Intellectual Ventures I LLC v. Altera Corp.*, 842 F. Supp. 2d 744, 753-54 (D. Del. 2012) ("*Altera*").[2]

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[2] On the other hand, where a plaintiff's choice of forum was made for an improper reason—such as where the choice is arbitrary, irrational, or selected to impede the efficient and convenient progress of a case—it should not be afforded substantial weight. *Pragmatus*, 2012 WL 4889438, at *4; *Affymetrix*, 28 F. Supp. 2d at 200 (noting that if a plaintiff had no good reason, or an improper reason, for filing suit in this District, this would likely weigh in favor of transfer).

Plaintiff states that it brought the case in this District in part because Defendant is incorporated in Delaware. (D.I. 19 at 3) In the past, this Court has repeatedly found that it is rational and legitimate for a plaintiff to choose to sue a defendant in that defendant's state of incorporation—a district where a plaintiff can have certainty that there will be personal jurisdiction over the defendant. *See, e.g.*, *TSMC Tech., Inc. v. Zond, LLC*, Civil Action No. 14-721-LPS-CJB, 2014 WL 7251188, at *15 (D. Del. Dec. 19, 2014) (citing cases). The rationale for doing so was stronger still after the decision of the Supreme Court of the United States in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017). In *TC Heartland*, the Supreme Court interpreted the patent venue statute, 28 U.S.C. § 1400(b), to allow that a corporate defendant could be sued for patent infringement only in a jurisdiction: (1) where it resides (i.e., where it is incorporated) or (2) where it committed an act of infringement and has a regular and established place of business. 137 S. Ct. at 1517. In light of *TC Heartland* and the record here, it appears that if Plaintiff did not wish to sue Defendant in the district in which Defendant had its principal place of business (the Northern District of California)—a decision that plaintiffs frequently make, uncontroversially, in federal patent cases—then this District was Plaintiff's only other choice.

Plaintiff also cites to other factors that reasonably led it to file suit here. Among those are that it chose to sue: (1) in the closest possible available venue to the District of Massachusetts, which is where its principal place of business is found and is the home of one of Plaintiff's two members, *see Pragmatus*, 2012 WL 4889438, at *6; and (2) in a district that is well familiar with patent litigation, *see Tessera, Inc. v. Broadcom Corp.*, Civil Action No. 16-379-LPS[-]CJB, Civil Action No. 16-380-LPS-CJB, 2017 WL 1065865, at *4 (D. Del. Mar. 21, 2017).

Therefore, because there are a number of clear, legitimate reasons why Plaintiff chose this forum for suit, this factor weighs against transfer.

b. Defendant's forum preference

As for the second private interest factor—the defendant's forum preference—Defendant prefers to litigate in the Northern District of California. In analyzing this factor, the Court has similarly "tended to examine whether the defendant can articulate rational, legitimate reasons to support that preference." *Pragmatus,* 2012 WL 4889438, at *6 (citation omitted).

Defendant contends that it has a number of legitimate reasons for seeking to transfer this action to the Northern District of California. These include that: (1) the forum is home to the entirety of its business and operations; and (2) relevant witnesses and evidence are likely to be found there. (D.I. 14 at 9-10) As this Court has often held, the physical proximity of the proposed transferee district to a defendant's principal place of business (and relatedly, to witnesses and evidence potentially at issue in the case) is a clear, legitimate basis for seeking transfer. *See, e.g., Nalco Co. v. AP Tech Grp. Inc.*, C.A. No. 13-1063-LPS, 2014 WL 3909114, at *1 (D. Del. Aug. 8, 2014); *Genetic Techs. Ltd. v. Natera, Inc.*, C.A. No. 12-1737-LPS, 2014 WL 1466471, at *1 (D. Del. Apr. 15, 2014). That logic applies here, and thus, the second private interest *Jumara* factor weighs in favor of transfer.

c. Whether the claim arose elsewhere

The third private interest *Jumara* factor asks "whether the claim arose elsewhere." As a matter of law, a claim regarding patent infringement arises "wherever someone has committed acts of infringement, to wit, 'makes, uses, offers to sell, or sells any patented invention' without authority." *McRo, Inc. v. Activision Blizzard, Inc.*, Civil Action No. 12-1508-LPS-CJB, 2013

WL 6571618, at *5 (D. Del. Dec. 13, 2013) (certain internal quotation marks and citations omitted), *adopted by* 2013 WL 6869866 (D. Del. Dec. 30, 2013). Nevertheless, as to this factor, this Court typically focuses on the location of the production, design, and manufacture of the accused instrumentalities. *Id.* (citing cases).

