

# EXHIBIT A

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

**ROCKSTAR CONSORTIUM US LP,  
AND MOBILESTAR TECHNOLOGIES LLC,**

**Plaintiffs,**

**v.**

**ZTE CORPORATION, ZTE (USA) INC., AND  
ZTE SOLUTIONS, INC.,**

**Defendants.**

**Civil Action No. 2:13-cv-901-JRG**

**ZTE (USA) INC.'S MOTION TO STAY OR, ALTERNATIVELY,  
TO TRANSFER TO THE NORTHERN DISTRICT OF CALIFORNIA**

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## **I. INTRODUCTION**

ZTE (USA) Inc. (“ZTE”) requests that the Court stay this action pending resolution of Google’s declaratory judgment action in the Northern District of California (involving the same seven patents at-issue here) given that the Northern District action will dispose of major questions at issue in this case, and may moot this litigation entirely. In the alternative, ZTE requests that the Court transfer this action to the Northern District. The ties to this District are scant – Plaintiffs Rockstar Consortium US LP and MobileStar Technologies LLC accuse ZTE of infringing patents purchased from a former Canadian telephone company, and Plaintiffs’ accusations are based on ZTE’s sales of phones that have the Android operating system, which was designed and developed by Google Inc. in Mountain View, California, located in the Northern District of California.

## **II. STATEMENT OF FACTS**

### **A. Apple and Other Companies Form Rockstar and MobileStar**

In 2011, five companies including Apple, Blackberry, and Microsoft, together purchased patents auctioned following the bankruptcy of Nortel Networks (“Nortel”).<sup>1</sup> (Exs. 1-3.) Their winning bid was \$4.5 billion. (Exs. 1-2.) Apple contributed “approximately \$2.6 billion,” or 58% of the total. (Ex. 4.) To hold and assert these patents, the five new owners formed various companies including Plaintiffs Rockstar and MobileStar. (Exs. 1, 5); *Rockstar Consortium US LP v. Samsung Electronics Co.*, No. 13-0900 (the “Samsung Action”), Dkt. No. 52, Declaration of Kristin Madigan, Exs. 5-8. Plaintiffs are admittedly a “patent licensing business” that produce no products and practice no inventions. (Ex. 6.) Instead, Plaintiffs’ engineers examine other

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<sup>1</sup> Unless stated otherwise, all referenced exhibits are attached to the accompanying Declaration of Anup M. Shah.

companies' successful products to develop infringement allegations, then their licensing staff send demand letters to those companies, and then Plaintiffs extract licensing fees under threat of litigation. (Exs. 1, 7.)

**B. Rockstar and MobileStar Filed This Action**

On October 30, 2013, Rockstar formed MobileStar as a wholly-owned subsidiary. Samsung Action, Dkt. No. 52, Declaration of Kristin Madigan, Ex. 8. Rockstar and MobileStar are both Delaware entities claiming their "principal place of business" at Legacy Town Center 1, 7160 North Dallas Parkway, Suite No. 250, Plano, Texas. (See Dkt. No. 29, ¶¶ 1-2 ("Complaint").) On October 31, 2013, the day after forming MobileStar, Rockstar transferred to MobileStar ownership of five of the seven patents in suit. Samsung Action, Dkt. No. 52, Declaration of Kristin Madigan, Ex. 12. That same day, Plaintiffs filed this action and six others accusing Android Original Equipment Manufacturers ("OEMs"), such as ZTE, of infringement by "certain mobile communication devices having a version (or an adaption [sic] thereof) of Android operating system," (Dkt. No. 1, ¶ 15)<sup>2</sup> which is developed by Google. See Samsung Action, Dkt. No. 52, Declaration of Abeer Dubey, ¶ 12.

On December 23, 2013, Google filed a declaratory action in the Northern District of California against Rockstar and MobileStar seeking judgment that its Android operating system does not infringe the same seven patents. See *Google Inc. v. Rockstar Consortium US LP*, No. 13-5833, Dkt. No. 1 (the "Google Action"). Thereafter, on December 31, 2013, Plaintiffs added

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<sup>2</sup> See also *Rockstar Consortium US LP v. ASUSTek Computer, Inc.*, No. 13-894, Dkt. No. 1 ¶ 14; *Rockstar Consortium US LP v. HTC Corp.*, No. 13-895, Dkt. No. 1 ¶ 15; *Rockstar Consortium US LP v. Huawei Investment & Holding Co.*, No. 13-896, Dkt. No. 1 ¶ 20; *Rockstar Consortium US LP v. LG Electronics Inc.*, No. 13-898, Dkt. No. 1 ¶ 16; *Rockstar Consortium US LP v. Pantech Co.*, No. 13-899, Dkt. No. 1 ¶ 14; and *Rockstar Consortium US LP v. Samsung Electronics Co.*, No. 13-900, Dkt. No. 1 ¶ 16.

