

# Exhibit D

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

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

**Plaintiffs,**

**vs.**

**LG ELECTRONICS, INC., LG ELECTRONICS  
U.S.A., INC., LG ELECTRONICS  
MOBILECOMM USA INC.,**

**Defendants.**

**Civil Action No. 2:13-cv-898-JRG**

**JURY TRIAL REQUESTED**

**PLAINTIFFS ROCKSTAR CONSORTIUM US LP AND MOBILESTAR  
TECHNOLOGIES LLC'S RESPONSE TO DEFENDANTS' MOTION TO STAY OR, IN  
THE ALTERNATIVE, TO TRANSFER THIS ACTION TO THE NORTHERN  
DISTRICT OF CALIFORNIA (DKT. NO. 35)**

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## I. INTRODUCTION

Defendants LG Electronics, Inc. (“LKEKR”), LG Electronics U.S.A., Inc. (“LGEUS”), and LG Electronics MobileComm USA Inc. (“LGEMU”) (collectively, “LG”) makes incorrect and derogatory allegations that Plaintiffs Rockstar Consortium US LP (“Rockstar”) and MobileStar Technologies LLC are “shell entities” created for the purpose of “manipulating venue.” Dkt. 35 at 17. As explained herein, Rockstar and MobileStar are not “shell” entities—they are real operating companies that are the successors to intellectual property created by the former Nortel Networks. LG’s Motion to Stay or Transfer (the “Motion”) ignores Rockstar’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 is not a manufacturer/customer suit. 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 LG’s hardware and the LG’s 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.

## 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. 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.



Rockstar<sup>1</sup> owns two of the patents-in-suit and previously owned the other five patents-in-suit, before assigning them to MobileStar. Powers Dec. ¶ 5. Rockstar is MobileStar's parent entity and maintains its principal place of business in Plano, Texas. *Id.* ¶ 7. MobileStar owns five of the patents-in-suit and is the exclusive licensee (from Rockstar) of the other two patents. Ex. 1. MobileStar maintains its place of business in at the same Plano address. *Id.*

***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.* ¶ 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>2</sup> *Id.* ¶ 26-28.

LG misleadingly focuses on the Canadian office, employees, and licensing letters of Rockstar Consortium Inc.—the wrong entity. *See* Dkt. 35 at 10-11. Rockstar Consortium Inc.,

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<sup>1</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. 12-13.

<sup>2</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, works in nearby Irving, Texas. *Id.* ¶ 28. Mr. Mishler is also a former Nortel patent attorney. *Id.*

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 many ways Rockstar Consortium Inc. stepped into the shoes of Nortel’s Canada division. *See Id.* ¶ 19. 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 relocated and settled into its current Plano location, it began sending licensing correspondence and entering into agreements from its Plano office. *Id.* ¶ 24. Thus, although LG notes that Rockstar’s initial correspondence originated from Canada, it makes no mention of subsequent correspondence and agreements—which originated from Plano. *Id.* ¶ 24. For example, since March 2012, Rockstar employees have signed non-disclosure agreements and other agreements with a number of companies from Rockstar’s Plano office. *Id.* ¶ 24.

### **B. LG’s Deep Ties to Texas**

LG neglects to mention its own deep ties to Texas. “The North Texas distribution hub is LG Electronics’ largest single distribution point” in the United States.” Ex. 2. LG also maintains “two other facilities at AllianceTexas, which include a 450,000-square-foot facility at 501 Henrietta Creek Road in Roanoke and its 500,000-square-foot facility at 13700 Independence Pkwy. in Fort Worth.” *Id.* John Taylor, a vice president with LG Electronics USA, recently stated: “We love the Dallas-Forth Worth area and expect to maintain a long-term alliance.” *Id.*

***LG Has Not Challenged Venue in the EDTX Forum.*** Given LG’s ties to Texas, it should be no surprise that it has not challenged venue in the EDTX in other litigation.<sup>3</sup>

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

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<sup>3</sup> *See, e.g.,* Ex. 6, *MYPort IP Inc. v. HTC*, 6:11-cv-00246-LED, Dkt. 108 at 7 (E.D. Tex. Mar. 26, 2012) (“LG Defendants do not contest whether venue properly lies in this district”).