Here, it does not appear disputed that the accused products were designed and developed in the Northern District of California, and that the marketing and instructional material for the accused technology and related software was developed in that District. (D.I. 14 at 10-11; D.I. 15 at ¶ 5)[3] While the products appear to be sold nationwide, even Plaintiff does not dispute that "a substantial amount of the alleged infringing activity occurs in the Northern District of California based on Meta's activity there." (D.I. 19 at 4) For that reason, this factor weighs in favor of transfer. *See Contour IP Holding, LLC v. GoPro Inc.*, Civil Action No. 15-1108-LPS-CJB, 2017 WL 3189005, at *10 (D. Del. July 6, 2017), *adopted by* 2017 WL 3225983 (D. Del. July 31, 2017).

d. Convenience of the parties as indicated by their relative physical and financial condition

In assessing the next private interest factor—"the convenience of the parties as indicated by their relative physical and financial condition"—this Court has traditionally examined a number of issues. These include: "(1) the parties' physical location; (2) the associated logistical and operational costs to the parties' employees in traveling to Delaware (as opposed to the proposed transferee district) for litigation purposes; and (3) the relative ability of each party to

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[3] Defendant did not provide clear record evidence as to where the accused products are made, but in its reply brief, it asserts that they are manufactured and assembled in the Northern District of California. (D.I. 23 at 3 & n.2) For purposes of this Memorandum Order, the Court assumes that is the case.

bear these costs in light of its size and financial wherewithal." *Audatex N. Am., Inc. v. Mitchell Int'l, Inc.*, C.A. No. 12-CV-139 (GMS), 2013 WL 3293611, at *4 (D. Del. June 28, 2013) (internal quotation marks and citations omitted); *see also McKee v. PetSmart, Inc.*, C.A. No. 12-1117-SLR-MPT, 2013 WL 1163770, at *4 (D. Del. Mar. 20, 2013) (footnote omitted).

Defendant states that because its principal and only place of business is located in the Northern District of California, as are all of its employees, then that District would be a more convenient place for it to litigate. (D.I. 14 at 11-12) The Court agrees that it would.

A few considerations, however, dilute the impact of this convenience argument. First, because Defendant has incorporated in Delaware (and, thus, has willingly submitted to suit here), it would be hard to conclude that Delaware is a decidedly *inconvenient* location for Defendant to defend a lawsuit. *Altera*, 842 F. Supp. 2d at 756 (citing *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1332 (Fed. Cir. 2011)). Second, while Defendant's employees would face some additional inconvenience were they obligated to travel to Delaware for pre-trial or trial proceedings, the amount of such travel is not likely to be large—particularly if this case does not result in a trial. *See, e.g., Graphics Props. Holdings Inc. v. Asus Comput. Int'l, Inc.*, 964 F. Supp. 2d 320, 328-29 (D. Del. 2013) ("[A]s a practical matter, regardless of the trial venue, most of the discovery [in a patent case involving Defendant] will take place in California or other locations mutually agreed to by the parties."); *Human Genome Scis., Inc. v. Genentech, Inc.*, C.A. No. 11-082-LPS, 2011 WL 2911797, at *7 (D. Del. July 18, 2011) (noting that the likelihood that few case events would occur in Delaware—particularly few if the case did not go to trial—weighed against transfer, as did technological advances that allow traveling employees to more easily interact with their office while away).