Google as a defendant in its Texas action against Samsung and initially accused Google of infringing three of the patents at-issue here. *See* Samsung Action, Dkt. No. 19. Plaintiffs later sought leave to add the remaining four patents. *See* Samsung Action, Dkt. No. 45. Google and Samsung moved to transfer the Samsung Action to the Northern District of California, which motion is currently pending. *Id.* at Dkt. No. 52.

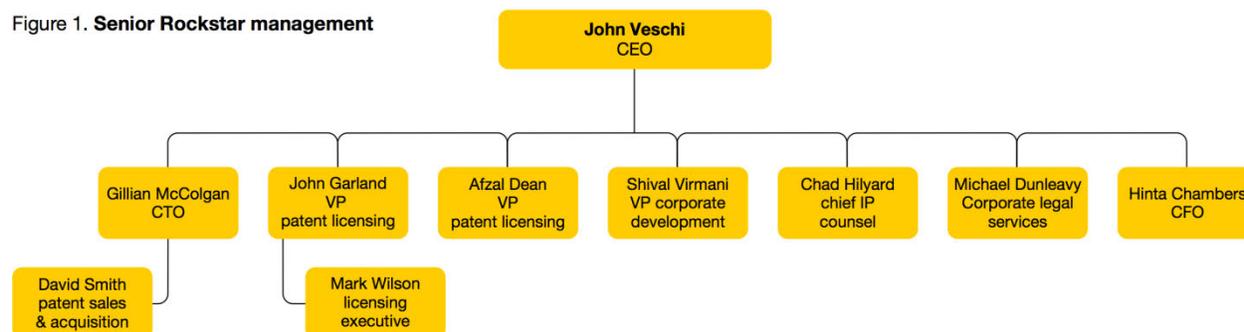
On March 24, 2014, Plaintiffs provided ZTE with their Patent L.R. 3-1 infringement contentions. (Ex. 8.) Plaintiffs' infringement contentions confirm that Plaintiffs' allegations are directed to phones with the Android operating system, as they generally identify stock Android functionality and applications developed by Google. (*Id.*)

**C. Rockstar's Principal Place of Business is in Canada, Not Texas**

Each of the two plaintiffs in this action claims to have "its principal place of business" in Texas. (Complaint, ¶¶ 1-2.) Public records reveal, however, that Rockstar's principal place of business is in Ottawa, Canada.

Rockstar's website lists addresses in Canada and Texas; Canada comes first, and is the only listed address with a phone number. (Ex. 6.) The same website links to Rockstar's LinkedIn page, which lists Rockstar's Canadian address as its "headquarters." (Exs. 9-10.) Rockstar also lists its employees on LinkedIn; there are 33 of them, with only five in Texas. (Ex. 10); Samsung Action, Dkt. No. 52, Declaration of Kristin Madigan, Ex. 15. Rockstar's own declarant, opposing transfer in Google's declaratory judgment action, averred only that the same five employees work in Rockstar's Texas office. *See* Google Action, Dkt. No. 33-1, ¶ 21. The bulk of Rockstar's employees, including its senior management, work in Ontario, Canada:

Figure 1. Senior Rockstar management



(Ex. 11.) Of these ten members of Rockstar’s senior management, five work in Canada; one each in California, Colorado, Massachusetts, New York, and Pennsylvania; and none in Texas.

(Ex. 11); Samsung Action, Dkt. No. 52, Declaration of Kristin Madigan, Exs. 15, 17-19. In addition to its senior management, Rockstar lists on its website six “Corporate Leaders,” none of whom are from Texas. (Ex. 12.) None of Rockstar’s declarants have averred that its management, “senior” or otherwise, is in Texas.

None of Rockstar’s licensing letters so far made public come from Texas. (Ex. 13.) Some came from Rockstar’s headquarters in Canada, and others from Rockstar’s licensing executive in California. (*Id.*) But the most telling exposure of Rockstar’s Canadian origin comes from the document transferring five of the patents-in-suit from Rockstar to MobileStar. Samsung Action, Dkt. No. 52, Declaration of Kristin Madigan, Ex. 12. Although Rockstar alleges that both buyer and seller have “Texas roots” (Google Action, Dkt. Nos. 20 at 5, 39-3 at 9), this critical transaction, which Rockstar alleges makes MobileStar indispensable, was executed by two members of Rockstar’s senior management, both Canadians, in Canada—duly witnessed and notarized by Rockstar’s Canadian corporate counsel. Samsung Action, Dkt. No. 52, Declaration of Kristin Madigan, Ex. 12. MobileStar did not even register with the Texas Secretary of State, as required by law, until more than a month later. (*See* Dkt. No. 23 at 5-7.)