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 (the “NDCA Action”). Ex. 3. 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.

#### **IV. DEFENDANTS’ REQUEST FOR A STAY SHOULD BE DENIED.**

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

LG misleadingly asserts that the NDCA Action will answer “major issues” regarding this Action. Dkt. 35 at 6. But while the accused devices each run different versions of the Android operating system, this case is *not* about Android.<sup>4</sup> 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. *See, e.g.,* Ex. 4. In fact, the ’551 patent covers only the hardware implementation within LG’s accused products—it has no tie to Android. Exs. 4, 5. As to the other six patents at-issue, each covers the combination of hardware (designed solely by the original equipment manufacturers, like LG) with software. These patents require “sending,”<sup>5</sup> “receiving,”<sup>6</sup> “displaying,”<sup>7</sup> and “storing”<sup>8</sup>—functionality that occurs within hardware. *See Microsoft Corp. v. Commonwealth Sci. & Indus. Res. Org.*, 2007 U.S. Dist. LEXIS 91550, at \*10 (E.D. Tex. Dec. 13, 2007).

Even if Plaintiffs’ infringement allegations were focused on Android, as LG asserts, its 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

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<sup>4</sup> Android is an open-source software project managed by Google, but contributed to by many other entities and individuals, including LG, the defendants in the other cases, and members of the public. *See* Exs. 7, 8, 25, 26.

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

<sup>6</sup> Claims 1, 2, 13 and 14 of the ’937; claims 11, 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>7</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>8</sup> Claims 17, 19, 23, and 30 of the ’298; claim 20 of the ’572.

more than ordinary end users or resellers of the accused products.<sup>9</sup> As in *Virtualagility*, here LG is “far more than just an ‘ordinary user’ of the accused products.” *Id.* While LG argues that Android “exclusively originates with Google” (Dkt. 35 at 13), the reality is that each of the defendants, including LG, develops and contributes to the source code to create its own, unique version of the Android platform. *See, e.g.*, Exs. 7, 8, 25-27. 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 own mobile devices—and those changes are material to the claims of infringement in this case.<sup>10</sup>

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

LG does not attempt to show how the NDCA Action (to which LG is not a party) would resolve the “major issues” in this case. *Spread Spectrum*, 657 F.3d at 1358; *see* Dkt. 35 at 15. Nor can it—LG has not agreed to be bound by the resolution of the NDCA Action (*i.e.* infringement and invalidity).<sup>11</sup> In any event, the NDCA Action cannot resolve the major, hardware-specific issues raised by Rockstar’s infringement claims against LG. *Secure Access, LLC v. Nintendo of Am., Inc.*, 2014 U.S. Dist. LEXIS30115, at \*19-20 (E.D. Tex. Mar. 7, 2014) (Gilstrap, J.).

Even if resolution of the claims against Google would resolve the issues of infringement and invalidity against LG and the other hardware manufacturers (which it would not), it would not resolve the individualized questions of damages with respect to Asus, Samsung, HTC, ZTE,

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<sup>9</sup> In *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*6-8, this Court rejected the argument “that because [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>10</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. 9.

<sup>11</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”).

and Pantech. *See Secure Access*, 2014 U.S. Dist. LEXIS30115, at \*19-20. “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 [LG] 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**

LG relies heavily on one unreported case from Michigan. *See* Dkt. 35 at 13 (citing *Delphi Corp. v. Auto. Techs. Int’l, Inc.*, 2008 U.S. Dist. LEXIS 56463, at \*15 (E.D. Mich. July 25, 2008)). 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. *Id.* at \*12-16.

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

Finally, the Court should deny a stay because the NDCA lacks personal jurisdiction over Plaintiffs. Exs. 23, 24.<sup>12</sup>

**V. DEFENDANTS’ 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>13</sup>

**A. Rockstar’s Meaningful, Longstanding Connections to the EDTX**

Plaintiffs’ principal place of business is in Plano. Contrary to LG’s unsupported allegations, *see* Dkt. 35 at 17, the Plano office is not recent, ephemeral, or an artifact of

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<sup>12</sup> For all the reasons stated herein, Rockstar likewise opposes a temporary stay. *See* Dkt. 35 at 15 n.12.

