

# Exhibit C

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

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

**PLAINTIFFS,**

**v.**

**HTC CORPORATION and HTC AMERICA,  
INC.,**

**DEFENDANTS.**

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**§ Civil Action No. 2:13-cv-00895-JRG**

**§ JURY TRIAL REQUESTED**

**PLAINTIFFS ROCKSTAR CONSORTIUM US LP AND MOBILESTAR  
TECHNOLOGIES LLC'S RESPONSE TO HTC'S MOTION TO TRANSFER  
OR, IN THE ALTERNATIVE, TO STAY (DKT. NO. 34)**

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## **I. INTRODUCTION**

Defendants HTC Corporation and HTC America, Inc. (collectively “HTC”) bear the burden of proof to show that this case should be transferred to the Northern District of California (“NDCA”), and they cannot make such a showing. HTC’s Motion to Transfer or Stay (the “Motion”) ignores Plaintiffs Rockstar Consortium US LP (“Rockstar”) and MobileStar Technologies LLC’s deep ties to the Eastern District of Texas (“EDTX”), instead misleadingly focusing on the Canadian location of a different entity, Rockstar Consortium Inc. Moreover, this case does not center on Google’s Android operating system. One of the patents-in-suit is a hardware patent with no relation to Google or the Android system. And the other six patents-in-suit read on the combination of HTC’s hardware and the HTC modifications to the Android operating system. For these reasons and those discussed below, this is not a manufacturer-customer suit and the EDTX is the most convenient venue.<sup>1</sup>

## **II. LEGAL STANDARD**

This Court is well acquainted with the legal standards governing the transfer analysis. *See Virtualagility, Inc. v. Salesforce.com, Inc.*, 2014 U.S. Dist. LEXIS 12015, at \*4-6 (E.D. Tex. Jan. 31, 2014) (Gilstrap, J.).

## **III. STATEMENT OF FACTS**

### **A. Rockstar Files this Action, Google Forum Shops to the NDCA**

On October 31, 2013, Plaintiffs filed patent infringement lawsuits in the EDTX against ASUS, HTC, Huawei, LG, Pantech, Samsung, and ZTE. *See* Dkt. 1. On December 23, 2014, rather than intervene in this case, Google filed its action for declaratory judgment in the NDCA. Ex. 1. On December 31, 2013, Plaintiffs added Google as a defendant to the Samsung case in the EDTX. *See* Case No. 2:13-cv-00900, Dkt. 19.

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<sup>1</sup> Should the Court be inclined to grant HTC’s Motion, Plaintiffs request that they first be permitted discovery on the actual locations of HTC’s relevant employee witnesses and other venue facts.



**B. This First-Filed Case Does not Turn on Google’s Android System**

HTC repeatedly argues that this case is all about Google’s Android platform, and HTC’s devices merely operate on *Google’s* Android platform. *See* Dkt. 34 at 2, 7. While the accused devices each run different versions of the Android operating system, this case is *not* about Android. Of the seven patents at-issue in this case, *none* is alleged by Plaintiffs to read solely on functions or features found in Android software. Ex. 2. In fact, the ’551 patent covers only the hardware implementation within HTC’s accused products—it has no tie to Android. *See id.*; *see also* Ex. 3. As to the other six patents at-issue, each covers the combination of hardware (designed solely by the original equipment manufacturers, like HTC) with software. These patents require “sending,”<sup>2</sup> “receiving,”<sup>3</sup> “displaying,”<sup>4</sup> and “storing”<sup>5</sup>—functionality that occurs within hardware.<sup>6</sup>

**C. Nortel, Rockstar, and Mobilestar’s Longstanding Ties to the EDTX**

*Nortel, Rockstar, and the Patents-in-Suit.* Plaintiffs are the assignees of intellectual property that resulted from research and development performed by Nortel. For twenty years, Nortel’s U.S. headquarters was in Richardson, Texas, and Nortel’s licensing activities were conducted out of Richardson. Powers Dec. ¶ 8. When Nortel confronted bankruptcy in 2011, it held an auction for its patents. Google made an initial \$900 million bid. Hearn Dec. ¶ 7. Google ultimately lost the auction to Rockstar Bidco LP, which paid \$4.5 billion. *Id.* ¶ 7.

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<sup>2</sup> Claims 14, 15, 19, 23, 24, 27, 28, and 31 of the ’298; claims 1, and 5 of the ’131.

<sup>3</sup> Claims 1, 2, 13 and 14 of the ’937; claims 11, 12, 14, 15, 16, 19, 23, 24, 25, 27, 28, 29, 31, and 32 of the ’298; claims 1, 4, 8, 21, and 33 of the ’973; claims 1 and 5 of the ’131; claim 17 of the ’572; claim 1 of the ’591.