### III. ARGUMENT

#### A. The Court Should Stay This Action Pending Resolution of the Google Action

ZTE requests that the Court stay this case and allow the Google Action to proceed to judgment first.

Plaintiffs define ZTE's accused devices as those having a version of the Android operating system. (*See* Dkt. No. 1, ¶ 15.) Plaintiff's infringement contentions also identify only stock Android functionality as allegedly infringing six of the seven patents-in-suit. (Ex. 8.) These contentions repeatedly and exclusively identify Android source code from Google's Android developer website in an attempt to establish infringement by ZTE's accused devices. (*Id.*) Plaintiffs also repeatedly make the claim that "this feature is present on all Accused Products running Android versions 1.0 or above" or similar claims. (*See, e.g., id.* at 1).

Google manufactures Android (*see* Samsung Action, Dkt. No. 52, Declaration of Abeer Dubey, ¶ 12), while ZTE Corporation implements the Android operating system on the accused devices. (Ex. 14.) ZTE is therefore Google's customer, and the customer suit exception to the first-to-file rule applies. *See generally Katz v. Lear Siegler, Inc.*, 909 F.2d 1459 (Fed. Cir. 1990).

In the interest of judicial efficiency and to guard against abuse, "litigation against or brought by the manufacturer of infringing goods takes precedence over a suit by the patent owner against customers of the manufacturer." *Katz*, 909 F.2d at 1464. The manufacturer's case need not resolve every issue in the customer suit; it "need only have the potential to resolve the 'major issues' concerning the claims against the customer—not every issue—in order to justify a stay of the customer suits." *Spread Spectrum Screening LLC v. Eastman Kodak*, 657 F.3d 1349, 1358 (Fed. Cir. 2011) (citing *Katz*, 909 F.2d at 1464). The Google Action clears this bar.

Given that Google developed Android (*see* Samsung Action, Dkt. No. 52, Declaration of Abeer Dubey, ¶ 12), it is “in the best position to defend its own products.” *Delphi Corp. v. Auto. Tech.’s Int’l, Inc.*, No. 08-11048, 2008 WL 2941116, at \*5 (E.D. Mich. July 25, 2008); *see also* *Microsoft Corp. v. Geotag Inc.*, 847 F. Supp. 2d 675, 681 (D. Del. 2012) (finding “the real dispute” was between the patentee and the manufacturers, rather than the customers who implemented the manufacturers’ software). The Google Action will resolve “major issues” in this litigation, simplifying many and likely obviating others. *Katz*, 909 F.2d at 1464; *see also* *DataTern, Inc., v. Staples, Inc.*, Case No. 10-133, Dkt. No. 185 at 9 (E.D. Tex. Mar. 12, 2012) (staying customer suits in favor of declaratory judgment action brought by software developers in New York because “‘in all likelihood [the New York cases] will settle many [issues] and simplify them all.’” (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 256 (1936) (alterations in original))).

At a minimum, the Google Action will resolve the issues of the Android operating system’s noninfringement of the patents-in-suit. Thus the Google Action “will efficiently dispose of the infringement issues” presented here. *Ricoh Co., Ltd. V. Aeroflex Inc.*, 279 F. Supp. 2d 554, 558 (D. Del. 2003). Staying this litigation will also promote judicial economy by encouraging “global” resolution rather than “piecemeal litigation.” *Delphi Corp.*, 2008 WL 2941116 at \*5; *see also* *Ricoh*, 279 F. Supp. 2d at 557 (“it is more efficient for the dispute to be settled directly between the parties in interest”); *Leviton Mfg. Co., Inc. v. Interline Brands, Inc.*, No. 05-123, 2006 WL 2523137, at \*2 (M.D. Fla. Aug. 30, 2006) (stay will “preserve judicial resources, prevent duplicative expenses, and prevent the possibility of inconsistent judgments”). The real dispute here, as shown by Plaintiffs’ repeated identification of stock Android functionality and Android applications in its infringement contentions, is between the Plaintiffs

and Google. ZTE therefore respectfully requests that the Court stay this action pending resolution of the Google Action.<sup>3</sup>

**B. In the Alternative, the Court Should Transfer to the Northern District of California**

Should the Court decline to grant a stay, ZTE requests that the Court transfer this case to the Northern District of California, the more convenient forum, for the reasons articulated in Google's and the Samsung Defendants' Motion to Stay or, in the Alternative, to Transfer to the Northern District of California in the Samsung Action. *See* Samsung Action, Dkt. No. 52, at 6-15.