<sup>13</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).

litigation. It is a fully operational office with full-time employees doing substantial patent prosecution, licensing, and litigation support work. Powers Dec. at ¶ 23. For over a decade, 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>14</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>15</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>16</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>17</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 to be part of a legitimate pursuit of business within the EDTX.<sup>18</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*

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<sup>14</sup> LG attempts to make too much of the fact that Nortel’s former office was not located in the EDTX—when it was located less than one mile from the EDTX. *See* Dkt. 35 at 19; Powers Dec. ¶ 8. But 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 also Thomas Swan*, 2014 U.S. Dist. LEXIS 773, at \*9 (considering companies “within or immediately adjacent to EDTX”).

<sup>15</sup> LG highlights the Canadian office, employees, and licensing letters for Rockstar Consortium Inc. *See* Dkt. 35 at 17. 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>16</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>17</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).

<sup>18</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. 10, *Bright Response LLC v. SAS Institute, Inc.*, No. 2:12-cv-280-JRG, Dkt. 28 at 5-8 (E.D. Tex. March 26, 2013).

*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).

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

### **1. LG Cannot Show That Access to Sources of Proof Favors Transfer**

*LG Fails to Describe its Sources of Proof with Specificity.* LG fails to meet its burden to "identify its sources of proof with some specificity such that the Court may determine whether transfer will increase the convenience of the parties." *U.S. Ethernet Innovations, LLC v. Samsung Elecs. Co.*, 2013 U.S. Dist. LEXIS 47384, at \*7 (E.D. Tex. Apr. 2, 2013). LG makes no mention of its own substantial presence in Texas. Instead, LG relies heavily on Google's assertion that Google's documents are "*managed and maintained*" and are "*accessible*" from California. Dkt. 35 at 12 (citing Samsung Action, Dkt. 52-29 at ¶ 3 (emphasis added)). Google's Dubey Declaration, also relied on by LG, is likewise circumspect, stating that documents "*are available in Mountain View . . . or are stored on Google's various secure servers, which are accessible and ultimately managed from Mountain View.*" Dubey Dec. ¶ 12 (emphasis added). Google never describes what those documents are, where it stores the documents, or whether other Google offices (including the ones in Texas) can "access" these documents. A casual reading of these statements "suggests more than is actually true." Ex. 11, *Personal Audio LLC v. CBS Corp.*, No. 2:13-CV-270-JRG-RSP, Dkt. 41 at 13 (E.D. Tex. Mar. 20, 2014). LG relies on Google's "artful wording to avoid disclosing the actual location of relevant documents" and therefore fails to carry its burden with respect to the sources of proof.<sup>19</sup> As in *U.S. Ethernet Innovations*, "[p]roblematically, the Court is asked to presume the bulk of relevant evidence would

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<sup>19</sup> *My Health, Inc. v. Click4Care, Inc.*, 2014 U.S. Dist. LEXIS 36850, at \*6 (E.D. Tex. Mar. 20, 2014) ("This Court routinely observes movants utilizing carefully worded statements to avoid disclosing key facts that disfavor their positions, especially in the context of a Motion to Transfer.").

come from the accused infringer, yet it has not been given the full picture as to the location of relevant sources of proof.” 2013 U.S. Dist. LEXIS 47384, at \*9.

***Rockstar, LG, and Third-Parties’ Sources of Proof Weigh Against Transfer.*** Even wrongly assuming that almost all of Google’s documents are in the NDCA, this factor still weighs against transfer. First, LG’s Motion makes little mention of LG’s sources of proof—which will be far more relevant to this action than Google’s documents. LG’s sources of proof will likely be found at its distribution hub in North Texas.<sup>20</sup> Second, “significant sources of proof exist within EDTX at least as relates to the Plaintiff,” because the documents related to the patents-in-suit are stored at Plaintiffs’ Plano headquarters.<sup>21</sup> *InMotion Imagery Techs.*, 2013 U.S. Dist. LEXIS 41830, at \*9. Third, courts also routinely look to third parties’ documents. Here those may include documents from Rockstar equity owners BlackBerry and Ericsson, who reside in the Dallas area; the patents-in-suits’ prosecuting attorneys who reside in Richardson and Irving; LG’s customers, including Verizon and AT&T, with facilities in Dallas; and third parties related to the Nortel auction in New York. *See* Exs. 12, 13.