<sup>4</sup> Claims 1- 3, 8-11, 13-15, 19, and 20-23 of the ’937; claims 1-6, 8-12, 21, and 24-26 of the ’973; claim 1 of the ’591; claim 17 of the ’572.

<sup>5</sup> Claims 17, 19, 23, and 30 of the ’298; claim 20 of the ’572.

<sup>6</sup> *See Microsoft Corp. v. Commonwealth Sci. & Indus. Res. Org.*, 2007 U.S. Dist. LEXIS 91550, at \*10 (E.D. Tex. Dec. 13, 2007).

Rockstar<sup>7</sup> owns two of the patents-in-suit and previously owned the other five patents-in-suit, before assigning them to MobileStar. *Powers Decl.* ¶ 5. Rockstar is MobileStar's parent entity and maintains its principal place of business in Plano, Texas. *Powers Dec.* ¶¶ 7, 20. MobileStar owns five of the patents-in-suit and is the exclusive licensee (from Rockstar) of the other two patents. *Id.* ¶ 5. MobileStar maintains its place of business at the same Plano address. Ex. 4.

***Rockstar and MobileStar's Roots in the EDTX.*** When Rockstar Bidco LP acquired the patents-in-suit from Nortel in 2011, the Rockstar entities also acquired many former Nortel employees responsible for licensing and prosecuting the Nortel patents. *Powers Dec.* ¶ 19 . Rockstar leased Nortel's Richardson office space where many of Nortel's patent files were already located, including files relevant to the patents-in-suit. *Id.* ¶¶ 20, 29. In August 2012, after Nortel sold its Richardson campus during its bankruptcy proceedings, Rockstar signed a seven-year lease for its current offices in nearby Plano, within the EDTX. *Id.* ¶ 20. Rockstar's Plano office is the company's only U.S. office, although some employees also work out of their homes. *Id.* ¶ 23. The office contains 8,125 square feet, with 10 assigned offices, 2 guest offices, 4 conference rooms, 7 work areas, and storage space. *Id.* ¶ 21. Rockstar has 15 full-time employees in the U.S., including five full-time employees in Plano and others who spend significant time there. *Id.* ¶ 22. No employees live or work in California. *Id.* ¶ 25. Eight of the U.S.-based employees likely have relevant information about the patents-in-suit; three of them work full-time out of the Plano office, one lives in Pennsylvania, one lives in Colorado, one lives in Massachusetts, one lives in North Carolina, and one lives in Florida.<sup>8</sup> *Id.* ¶ 26-28.

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<sup>7</sup> The equity owners of Rockstar include: Apple, BlackBerry, Ericsson, Microsoft, and Sony. *Powers Dec.* ¶ 10. Ericsson's U.S. headquarters are located within the EDTX; BlackBerry is in the Dallas-area, within just miles of the EDTX; Microsoft is in Seattle; Apple is in the NDCA; and Sony is in New Jersey. *See* Exs 10-11.

<sup>8</sup> Additionally, two Rockstar board members live and work in EDTX or nearby. Kasim Alfalahi, a Rockstar Board member and Chief IP officer at Ericsson, works in the EDTX, across the street from Rockstar's Plano office. *Powers Dec.* ¶ 27. Randy Mishler, another Rockstar Board member and Senior Director of IP Licensing at BlackBerry,

HTC misleadingly focuses on the Canadian office, employees, and licensing letters of Rockstar Consortium Inc.—the wrong entity. *See* Dkt. 34 at 5-6. Rockstar Consortium Inc., which is not a party to this litigation, is a different (although affiliated) entity from Rockstar. Powers Dec. ¶ 6. Rockstar Consortium Inc. is a British Columbia corporation. *Id.* ¶ 6. Rockstar is a Delaware limited partnership. *Id.* ¶ 6. When Rockstar acquired Nortel’s patent portfolio in 2011, in many ways Rockstar simply continued the work of Nortel’s well-established patent licensing division. Similarly, in some ways Rockstar Consortium Inc. stepped into the shoes of Nortel’s Canada division. *See id.* Accordingly, Rockstar and Rockstar Consortium Inc. have entered into a services agreement for Rockstar Consortium Inc. to provide various support services to Rockstar. *Id.* ¶ 19. When Rockstar initially formed, for example, for a transitional period Rockstar would send licensing correspondence using Rockstar Consortium Inc.’s Ottawa address. *Id.* ¶ 24. Once Rockstar re-located and settled into its current Plano location, it began sending licensing correspondence and entering into agreements from its Plano office. *Id.* Thus, although HTC notes that “Rockstar’s initial correspondence to HTC” originated from Canada, it makes no mention of subsequent correspondence and agreements—which originated from Plano. *See Id.* ¶ 24. For example, since March 2012, Rockstar employees have signed non-disclosure and other agreements with a number of companies from Rockstar’s Plano office. *Id.* ¶ 24.