The Court must first determine "whether a civil action 'might have been brought' in the destination venue." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 (5th Cir. 2008) (en banc) ("Volkswagen II") This test is "only a requirement that the transferee court have jurisdiction over the defendants in the transferred complaint." *In re Genentech*, 566 F.3d 1338, 1346 (Fed. Cir. 2009). ZTE does not contest jurisdiction in the Northern District of California for this action, thus resolving this issue.

Next, courts look to "private" and "public" interest factors in evaluating whether the proposed transferee forum is sufficiently more convenient:

The private interest factors are: (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. The public interest factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests

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<sup>3</sup> This Court should also stay this action because this case is in its early stages, a stay will simplify the issues, and a stay will not prejudice Plaintiffs. *See Southwire Co. v. Cerro Wire, Inc.*, 750 F. Supp. 2d 775, 778-80 (E.D. Tex. 2010). Plaintiffs are non-practicing entities that can be fully compensated with monetary damages. *Microline, LLC v. Intel Corp.*, No. 07- 488, 2010 WL 3766655, at \*2 (E.D. Tex. Sept. 20, 2010).

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.

*Volkswagen II*, 545 F.3d at 315 (internal citation omitted). The law requires an “individualized, case-by-case consideration of convenience and fairness” to the parties. *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964).

The private factors favor transfer because Plaintiffs have accused ZTE devices primarily based on the Android operating system, which Google designed and developed in Mountain View, California. *See* Samsung Action, Dkt. No. 52, Declaration of Abeer Dubey, ¶ 12. Google’s relevant technical evidence is either in the Northern District of California, or much closer to it than to this District. *See* Samsung Action, Dkt. No. 52, at 6-14. Further, Google witnesses, who may be crucial to ZTE’s defense, are concentrated in Mountain View, California, including employees responsible for the research, design, and development of the accused Android features. *See id.*, Declaration of Abeer Dubey, ¶ 6; *see also Ingeniador, LLC v. Adobe Sys. Inc.*, No. 12-805, 2014 WL 105106, at \*3 (E.D. Tex. Jan. 10, 2014) (granting motion to transfer to N.D. Cal. due in part to the defendant’s witnesses being located there). According to Google, there are no relevant Google documents or employees in the Eastern District of Texas. *See* Samsung Action, Dkt. No. 52, Declaration of Abeer Dubey, ¶¶ 7-9.

As Google noted, at least three sets of relevant witnesses are located in the Northern District of California. First, witnesses with knowledge of the Android platform, including former employees of Google and Android Inc., remain heavily concentrated in the Northern District. Second, at least one named inventor resides in the Northern District (*See* Samsung Action, Dkt. No. 52, Declaration of Kristin Madigan, Ex. 22), and dozens of named inventors of

relevant prior art are listed as living in the Northern District.<sup>4</sup> Finally, the Northern District is home to important, but very likely unwilling, trial witnesses: employees of Apple. “[T]he focus of this factor is on witnesses for whom compulsory process might be necessary.” *Ingeniador*, 2014 WL 105106, at \*2. Given that Apple was involved in the auction of Nortel’s patent portfolio, the valuation of which may be at issue in this case (Samsung Action, Dkt. No. 19 ¶¶ 7-12), Apple’s witnesses may be necessary trial witnesses. Accordingly, this factor favors transfer.

The public interest factors also either favor transfer or are neutral because the Northern District of California has a greater interest in this case. *See* Samsung Action, Dkt. No. 52, at 15. “The Northern District of California has an interest in protecting intellectual property rights that stem from research and development in Silicon Valley.” *Affinity Labs of Texas v. Samsung Elecs. Co., Ltd.*, No. 12-557, 2013 WL 5508122, at \*3 (E.D. Tex. Sept. 18, 2013). The Northern District’s local interest is even stronger where the action “calls into question the work and