## **2. The Availability of Compulsory Process Favors Plaintiffs**

This factor examines the availability of compulsory process to secure the attendance of third-party witnesses. *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*13. The third-party witnesses identified by LG should be accorded little weight because either they are likely within LG’s control or not identified with adequate specificity, their testimony has little or no relevance to issues in the case, or their testimony will be available via deposition.<sup>22</sup> On the other hand, the most important third-party witnesses will likely be located in the EDTX, on the East Coast, or in

<sup>20</sup> *See Fractus, SA. v. Samsung Elecs. Co.*, 2010 U.S. Dist. LEXIS 70443, at \*24 (E.D. Tex. June 10, 2010).

<sup>21</sup> Relevant documents in Plano include historical Nortel files relating to patent licenses, patent licensing efforts, and payment of royalties. Powers Dec. ¶ 29.

<sup>22</sup> LG argues that transfer is appropriate because Apple witnesses are “very likely” necessary witnesses. *See* Dkt. 35 at 13. But, if necessary, LG could present evidence regarding Apples’ valuation of the Nortel patent portfolio through video deposition. LG fails to explain how it would be inconvenienced by presenting any Apple witnesses’ deposition testimony at trial. Indeed, this Court recently rejected a similar argument. *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 Consortium US. *See* Exs. 12, 13.



Canada. On balance, the analysis cuts decisively in Plaintiffs' favor.

***Allegations As To Google Witnesses Lack Specificity or Showing of Unwillingness.***

LG's vague reference to unidentified former Google and Android "witnesses with knowledge" (Dkt. 35 at 9) allegedly "concentrated" in California warrants no weight because it lacks the required level of specificity.<sup>23</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. Moreover, LG 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). Indeed, LG first lists Google witnesses under the "willing witnesses" factor, recognizing that compulsory process will not be necessary for Google's employee witnesses. *See* Dkt. 35 at 15.

***Prior Artists.*** At the outset, LG has again failed to meet its burden of proof: it offers no evidence that these prior art witnesses would be unwilling to testify in the EDTX. *See Tex. Data Co., LLC v. Target Brands, Inc.*, 771 F. Supp. 2d 630, 643 (E.D. Tex. 2011). Additionally, LG implies that prior art authors are concentrated in the NDCA. *See* Dkt. 35 at 13. But of the *hundreds* of inventors on the prior art patents, only 39 reside in the NDCA. *See* Dkt. 35 at 13. The remainder are scattered throughout the world, including at least 12 in Texas, 91 on the East Coast, and 24 outside the U.S. Budwin Dec. ¶¶ 3-5. Of the prior art inventors residing in Texas, three appear to reside in the Dallas area—within the "absolute subpoena power" of the Court. *Id.* And importantly, "inventors of prior art rarely, if ever, actually testify at trial," and therefore it is

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<sup>23</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").

more important to examine other categories of witnesses.<sup>24</sup>

**Rockstar Equity Owners and Nortel Bidders Will Be Irrelevant.** LG's focus on Apple is inapposite: the parties do not dispute 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 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>25</sup> Ericsson maintains its headquarters in the EDTX and Blackberry is headquartered in the Dallas area, just a few miles from the EDTX. Exs. 12, 13.

**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. ¶ 4. 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>26</sup> See Wooten Dec., Poisson Dec., St. George Dec., Egan Dec., and Colvin Dec.

**Prosecuting Attorneys.** The attorneys who prosecuted the patents-in-suit are likely to have material information related to this case.<sup>27</sup> Two of the attorneys responsible for prosecuting the patents-in-suit live and work in Texas (one in Richardson, within the EDTX); three live in North Carolina; one lives in New Jersey, and none live in California. Budwin Dec. ¶ 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

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<sup>24</sup> *PersonalWeb Techs., LLC v. NEC Corp.*, No. 6:11-cv-655, Dkt. 74 at 16 n.13 (E.D. Tex. Mar. 21, 2013); see also *RPost Holdings*, 2013 U.S. Dist. LEXIS 116894, at \*10-11.