#### **IV. HTC’S MOTION FOR TRANSFER SHOULD BE DENIED**

Because Plaintiffs could have filed suit in the NDCA, the transfer analysis depends on the private and public interest factors with which this Court is familiar.<sup>9</sup>

##### **A. Each Of The Private-Interest Factors Weigh Heavily Against Transfer**

###### **1. The Judicial Economy Factor Favors Plaintiffs**

HTC argues that this case “is about the Android platform” and therefore this *first-filed*

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works in nearby Irving, Texas. *Id.* ¶ 28. Mr. Mishler is also a former Nortel patent attorney. *Id.*

<sup>9</sup> *See, e.g., Thomas Swan & Co. v. Finisar Corp.*, 2014 U.S. Dist. LEXIS 773, at \*4-6 (E.D. Tex. Jan. 6, 2014).

case in the EDTX should be transferred to the NDCA, where Google filed its declaratory judgment action. Not only is this case against HTC not about Google's Android platform, but transfer to the NDCA would disserve judicial economy.

At the outset, for the reasons addressed below with respect to the customer suit exception, Plaintiffs' claims against HTC are *not* about the Google Android platform. Further, the "Federal Circuit has emphatically instructed" that the "existence of duplicative suits involving the same or similar issues creates practical difficulties that will weigh heavily in favor or against transfer (in order to try duplicative suits in the same venue)."<sup>10</sup> Indeed, the Supreme Court has made clear that transferring an overlapping suit to another district "leads to the wastefulness of time, energy, and money that § 1404(a) was designed to prevent."<sup>11</sup> This case is one of six filed by Rockstar in the EDTX involving the same patents and technologies, which this Court has already consolidated. Dkt. 51. At a minimum, the cases will call for common information regarding claim construction, the Nortel auction, as well as Nortel's and Rockstar's history and corporate structure. Powers Dec. ¶ 29. And the defendants will almost certainly file counterclaims with similar or identical invalidity counterclaims. If transfer were granted in this case, five other defendants would continue to litigate duplicative claims in this Court.<sup>12</sup> The existence of overlapping suits "involving the same or similar issues creates practical difficulties that will weigh heavily ... against" transferring one of those suits to another venue. *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*22.<sup>13</sup> Moreover, instead of intervening in this previously-pending

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<sup>10</sup> *Ctr. One v. Vonage Holdings Corp.*, 2009 U.S. Dist. LEXIS 69683, at \*22 (E.D. Tex. Aug. 10, 2009); see *In re Volkswagen of Am., Inc.*, 566 F.3d 1349, 1351 (Fed. Cir. 2009) (describing this issue as "a paramount consideration" in the transfer analysis); *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997) (noting that considerations such as these "may be determinative to a particular transfer motion").

<sup>11</sup> *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960); see also *Adrain v. Genetec Inc.*, 2009 U.S. Dist. LEXIS 86855, at \*9 (E.D. Tex. Sept. 22, 2009).

<sup>12</sup> More of the defendants are closer to the EDTX. See Budwin Dec. at 2. Here, as in *In re Apple*, "[a]s compared to those cases in which this court granted mandamus, here there are fewer defendants in the [NDCA] and potential evidence identified in the [EDTX], along with defendants and witnesses that will find it easier and more convenient to try this case in the Eastern District of Texas." *In re Apple Inc.*, 456 F. App'x 907, 909 (Fed. Cir. 2012).

<sup>13</sup> See also *Ho Keung TSE v. Google, Inc.*, 2012 U.S. Dist. LEXIS 176509, at \*10 (E.D. Tex. Dec. 13, 2012)

case to protect the interests of its alleged customers—as Google asserts it is trying to do—Google instead chose to select its preferred forum by filing suit in the NDCA. Encouraging such gamesmanship by Google would set a disturbing precedent—conduct that has been “knowingly undertaken to manipulate venue in this case . . . should not be rewarded.” *MobileMedia Ideas*, 2012 U.S. Dist. LEXIS 62153, at \* 8.