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<sup>4</sup> The inventors include Robert Irribarren, named inventor on U.S. Patent No. 5,737,395, Ajay Gupta and Gregory Skinner, named inventors on U.S. Patent No. 5,781,550; Christopher D. Coley, named inventors on U.S. Patent No. 5,826,014; Snehal G. Karia and Dean C. Cheng, named inventors on U.S. Patent No. 6,643,267; Kamran Sistanizadeh and Masoud M. Kamali, named inventors on U.S. Patent No. 6,681,232; Ilan Raab, Ravi Manghirmalani, Ofer Doitel, and Lynne Marie Izbicki, named inventors on U.S. Patent No. 5,751,967; Judy Dere, Leon Leong, Daniel Simone, and Allan Thomson, named inventors on U.S. Patent No. 5,802,286; Tom Ziola and William Herman, named inventors on U.S. Patent No. 5,862,339; Nicolle Henneuse and Pete Billington, named inventors on U.S. Patent No. 5,963,913; John H. Hart and W. Paul Sherer, named inventors on U.S. Patent No. 6,041,166; Srikumar N. Chari, named inventor on U.S. Patent No. 6,046,742; Prakash C. Banthia, a named inventor on U.S. Patent No. 6,085,243; Umesh Muniyappa, Alampoondi Eswaran Natarajan, Nicholas Michael Brailas, and Micheal Terzich, named inventors on U.S. Patent No. 6,092,200; Keith McCloghrie, Bernard R. James, Christopher Young, and Norman W. Finn, named inventors on U.S. Patent No. 6,219,699; Leslie J. Arrow, Russell C. Jones, and Quentin C. Liu, named inventors on U.S. Patent No. 6,226,751; Michael C. Tchao, named inventor on U.S. Patent No. 5,563,996; Scott A. Jenson, named inventor on U.S. Patent No. 5,570,109; Mitchell D. Forcier, named inventor on U.S. Patent No. 5,590,257; Stephen P. Capps, named inventor on U.S. Patent No. 5,745,716; Thomas P. Moran and Patrick Chiu, named inventors on U.S. Patent No. 5,809,267; Edward H. Frank and James Arthur Gosling, and John C. Liu, named inventors on European Patent No. 0,605,945; and Ashish Thenawala, named inventor on European Patent No. 0,630,141. Samsung Action, Dkt. No. 52, Declaration of Dale Jachlewski ¶ 3.

reputation of several individuals residing in or near that district and who presumably conduct business in that community.” *In re Hoffman-La Roche Inc.*, 587 F.3d 1333, 1336 (Fed. Cir. 2009).

This District’s interest is much weaker. Although both Plaintiffs claim their “principal place of business” is in this District, their true principal place of business is in Canada. (*See supra* at 5-6.) The Supreme Court has defined “principal place of business” as “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities,” also known as “the corporation’s ‘nerve center.’” *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010). Citing *Hertz Corp.*, the Federal Circuit has favored transferring similar cases out of this District. *See In re Microsoft Corp.*, 630 F.3d 1361, 1364 (Fed. Cir. 2011) (granting mandamus and reminding that courts should, if “the record reveals attempts at manipulation” regarding the principal place of business, “take as the ‘nerve center’ the place of actual direction, control, and coordination, in the absence of such manipulation.”).

Plaintiffs’ presence in Texas, as evidenced by its Canadian nerve center and MobileStar’s late registration in this state, is “recent, ephemeral, and an artifact of litigation.” *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010) (noting that *Hertz Corp.* urges “courts to ensure that the purposes of jurisdiction and venue laws are not frustrated by a party’s attempts at manipulation.”). “Courts should not ‘honor connections to a preferred forum made in anticipation of litigation and for the likely purpose of making that forum appear convenient.’” *In re Apple Inc.*, 456 F. Appx. 907, 908-09 (Fed. Cir. 2012) (quoting *In re Microsoft Corp.*, 630 F.3d 1361, 1364 (Fed. Cir. 2011)). The remaining public interest factors are neutral or weigh slightly in favor of transfer, because both districts are familiar with and can apply the federal patent laws, and no conflict of laws problems are expected in either district.

Given that this action could have been brought in the Northern District of California, and the private and public interest factors all either weigh in favor of transfer or are neutral, the Court should transfer this case to the Northern District of California.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant ZTE (USA) Inc. respectfully requests that this Court stay this case pending resolution of the Google Action or, in the alternative, transfer this case to the Northern District of California pursuant to 28 U.S.C. § 1404(a).

Date: March 28, 2014

Respectfully submitted,

/s/ Everett Upshaw

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**CERTIFICATE OF CONFERENCE**

The undersigned hereby certifies that counsel has complied with the meet and confer requirement of Local Rule CV-7(h) and that the motion is opposed. Steven T. Snyder and Anup M. Shah, on behalf of counsel for ZTE (USA) Inc., conferred in good faith with Josh Budwin, counsel for Plaintiffs by telephone on March 26, 2014. The parties reached an impasse, leaving an open issue for the Court to resolve.

Dated: March 28, 2014

/s/ Anup M. Shah  
Anup M. Shah

**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record have consented to electronic service and are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on March 28, 2014.

/s/ Everett Upshaw  
Everett Upshaw