<sup>25</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. 14, 15.

<sup>26</sup> See Ex. 16, 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>27</sup> See *In re Acer Am. Corp.*, 626 F.3d 1252, 1255 (Fed. Cir. 2010) (prosecuting attorneys are likely witnesses).

during the years of their employment.

***LG's Customers in EDTX.*** LG's customers represent a key link in the supply chain for 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>28</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.

***Using Third-Party Witness Depositions Will Not Result in "Serious Inconvenience."*** LG argues that it would be "inconvenienced" and it would be "prejudicial" to LG if at trial it can present evidence regarding Apples' valuation of the Nortel patent portfolio only through video deposition. Dkt. 35 at 14. 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. See Exs. 12, 13.

### **3. The Cost of Attendance for Willing Witnesses Favors Plaintiffs**

***LG Fails to Carry its Burden of Proof.*** LG fails to meet its burden of proof with respect to the allegations regarding LG and Google witnesses. Mostly Google and LG use 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

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<sup>28</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. 17-21.

development for mobile devices,” lives in Austin, Texas. Ex. 22. Thus, Google’s California-based witnesses should not be factored into the transfer analysis.<sup>29</sup>

**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.* “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. *See also*, McColgan Decl.; Veschi Decl.

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

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

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<sup>29</sup> LG 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.

or against transfer (in order to try duplicative suits in the same venue).”<sup>30</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.” *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).

LG takes the position that “there are no practical problems with transferring [this] case.” Dkt. 35 at 11. Yet this case is one of six filed by Rockstar in the EDTX involving the same patents and technologies, which this Court has already consolidated for pre-trial purposes. Dkt. 32. 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. ¶ 32. 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>31</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.<sup>32</sup> *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*22.

### **C. The Public Interest Factors Slightly 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

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<sup>30</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>31</sup> More of the Defendants are closer to the EDTX. *See* Budwin Dec. ¶ 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>32</sup> *See also Ho Keung TSE v. Google, Inc.*, 2012 U.S. Dist. LEXIS 176509, at \*10 (E.D. Tex. Dec. 13, 2012) (transferring case from EDTX to district where claims involving the same patent were already pending).

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>33</sup>

Plaintiffs agree that the remaining public interest factors—court congestion, familiarity of the forum with the governing law, and the avoidance of conflicts of laws—are neutral.

**D. The Facts of the Purportedly “Similar” Cases Relied on by Defendants Differ Dramatically from this Case**

LG attempts to twist this Court’s precedent to suggest that transfer is appropriate. *See* Dkt. 35 at 21. First, in *Touchscreen Gestures v. HTC*, neither party had headquarters, documents, or party witnesses located in the EDTX. No. 12-0261, Dkt. 17 at 1, 6, 9 (E.D. Tex. Mar. 27, 2013). In contrast, here Rockstar’s headquarters, documents, and party witnesses are located in the EDTX (as are those of Samsung and ZTE, defendants in the related actions). Second, in *Ingeniador*, “[n]o party contend[ed] that relevant evidence exists in the Eastern District.” 2014 U.S. Dist. LEXIS 3308 at \*4-5. But here, Rockstar has relevant evidence that exists within the EDTX (as do Samsung and ZTE, in the related actions). Moreover, in *Ingeniador*, “none of Plaintiff’s witnesses reside or work in the Eastern District of Texas.” 2014 U.S. Dist. LEXIS 3308 at \*8. In contrast, Rockstar is headquartered here and many of its witnesses reside and work in the EDTX. Powers Dec. ¶ 31. Finally, in *Blue Spike, LLC v. Texas Instruments, Inc.*, the plaintiff could point to “no third-party witnesses that this Court would have absolute subpoena power over.” No. 12-558, Dkt. 16 at 5 (E.D. Tex. Mar. 13, 2014). Rockstar, however, has identified many third-party witnesses within this Court’s subpoena power.

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<sup>33</sup> *See Thomas Swan*, 2014 U.S. Dist. LEXIS 773, at \*16; *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at \*23.

Dated: April 14, 2014.

**McKool Smith, P.C.**

*/s/ Ted Stevenson III*

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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/ Joshua W. Budwin*

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Joshua W. Budwin