## 2. The Cost of Attendance for Willing Witnesses Favors Plaintiffs

*HTC Fails to Carry its Burden of Proof.* HTC fails to meet its burden of proof with respect to the allegations regarding HTC and Google witnesses. Google and HTC specifically identify only two potential Google witnesses within the NDCA. Mostly Google uses vague assertions, such as stating that operations for the products are “predominantly based” at its headquarters, and “most employees” familiar with the business aspects of the products and “key engineers” on the products work from its headquarters. Case No. 2:13-cv-894, Dkt. 52-29 at ¶ 6. Contrary to such vague assertions, publicly available information suggests that Google’s Texas employees work on the development of the Android platforms. Specifically, Jeff Hamilton, a software engineer on Google’s Android team who specializes in “[o]perating systems development for mobile devices,” lives in Austin, Texas. Ex. 5. Thus, Google’s California-based witnesses should not be factored into the transfer analysis.<sup>14</sup>

Similarly, with the exception of one individual, HTC fails to specifically identify the “likely” HTC employee witnesses “responsible for the research, design, development, marketing and sales of the accused products.” Dkt. 34 at 11; Bariault Dec. While HTC admits that employees with knowledge regarding marketing and sales of HTC products are foreseeable witnesses, HTC fails to disclose its employees with this type of knowledge that live and work in

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(transferring case from EDTX to district where claims involving the same patent were already pending).

<sup>14</sup> HTC has not even attempted to make any showing that the Google witnesses would be “unwilling” witnesses that require compulsory process. *See Tex. Data Co., LLC v. Target Brands, Inc.*, 771 F. Supp. 2d 630, 643 (E.D. Tex. 2011). Accordingly, Google is addressed here within the “willing witnesses” factor of the transfer analysis.

Texas. *See* Exs. 6-9, 29-30. For example, Laks Thandu is an HTC Technical Account Manager based out of Austin, TX who is a “technical evangelist” for HTC devices, works closely with HTC customers, and whose testimony at trial could offer a “critical view” into customer demand for HTC products and processes. Ex. 8. HTC instead attempts to twist this Court’s precedent to suggest that transfer is appropriate based on *Touchscreen Gestures v. HTC*. *See* Dkt. 34 at 10. But in *Touchscreen Gestures v. HTC*, neither party had headquarters, documents, or witnesses located in the EDTX. No. 12-0261, Dkt. 17 at 1, 6, 9 (E.D. Tex. Mar. 27, 2013). In contrast, here both Rockstar’s headquarters, documents, and witnesses are located in the EDTX, and there are other facts (including the existence of the related cases), which counsel against transfer.

***Rockstar Witnesses.*** Rockstar has no ties to the NDCA. Rockstar employees with relevant knowledge live and work in the EDTX, and the EDTX is also more convenient for those employees who are home-based (primarily on the East Coast) and regularly commute to Plano. Rockstar employees with relevant knowledge include Donald Powers, who works full-time in the Plano headquarters and has material information related to this suit, including knowledge of Nortel and Rockstar’s corporate organization and structure, documents investigated for purposes of this suit, and employees and other parties with knowledge about the patents-in-suit. Powers Decl. ¶¶ 1–2. Bernard Tiegerman, Rockstar’s Senior Patent Counsel, possesses material information related to Plaintiffs’ licensing efforts and was involved in the prosecution of U.S. Patent No. 6,463,131. *Id.* ¶ 26; Tiegerman Decl. ¶¶ 3-4. Mr. Tiegerman works full-time out of Rockstar’s Plano headquarters and he lives in Dallas. *Id.* Eric Fako, Rockstar’s Lead Patent Counsel, was involved in the prosecution of U.S. Patent No. 6,128,298. Fako Decl. ¶¶ 3-4. Like Mr. Tiegerman, Mr. Fako routinely works out of Rockstar’s Plano, Texas headquarters. *Id.* Mark Hearn is Senior Licensing Counsel for Rockstar, and previously worked for Nortel for over 13 years (in its Richardson office) as Senior Counsel. Hearn Decl. ¶ 1. He currently works full-time

out of Rockstar’s Plano office and lives in Dallas. *Id.*; *see also* McColgan Decl. and Veschi Decl. “Where a transfer will only shift the inconvenience from one district to another, the movant has not met its burden of persuasion.” *See Thomas Swan & Co.*, 2014 U.S. Dist. LEXIS 773, at \*13.

### 3. The Availability of Compulsory Process Favors Plaintiffs

This factor examines the availability of compulsory process to secure the attendance of unwilling third-party witnesses. *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*13. “Witnesses from Apple”—the only third party witnesses identified by HTC—should be accorded little weight because they are not identified with specificity, their testimony has little or no relevance to issues in the case, and their testimony will be available via deposition. On the other hand, the most important third-party witnesses will likely be located in the EDTX, on the East Coast, or in Canada. On balance, the analysis cuts decisively in Plaintiffs’ favor.