As for Plaintiff, it has two members. One, Edward Merritt, is located in Massachusetts, far closer to Delaware than to the Northern District of California. For him, Delaware, although located a few states to the south, would presumably be more convenient than the proposed transferee forum. The other, Gene Fein, is located in or around Ventura County, California, near Los Angeles, which is located in the Central District of California. (D.I. 19 at 5) The Northern District of California's courthouses aren't exactly close to him (as they are located hundreds of miles away), but are obviously far closer than is Delaware's federal courthouse. Thus, a case could be made that either district at issue here has benefits and drawbacks for Plaintiff regarding the issue of convenience. But ultimately, the fact that (1) one half of Plaintiff's members are located closer to this Court; (2) Plaintiff's principal place of business is located closer to this Court; and (3) Plaintiff wishes to be in this Court, all lead to the conclusion that, on balance, this District can be viewed as being more convenient to Plaintiff than would the proposed transferee district.

Lastly, both sides cite to their size and financial condition and argue that this sub-factor should militate in their favor. Defendant, for example, notes that it is a start-up company supported by venture financing; it argues that, as a result, the costs and expenses associated with any pre-trial and trial efforts in Delaware would impact it materially. (D.I. 14 at 11-12) Defendant also cites a "great deal of lost productivity" that it would face if its engineers were required to travel here for trial. (*Id.* at 12) However, much of this comes across in the form of attorney argument, as Defendant did not submit declarations providing factual enhancement to its

claims of "significant" money-loss or "a great deal of lost productivity[.]" (*Id.*)[4] Plaintiff, for its part, notes that it has had [redacted] revenues over its decade-plus of existence, (D.I. 19 at 6 (citing D.I. 20 at ¶ 3)), and claims that Defendant can "bring [more] substantial resources to bear" in this litigation than it can, (*id.*). Plaintiff certainly appears to have a smaller footprint than does Defendant and so the "size and financial wherewithal" sub-factor should slightly favor it. But here too, Plaintiff did not provide much insight into what its true financial picture really is. And so this sub-factor should not materially affect the overall assessment of the "convenience of the parties" factor.

With both sides having an understandable argument as to why it would be more convenient for them to proceed in their chosen forum, and with neither side's size or financial condition demonstrably affecting the overall calculus, the Court finds this factor to be neutral.

e. Convenience of the witnesses to the extent that they may actually be unavailable for trial in one of the fora

The "convenience of the witnesses" is the next factor, "but only to the extent that the witnesses may actually be unavailable for trial in one of the fora." Of particular concern here are

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[4] Defendant did submit the declaration of Karen J. Kwan, its Vice President of Finance and Operations. (D.I. 15) Ms. Kwan's declaration provided a number of factual details about Defendant's operations (such as where Defendant's employees and records are based, how many full-time employees work for Defendant, or how many of the accused products have been sold). (*Id.* at ¶¶ 2, 5, 8) Those details, which are incorporated throughout this Memorandum Order, have at times redounded to Defendant's benefit in the transfer calculus. The Court notes, however, that as to issues of finances and engineer activity/productivity, Ms. Kwan's declaration is lighter on details. How difficult will it be for Defendant, in light of the specifics of its current financial situation, to pay for travel and lodging expenses for its employees, were a trial to occur? How many of Defendant's engineers might reasonably be expected to participate in Delaware-based trial efforts? How does that number compare to the number of engineers that Defendant employs in total? How exactly might that diversion of resources impact Defendant's overall business? The facts associated with the answers to such questions are important, and might have been helpful to Defendant's Motion. But they are left out of Ms. Kwan's declaration.

fact witnesses who may not appear of their own volition in the venue-at-issue and who could not be compelled to appear by subpoena pursuant to Federal Rule of Civil Procedure 45. *ADE Corp. v. KLA-Tencor Corp.*, 138 F. Supp. 2d 565, 569 (D. Del. 2001); *Affymetrix,* 28 F. Supp. 2d at 203-05.