***HTC Fails to Meet its Burden of Proof for Apple Witnesses.*** HTC’s vague reference to unidentified “witnesses from Apple” (Dkt. 34 at 10) warrants no weight because—with the exception of Mr. Krpata—it lacks the required level of specificity.<sup>15</sup> “Defendants are asking the Court to attribute more weight based on this assertion of a potential likelihood that an un-named and otherwise unidentified third-party witness may or may not be used for trial sometime in the future.” *Wi-Lan Inc. v. HTC Corp.*, 2013 U.S. Dist. LEXIS 99635, at \*30 (E.D. Tex. July 17, 2013) (Gilstrap, J.); *see also In re Toyota*, No. 2014-113, slip op. at 4 n.1.

Regardless, HTC’s focus on Apple is inapposite: the parties do not dispute the amounts of the bids placed for the Nortel patent portfolio. Additionally, Rockstar’s equity owners do not direct or control Rockstar’s licensing efforts. Powers Dec. ¶ 15. However, to the extent that

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<sup>15</sup> *See Internet Machs. LLC v. Alienware Corp.*, 2011 U.S. Dist. LEXIS 66207, at \*22 (E.D. Tex. Jun. 7, 2011) (finding that a party must at least identify witnesses who would require compulsory process); *Core Wireless Licensing, S.A.R.L. v. Apple, Inc.*, 2013 U.S. Dist. LEXIS, at \*9-10 (E. D. Tex. Feb. 22, 2013) (finding assertions that “the alleged infringing products were designed and developed in Cupertino, CA and the employees responsible for that development are based in the Cupertino area” to be “vague” such that “weighing [them in the analysis] ... would be merely speculative”).

testimony from Apple is relevant, testimony from the other Nortel bidders and Rockstar equity investors would be equally relevant, including Microsoft, Blackberry, Ericsson, Sony, and Google.<sup>16</sup> Ericsson maintains its headquarters in the EDTX and Blackberry is headquartered in the Dallas area, just a few miles from the EDTX. Exs. 10, 11.

***Inventors Across the Country.*** The majority of the inventors of the patents-in-suit reside in Canada or the East Coast (New York, Massachusetts, New Hampshire, North Carolina). *See* Budwin Dec. ¶¶ 3-5. Five named inventors on the patents-in-suit (two from Canada and therefore subject to the Hague Convention) have agreed to travel to EDTX to provide testimony.<sup>17</sup> *See* Colvin Dec., Wooten Dec., Poisson Dec., St. George Dec., Colvin Dec., and Egan Dec.

***Prosecuting Attorneys.*** The attorneys who prosecuted the patents-in-suit are likely to have material information related to this case.<sup>18</sup> Contrary to HTC's conclusory assertion, two of the attorneys responsible for prosecuting the patents-in-suit live and work in Texas (one in Richardson, in the EDTX); three live in North Carolina; one lives in New Jersey; none live in California. Budwin Dec. at ¶ 6.

***Former Nortel Employees.*** Several former Nortel employees who possess material information and are not employed by Plaintiffs reside in or near the EDTX. Art Fisher, Nortel's VP for IP Law 1998–2004, resides in the Dallas area. Powers Dec. ¶ 31. Rich Weiss served as Nortel's Deputy IP Counsel from 1997–2008 and works in McKinney, in the EDTX. *Id.* ¶ 31. Mr. Fisher and Mr. Weiss possess knowledge related to Nortel's licensing practices and policies during the years of their employment.

***HTC Customers in EDTX.*** HTC customers represent a key link in the supply chain for

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<sup>16</sup> The former head of patent strategy for Google, who likely has relevant knowledge regarding Google's bidding for the patents-in-suit, now lives on the East Coast. Exs. 12, 13.

<sup>17</sup> *See* Ex. 14, Tr. of Motion to Transfer Hr'g, *Solid State Solutions, Inc. v. Stec, Inc.*, 2:11-cv-391-JRG-RSP, at 115:3-6 (E.D. Tex. Jan. 18, 2013).

<sup>18</sup> *See In re Acer Am. Corp.*, 626 F.3d 1252, 1255 (Fed. Cir. 2010) (prosecuting attorneys are likely witnesses).



the infringing hardware, and will provide important evidence regarding damages and demand for the features afforded by the patents-in-suit. Several of those providers have significant facilities in North Texas. For instance, AT&T Service, Inc. and AT&T Mobility are headquartered in Dallas, and Verizon has a Richardson facility with 2,250 employees.<sup>19</sup> See *Geotag, Inc. v. Aromatique, Inc.*, 2013 U.S. Dist. LEXIS 173481, at \*20-21 (E.D. Tex. Jan. 14, 2013); *Thomas Swan & Co.*, 2014 U.S. Dist. LEXIS 773, at \*9.