In *Jumara*, the Third Circuit made clear that in order for this factor to meaningfully favor the movant, the movant must come forward with some amount of specificity. This is evident from the wording of the factor itself, which notes that the witnesses' convenience should be considered "only to the extent that the witnesses may *actually be* unavailable for trial in one of the fora[.]" *Jumara*, 55 F.3d at 879 (emphasis added) (citation omitted). It is also evident from the legal authority that *Jumara* cited to in setting out this factor, which explains:

> The rule is that these applications [for transfer] are not determined solely upon the outcome of a contest between the parties as to which of them can present a longer list of possible witnesses located in the respective districts in which each party would like to try the case. The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this showing rather than numbers. One key witness may outweigh a great number of less important witnesses. If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied.

15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3851, at 425-28 (2d ed. 1986) (footnotes omitted) (cited in *Jumara*, 55 F.3d at 879). In light of this, in order for the movant to convincingly argue that this factor squarely favors transfer, the Court believes that the movant must provide specificity as to: (1) the particular witness to whom it is referring; (2) what that person's testimony might have to do with a trial in this case; and (3) what reason there is to think that the person will "actually" be

unavailable for trial (as opposed to the proffer of a guess or speculation on that front). *See Elm 3DS Innovations LLC v. SK Hynix Inc.*, Civil Action No. 14-1432-LPS-CJB, 2015 WL 4967139, at *8 (D. Del. Aug. 20, 2015).

Defendant first points out that Plaintiff alleges that the accused products utilize software produced by third-party Unity. (D.I. 14 at 13) It thus suggests that one or more of Unity's employees might be needed for trial. (*Id.*) That seems a fairly reasonable inference, although in truth, it is hard to predict at this stage whether someone from a third-party like Unity might really be needed to testify. Defendant also states that since Unity is based in the Northern District of California, it "stands to reason that a critical mass of their engineers and other relevant witnesses are likely located" there. (*Id.*) That too seems like a reasonable inference. But on the other hand, Unity does have 24 offices in the U.S. and around the globe. And so it is also very possible that some or all of its relevant witnesses may be found in one of those other offices. And Defendant provides no reason to believe that any Unity employees, wherever they might hail from, would not appear for trial in Delaware.

The parties also cite to the location of the two non-party inventor witnesses.[5] One, Jackson Fein, lives in the Central District of California. It is possible that Jackson Fein could be compelled to testify at trial in the Northern District of California pursuant to a Rule 45 subpoena, but only if doing so would not require him to incur "substantial expense[.]" Fed. R. Civ. P. 45(c)(1)(B)(ii); *see also Garlough v. Trader Joe's Co.*, Case No. 15-cv-01278-TEH, 2015 WL

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[5] It is an easier inference that the testimony of inventors (here, the two third-party inventors) may be necessary for trial, in light of the important role inventor testimony tends to play in patent cases. *See Papst Licensing GmbH & Co. KG v. Lattice Semiconductor Corp.*, 126 F. Supp. 3d 430, 442 n.7 (D. Del. 2015).

4638340, at *5-6 (N.D. Cal. Aug. 4, 2015). The other non-party inventor, Eli Merritt, lives in Massachusetts. There is no reason in the record to believe that either would refuse to testify at trial. Thus, the non-party inventor category of third-party witnesses does not move the needle here.

In the end, the record as to third-party witnesses who may actually be unavailable for trial in either fora is limited. It does not meaningfully favor either side. For that reason, this factor is neutral.

f. Location of books and records

Next the Court considers "the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum)." "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 citation omitted). Yet this factor is commonly given little weight, as technological advances have "shortened the time it takes to transfer information, reduced the bulk or size of documents or things on which information is recorded . . . and have lowered the cost of moving that information from one place to another." *Cypress Semiconductor Corp. v. Integrated Circuit Sys., Inc.*, No. 01-199-SLR, 2001 WL 1617186, at *3 (D. Del. Nov. 28, 2001) (internal quotation marks and citation omitted); *see also Cellectis S.A. v. Precision Biosciences, Inc.*, 858 F. Supp. 2d 376, 382 (D. Del. 2012).

Here, any of Defendant's records relating to the accused products will likely be located in the company's San Mateo offices. (D.I. 15 at ¶ 5) No relevant evidence will likely be found in

Delaware.