***Live Testimony, Rather than “Canned Videotape Clips” is Not a Key Strategic Factor.***

HTC argues that live testimony at trial from Google and Apple witnesses, “rather than canned videotape clips, is a key strategic factor at trial.” Dkt. 34 at 11. But this Court recently rejected a similar assertion in *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*18-19. Moreover, to the extent Apple’s testimony is relevant, it is just as relevant as the testimony of Dallas-area resident BlackBerry and EDTX resident Ericsson, who also bid on the Nortel portfolio as part of the Rockstar Bidco. Further, HTC has made no showing that Google would be an unwilling witness, whose testimony it would be forced to present via videotaped deposition. See *Tex. Data Co.*, 771 F. Supp. 2d at 643.

**4. Both Rockstar’s and Third Parties’ Sources of Proof Favors Transfer**

While the bulk of documents generally reside with the infringers, that evidence “cannot be the sole focus of this Court’s venue analysis.” *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*12. Here “significant sources of proof exist within EDTX at least as relates to the Plaintiff,” because documents related to the patents-in-suit are stored at Plaintiffs’ Plano headquarters. *InMotion Imagery Techs.*, 2013 U.S. Dist. LEXIS 41830, at \*9. Relevant documents in Plano include historical Nortel files relating to patent licenses, patent licensing efforts, and payment of

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<sup>19</sup> Although evidence from these customers would likely be sought via Rule 30(b)(6) requests, individuals with this knowledge include: Brad Bridges, Kevin Jeffries, John Stephens, Joe Tesson, Mark Madere, Kelly Haltom, and David Pluss. See Exs. 15-21.

royalties. Powers Dec. ¶ 29. These documents concerning licensing and monetization of the patents-in-suit have resided in or near the EDTX since their time of creation in the Nortel era. Hearn Dec. ¶ 6.

Courts also routinely look to third parties' documents. Here those may include documents from the patents-in-suits' prosecuting attorneys who reside in Richardson and Irving; HTC's customers, including Verizon and AT&T, which each maintain large facilities in Dallas; and third parties related to the Nortel auction in New York (to the extent relevant). *See* Budwin Dec. at ¶ 2; Powers Dec. at ¶ 26. The third party sources of proof referenced by HTC—Google and Apple—should have no bearing on the transfer analysis. For the reasons discussed above in sections III.B and V.A, this case does not center on Google's Android system, as HTC asserts. *See* Dkt. 34 at 9. And, Google is already a party to a related case. Regardless, neither HTC or Google has carried its burden of proof to show the location of any relevant Google documents. *See U.S. Ethernet Innovations, LLC v. Samsung Elecs. Co.*, 2013 U.S. Dist. LEXIS 47384, at \*7 (E.D. Tex. Apr. 2, 2013).

#### **B. The Public Interest Factors Favor Venue in the EDTX**

“Local interest arises when a district is home to a party because the suit may call into question the reputation of individuals that work in the community.” *In re Hoffman-La Roche*, 587 F.3d 1333, 1336 (Fed. Cir. 2009). Here that standard is met: Plaintiffs run their business from the EDTX. Powers Dec. ¶ 20. In addition, the patents-in-suit are the result of research undertaken by Nortel, which maintained its U.S. location in Richardson for two decades. *Id.* Accordingly, this factor either favors Plaintiffs or is neutral.<sup>20</sup>

The remaining public interest factors (which HTC fails to address)—court congestion, familiarity with the governing law, and the avoidance of conflicts of laws—are neutral.

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<sup>20</sup> *See Thomas Swan*, 2014 U.S. Dist. LEXIS 773, at \*16; *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*23.

### C. Rockstar's Meaningful, Longstanding Connections to the EDTX

Plaintiffs' principal place of business is in Plano. Contrary to HTC's unsupported allegations, *see* Dkt. 34 at 5-6, the Plano office is not recent, ephemeral, or an artifact of litigation. It is a fully operational office with full-time employees doing substantial patent prosecution, licensing, and litigation support work. Powers Dec. at ¶ 23. Nortel prosecuted patents and ran programs to monetize patents (including the patents-in-suit) out of Richardson, less than a mile from the EDTX.<sup>21</sup> Today, Rockstar employs five full-time employees in the Plano office, including three patent attorneys and an office administrator. *Id.* ¶ 22. Rockstar's licensing and litigation activities conducted in the Plano office are within Rockstar's normal course of business. *Id.* Additionally, Rockstar's board meetings are held at the Plano office, as are its annual strategy sessions.<sup>22</sup> *Id.* ¶ 23.

Rockstar's meaningful ties to the EDTX are a far cry from the type of presence that courts consider ephemeral or an artifact of litigation.<sup>23</sup> Unlike the venue manipulation facts of *In re Zimmer* and *In re Microsoft*, here Rockstar has employees in the EDTX and it conducts its ordinary business in the EDTX.<sup>24</sup> Powers Dec. ¶ 20; *see In re Microsoft Corp.*, 630 F.3d 1361, 1364-65 (Fed. Cir. 2011); *In re Zimmer*, 609 F.3d at 1381. Rather, Rockstar's situation resembles cases where this Court has found that the plaintiff's ties to the EDTX, although recent, to be part

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<sup>21</sup> As the Court explained in *Invensense, Inc. v. STMicroelectronics, Inc.*, it may consider "evidence extremely close by" the EDTX in the venue analysis. 2014 U.S. Dist. LEXIS 3311, at \*6, 23 (E.D. Tex. Jan 1, 2010); *see Thomas Swan*, 2014 U.S. Dist. LEXIS 773, at \*9 (considering companies "within or immediately adjacent to EDTX").

<sup>22</sup> Defendants highlight the Canadian office, employees, and licensing letters for Rockstar Consortium Inc. *See* Dkt. 52 at 3-4. But Rockstar Consortium Inc.—which is not a party to this litigation—is a different (although affiliated) entity from Rockstar Consortium US LP, a plaintiff in this case. Powers Dec. ¶ 6.

<sup>23</sup> *See In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010) (suggesting that the record will reveal attempts at venue manipulation where a plaintiff's alleged place of business for purposes of the litigation "is nothing more than a mail drop box, a bare office with a computer, or the location of an annual executive retreat . . .").

<sup>24</sup> This case also differs from the recent *In re Toyota* decision, where the plaintiff brought suit in the EDTX just five months after opening an office in the EDTX for venue purposes; here Rockstar moved to the EDTX from nearby Richardson after Nortel sold its office buildings as part of its bankruptcy proceedings. Powers Dec. ¶ 20; *see In re Toyota Motor Corp.*, No. 2014-113, slip op. at 2-3 (Fed. Cir. April 3, 2014).

of a legitimate pursuit of business within the EDTX.<sup>25</sup> In *RPost Holdings*, the Court found that the Texas office of a Delaware company was not an artifact of litigation where the Vice President of Marketing worked in the office, and the office had relevant documents related to marketing and sales. *RPost Holdings, Inc. v. StrongMail Sys.*, 2013 U.S. Dist. LEXIS 116894, at \*8-9 (E.D. Tex. Aug. 19, 2013). Similarly, in *Eolas Technologies* the Court refused to consider a plaintiff's EDTX presence "recent and insubstantial" where its Chief Legal Officer lived and worked in the EDTX, most of the company's files were located in the EDTX, and the company conducted research in the EDTX. *Eolas Techs., Inc. v. Adobe Sys., Inc.*, 2010 U.S. Dist. LEXIS 104125, at \*20-21 (E.D. Tex. Sept. 28, 2010).

**V. HTC'S REQUEST FOR A STAY SHOULD BE DENIED.**

**A. This Action is Not a Manufacturer-Customer Suit**

HTC misleadingly asserts that this case is about Android. Dkt. 34 at 1. For the reasons discussed above in section III.B, HTC is simply wrong. *See Microsoft Corp. v. Commonwealth Sci. & Indus. Res. Org.*, 2007 U.S. Dist. LEXIS 91550, at \*10 (E.D. Tex. Dec. 13, 2007). Android is an open-source software project managed by Google, but contributed to by many other entities and individuals, including HTC, the defendants in the other cases, and members of the public. *See Exs. 23-25, 32-33.*

Even if Plaintiffs' infringement allegations were focused on Android, as HTC asserts, their invocation of the "customer suit exception" to the first-to-file rule is still misplaced. While, as a general matter, litigation against the manufacturer of infringing goods takes precedence over a suit against that manufacturer's customers, *see Spread Spectrum Screening LLC v. Eastman Kodak*, 657 F.3d 1349, 1357 (Fed. Cir. 2011), a stay is inappropriate when co-defendants are more than ordinary end users or resellers of the accused products.<sup>26</sup> As in *Virtualagility*, here

<sup>25</sup> *See InMotion Imagery Techs., LLC v. Imation Corp.*, 2013 U.S. Dist. LEXIS 41830, at \*5-14 (E.D. Tex. Mar. 26, 2013) (Gilstrap, J.); Ex. 22, *Bright Response LLC v. SAS Institute, Inc.*, No. 2:12-cv-280-JRG, Dkt. 28 at 5-8 (E.D. Tex. March 26, 2013).