With that said, there was also no suggestion that any of this evidence would be difficult to produce in Delaware for trial. As such, this factor should only slightly favor transfer, and should not have a significant impact in the overall calculus. *Contour IP*, 2017 WL 3189005, at *13; *McRo, Inc.*, 2013 WL 6571618, at *9-10.

2. Public Interest Factors

The Court below addresses the three public interest factors that were asserted by the parties to be anything other than neutral.

a. Practical considerations that could make the trial easy, expeditious, or inexpensive

The Court first considers the "practical considerations that could make the trial easy, expeditious, or inexpensive." In its briefing, Defendant asserts that the Northern District of California "generally allows – and even encourages – early identification and action on case-dispositive matters[,]" and suggests that in this District, such a practice is not encouraged to the same degree. (D.I. 14 at 15) Defendant states that this issue—identifying and addressing case dispositive issues early—is particularly important here because its products do not practice the "quadrilateral angle navigation" limitation found in all asserted claims. (*Id.* at 15-16) If its pending motion to dismiss is not granted, Defendant explains that it will seek to file an early summary judgment motion on this ground. (*Id.* at 16)

It is not clear that, were this case in the Northern District of California, Defendant would be permitted to file such an early summary judgment motion. (*See, e.g.*, D.I. 19 at 8 & ex. B) But as for what would happen if the case remained in this Court, the Court would require the parties to address a number of issues prior to the initial Rule 16 Case Management Conference

("CMC"). One such issue would be whether the case would benefit from the filing of early summary judgment motions. *See* Checklist, http://www.ded.uscourts.gov/judge/magistrate-judge-christopher-j-burke (under "Guidelines" tab). If the Court was convinced at the CMC that to do so would promote efficient case management, then Court would permit the filing of such a motion here.[6]

Thus, the Court finds this factor to be neutral.

b. Administrative difficulties in getting the case to trial

The next factor is the "relative administrative difficulty in the two fora resulting from court congestion." Defendant notes that at the time of filing of the instant Motion, this Court had two full-time judicial vacancies. (D.I. 14 at 16) It also notes that in *MEC Resources, LLC v. Apple, Inc.*, — F. Supp. 3d. —, 2017 WL 4102450, at *5 (D. Del. Sept. 15, 2017), a visiting District Judge transferred a case to the Northern District of California, citing these two judicial vacancies as a factor in rendering that decision. (*Id.*)

Here though, as noted above, the parties have consented to the Court's jurisdiction to conduct all proceedings in the case (including trial and all post-trial proceedings). The Court's calendar is such that the parties will be able to select a trial date in whatever time frame they can agree to; the pending District Judge vacancies will have no bearing on that process. (D.I. 19 at 9) Thus, the factor is neutral.

c. Local interests in deciding local controversies at home

In patent litigation, the local interest factor is typically neutral, as patent issues tend to

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[6] The fact that the claim term at issue appears in all asserted claims of all six patents-in-suit helps Defendant's argument that resolution of such a Motion might help promote efficient disposition of the litigation.

raise controversies that are more properly viewed as national, not local, in scope. *Graphics Props.*, 964 F. Supp. 2d at 330. Nevertheless, "[w]hile the sale of an accused product offered nationwide does not give rise to a substantial interest in any single venue, if there are significant connections between a particular venue and the events that gave rise to a suit, this factor should be weighed in that venue's favor." *In re Hoffman-La Roche, Inc.*, 587 F.3d 1333, 1338 (Fed. Cir. 2009) (internal citation omitted); *see also Graphics Props.*, 964 F. Supp. 2d at 330-31.

Defendant suggests that there is a stronger local interest in this case in the Northern District of California because the Meta engineers who worked on the technology at issue are found in that forum, and Unity employees with a tie to this case might also be found there. (D.I. 14 at 17) There are surely some connections between this matter and the proposed transferee district.