<sup>26</sup> In *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*6-8, this Court rejected the argument "that because

HTC is “far more than just an ‘ordinary user’ of the accused products.” *Id.* While HTC argue that the “Android platform originates with Google” (Dkt. 34 at 14), the reality is that Android is an open-source software project with many non-Google contributors and each of the defendants, including HTC, develops and contributes to the source code to create its own, unique version of the Android platform. *See* Exs. 23-25, 32-33; Dkt. 52-30, Kang Dec. ¶ 9. Rockstar’s infringement contentions (without having received discovery on the issue) reflect that each defendant makes proprietary, extensive modifications to the Android code for implementation in its mobile devices—and those changes are material to the claims of infringement in this case.<sup>27</sup>

**B. The NDCA Action Would Not Resolve the “Major Issues” in This Case**

HTC does not attempt to show how the NDCA Action (to which HTC is not a party) would resolve the “major issues” in this case. *Spread Spectrum*, 657 F.3d at 1358; *see* Dkt. 52 at 4-5. Nor can they—HTC has not agreed to be bound by the resolution of the NDCA Action (*i.e.* infringement and invalidity).<sup>28</sup> In any event, the NDCA Action cannot resolve the major, hardware-specific issues raised by Rockstar’s infringement claims against HTC.

Even if resolution of the claims against Google would resolve the issues of infringement and invalidity against HTC and the other hardware manufacturers (which it would not), it would not resolve the individualized questions of damages with respect to Asus, Samsung, HTC, LG, ZTE, and Pantech. *See Secure Access, LLC v. Nintendo of Am., Inc.*, 2014 U.S. Dist.

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[Defendant] is the sole maker of the accused . . . applications, [Defendant’s] ‘development, manufacturing and marketing’ of these products are ‘key evidence’ in this litigation and should be the sole focus of this Court’s venue analysis.” Instead, this Court found that the co-defendant was “far more than just an ‘ordinary user’ of the accused products” based on the extent of the collaboration between the alleged customer and manufacturer. *See also Lodsys v. Brother Int’l Corp.*, 2013 U.S. Dist. LEXIS 51336, 43 (E.D. Tex. Jan. 14, 2013); *Pragmatus Telecom, LLC v. Neiman Marcus Group, Inc.*, 2012 U.S. Dist. LEXIS 189149, at \*7 (E.D. Tex. Nov. 20, 2012).

<sup>27</sup> Rockstar’s infringement contentions reflect considerable differences between each defendants’ implementation of the Android platform, suggesting that each defendant significantly customizes the Android platform for use in its own products. *See, e.g.*, Ex. 26.

<sup>28</sup> *See, e.g., Kahn v. Gen. Motors Corp.*, 889 F.2d 1078, 1082 (Fed. Cir. 1989) (noting that GM had “not agreed to be bound by the Illinois decision or any injunction against Motorola”); *Pragmatus*, 2012 U.S. Dist. LEXIS 189149, at \*8 (observing that “it appears there is still some indecision regarding agreements to be bound by the Defendants”).

LEXIS30115, at \*19-20 (E.D. Tex. Mar. 7, 2014) (Gilstrap, J.). “Damages is no less a core issue in a patent infringement case than the issues of infringement and validity.” *Id.* at \*21. As required by the Federal Circuit, Rockstar’s damages model against each defendant will necessarily be distinct, grounded in the specific facts relating to each defendant and based on an individualized analysis of the sales of the different accused products *See, Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317-18 (Fed. Cir. 2011). Here, as in *Secure Access*, “as to the issue of damages, the claims against HTC are not peripheral to those of” Google. *Id.*

**C. The Customer-Suit Exception Does Not Apply Because Google—the Purported “Manufacturer”—Is A Party to the First Filed Action**

HTC relies on *Delphi Corp. v. Auto. Techs. Int’l, Inc.*, 2008 U.S. Dist. LEXIS 56463, at \*5 (E.D. Mich. July 25, 2008), an unreported case from Michigan. *See* Dkt. 34 at 14. But the same Michigan court has clarified that the customer-suit exception is inapplicable when, as is the case here, “the manufacturer not only can be, but is a party to the first-filed litigation[.]” *Drew Techs., Inc. v. Robert Bosch, LLC*, 2012 U.S. Dist. LEXIS 11489, at \*12-16 (E.D. Mich. Jan. 31, 2012). Here a stay is inappropriate because Google is a party to the first-filed action and may “fully protect its interests” by defending in the EDTX. *Id.* at \*12-16.

**D. The NDCA Lacks Personal Jurisdiction Over Rockstar and MobileStar**

Finally, the Court should deny a stay because the NDCA lacks personal jurisdiction over Plaintiffs. Exs. 27, 28.

**VI. CONCLUSION**

For these reasons, Plaintiffs respectfully ask that the Court deny HTC’s motion to transfer or stay this case.

Dated: April 14, 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on April 14, 2014. As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A).

*/s/ Theodore Stevenson, III*

Theodore Stevenson, III