Yet Defendant has not demonstrated that the case has any type of outsized resonance to the citizens of the Northern District of California, nor that its outcome would significantly impact that district. It is *that* kind of showing that, pursuant to Third Circuit precedent and the precedent of this Court, would cause this factor to meaningfully favor one party or the other. *Cf. Andrews Int'l, Inc. v. Indian Harbor Ins. Co.*, C.A. No. 12-775-LPS, 2013 WL 5461876, at *4 (D. Del. Sept. 30, 2013) (holding that this factor "strongly" favored transfer where the case involved consideration of the enforceability under California law of certain insurance coverage provisions, which was "an issue of first impression" in that state, where the transferee district was located); *Downing v. Globe Direct LLC*, Civil Action No. 09-693 (JAP), 2010 WL 2560054, at *4 (D. Del. June 18, 2010) (finding that this factor favored transfer where the case "concern[ed] . . . the conduct of [a] Massachusetts government agency, and therefore the case [had] the potential to

impact the public policy of as well as, to some extent, the taxpayers of Massachusetts [the transferee forum]"); *see also Papst*, 126 F. Supp. 3d at 445-46 & n.12.[7]

As for Delaware, Defendant has chosen it for its corporate home. But it does not want to claim the benefits of being a Delaware corporation in this case, and so its Delaware corporate status should have little bearing as to this factor. *Contour IP*, 2017 WL 3189005, at *14.

Under these circumstances, this factor slightly favors transfer. *Id.*

3. Conclusion Regarding Impact of *Jumara* Factors

In sum, Defendant's forum preference and the "whether the claim arose elsewhere" factor both squarely favor transfer. The "location of books and records" and "local interests" factors slightly favor transfer. Plaintiff's choice of forum weighs squarely against transfer. And the remainder of the *Jumara* factors are neutral.

While more of the factors tilt Defendant's way than Plaintiff's way, the Court cannot conclude that the balance of convenience "is *strongly in favor* of" Defendant. *Shutte*, 431 F.2d at 25 (emphasis added). After all, the case was brought in one of the two possible venues in which it could have been brought—the venue that is Defendant's corporate home. And it was brought

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[7] In listing this public interest factor as relevant in *Jumara*, the Third Circuit cited to 2 James Wm. Moore et al., *Moore's Federal Practice* ¶ 0.345[5], at 4374 (2d. ed. 1995). *See Jumara*, 55 F.3d at 879-80. That portion of *Moore's Federal Practice* cites only to a single case, *McCrystal v. Barnwell Cnty., S.C.*, 422 F. Supp. 219, 224 (S.D.N.Y. 1976). *McCrystal* was a case where it was very clear that local interests in the transferee forum were implicated—not only because the "great majority of acts complained of took place in South Carolina[,]" but, importantly, also because the case involved "public bonds issued pursuant to a state statute in which the governmental body which issued the bonds, Barnwell County, is named as a defendant," such that the case "directly involved units of South Carolina's government." 422 F. Supp. at 224. The *McCrystal* Court held that "[i]ssues of South Carolina law and inquiries into the workings of South Carolina government are better left to South Carolina District Judges." *Id.* at 225.

in a venue that is far closer to Plaintiff's principal place of business (and the location of one of Plaintiff's two members) than is the Northern District of California.

Defendant rightly notes that the core of the evidence in the case is located in the proposed transferee district. But the record does not support the conclusion that trial in Delaware will unduly inconvenience Defendant (or Plaintiff). Perhaps if the record showed that even one more *Jumara* factor had squarely favored transfer—that another factor had really, meaningfully indicated that party convenience would be served by transferring the case—then the outcome would have been different. But that was not the case.

In light of the entire record, then, the Court finds that denial of Defendant's Motion is warranted.

III. CONCLUSION

The Court therefore DENIES Defendant's Motion.[8]

Because this Memorandum Order 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 document. Any such redacted version shall be submitted by not later than **January 11, 2018** for review by the Court, along with an explanation as to why disclosure of any proposed redacted material would "work a clearly defined and serious injury to the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.

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[8] Defendant's request for oral argument on the Motion, (D.I. 25), is DENIED.

Dated: January 8, 2018

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE