

Exhibit E

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

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

Plaintiffs,

vs.

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

Defendants.

Civil Action No. 2:13-cv-00901-JRG

JURY TRIAL

**PLAINTIFFS ROCKSTAR CONSORTIUM US LP AND MOBILESTAR
TECHNOLOGIES LLC'S RESPONSE TO DEFENDANT ZTE (USA) INC.'S MOTION
TO STAY OR, ALTERNATIVELY, TO TRANSFER TO THE NORTHERN DISTRICT
OF CALIFORNIA (DKT. NO. 44)**

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I. INTRODUCTION

Defendant ZTE (USA) Inc. (“ZTE”)¹ bears the burden of proof to show that this case should be transferred to the Northern District of California (“NDCA”), and it cannot make such a showing. Not only does ZTE’s motion to stay or transfer to the NDCA (the “Motion”) ignore Plaintiffs Rockstar Consortium US LP (“Rockstar”) and MobileStar Technologies LLC’s deep ties to the Eastern District of Texas (“EDTX”), it also omits any discussion of ZTE’s longstanding ties to the EDTX. Incredibly, despite the fact that all parties to this Motion are headquartered squarely within the EDTX, ZTE claims that the NDCA is a more convenient forum. 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 ZTE’s hardware and ZTE’s modifications to the Android operating system. The EDTX is the most convenient venue for this suit.²

II. LEGAL STANDARD

This Court is well acquainted with the legal standards governing the transfer analysis, as discussed in *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 Decl. ¶ 8. When Nortel confronted bankruptcy in 2011, it held an auction for its patents. Google made an initial \$900 million bid. Hearn Decl. ¶ 7. Google ultimately lost the auction to Rockstar Bidco LP, which paid \$4.5 billion. *Id.*

¹Co-defendants ZTE Solutions, Inc. and ZTE Corporation chose not join ZTE (USA), Inc. in its Motion. The absence of ZTE Solutions, Inc. and ZTE Corporation underscores the fact that granting ZTE’s Motion would only serve to frustrate and delay the resolution of this lawsuit.

²Should the Court be inclined to grant ZTE’s Motion, Plaintiffs request that they first be permitted discovery on the actual locations of ZTE’s relevant employee witnesses and other venue facts.

Rockstar³ 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. *Id.* ¶¶ 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. 1.

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. *Id.* ¶ 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 six 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.⁴ *Id.* ¶ 26-28.

B. Google's Connections to the Eastern District of Texas

ZTE claims that unidentified Google witnesses will be "crucial" to ZTE's defense. Dkt.

³ The equity owners of Rockstar include: Apple, BlackBerry, Ericsson, Microsoft, and Sony. Powers Decl. ¶ 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.

⁴ 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 Decl. ¶ 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.*

44 at 8. But although ZTE leans heavily on Google’s unsupported assertion that relevant evidence closer to the NDCA than the EDTX, Google maintains at least two Texas offices, in Dallas (which ZTE fails to mention, located approximately 20 miles from the EDTX) and Austin.⁵ Exs. 2, 3. Google’s Austin office focuses on developer relations and technical solutions, among other issues. Ex. 4. Google’s Dallas office contains departments for design and engineering, as well as sales. Ex. 5.

C. The EDTX is ZTE’s Home Forum

ZTE is Located in Richardson. ZTE’s Motion focuses almost entirely on Google, without any reference to ZTE itself. Dkt. 44 at 14. But ZTE’s headquarters are in Richardson—squarely within the EDTX. Ex. 6. From the EDTX, ZTE researches and designs the accused products. Ex. 7.⁶ Economic development officials from Richardson “emphasize the importance of [ZTE] to [Richardson’s] economy.” Ex. 8.

ZTE’s Richardson office is heavily involved in developing the Android source code: current job postings for ZTE’s Richardson location seek employees to work with Android software that will “[w]ork closely with the R&D team.” Ex. 9. ZTE also has an office in Austin, which focuses on chip design. Ex. 10. ZTE’s presence in Texas dwarfs its presence in California: of eighteen job openings listed on its website, only three are for positions in California—the other fifteen are for positions at ZTE’s headquarters in the EDTX. Ex. 11.

ZTE Regularly Avails Itself of the EDTX Forum. Because the EDTX is ZTE’s home forum, ZTE is no stranger to litigating here. Not only does ZTE frequently litigate in the EDTX, it has not challenged venue in the EDTX in other litigation.⁷ Because ZTE has extensively

⁵ In 2012, Google opened an office in Frisco, Texas (in the EDTX). Samsung Action, Dkt. 52-29, Dubey Dec. at ¶ 10. Just a year later, Google appears to have relocated that office to Dallas (in the NDTX). Ex. 2. Google offers no explanation for the move. See *MobileMedia Ideas LLC v. HTC Corp.*, 2012 U.S. Dist. LEXIS 62153, at *7-12 (E.D. Tex. May 3, 2012) (denying motion to transfer when alleged infringer closed facilities in EDTX and reincorporated in Washington state after receiving notice of infringement).

⁶ ZTE touts that it “maintains a local presence to [ensure] more responsive services while working with customers, employees, investors and the industry at large to drive success for all.” Ex. 7.

⁷ See, e.g., Ex. 16, *Dataquill Ltd. v. Huawei Techs. Ltd.*, 2:13-cv-00633-JRG-RSP, Dkt. 30 at 2 (E.D. Tex. Mar. 11, 2014) (“ZTE admits that venue is proper in this district.”); Ex. 17, *E-Contact Techs. v. Acer Am. Corp.*, 1:12-cv-00352-RC-KFG, Dkt. 83 at 2 (E.D. Tex. Dec. 4, 2012) (“Venue is proper in this District”); Ex. 18, *Traffic Info., LLC v. Cellular USA Inc.*, 2:10-cv-00145-JRG-RSP, Dkt. 92 at 3 (E.D. Tex. Oct. 11, 2010) (“ZTE USA admits that

availed itself of litigating in the EDTX, it cannot now claim that venue here is inconvenient.

D. 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. Ex. 12. On December 23, 2014, rather than intervene in this case, Google filed its action for declaratory judgment in the NDCA. Ex. 13. On December 31, 2013, Plaintiffs added Google as a defendant to Case No. 2:13-cv-00900 (“Samsung Action”). Samsung Action, Dkt. 19.

IV. DEFENDANTS’ REQUEST FOR A STAY SHOULD BE DENIED

A. This Action is Not a Manufacturer-Customer Suit

ZTE misleadingly asserts that this case is about Android.⁸ Dkt. 44 at 5. 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. *See, e.g.*, Ex. 14. In fact, the ’551 patent covers only the hardware implementation within ZTE’s accused products—it has no tie to Android. *See* Exs. 14, 15. As to the other six patents at-issue, each covers the combination of hardware (designed solely by the original equipment manufacturers, like ZTE) with software. These patents require “sending,”⁹ “receiving,”¹⁰ “displaying,”¹¹ and “storing”¹²—functionality that occurs within hardware.¹³

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

venue is proper in this judicial district.”); Ex. 19, *Innovative Display Techs. LLC v. ZTE Corp.*, 2:13-cv-00527-JRG, Dkt. 20 at 2 (E.D. Tex. Aug. 26, 2013) (“ZTE USA admits that venue is proper in this District and that it transacts business in this District.”); Ex. 20, *Garnet Digital, LLC v. Apple, Inc.*, 6:11-cv-00647-LED, Dkt. 156 at 4 (E.D. Tex. Feb. 9, 2012) (“ZTE admits that venue is proper in this District.”).

⁸ Android is an open-source software project managed by Google, but contributed to by many other entities and individuals, including ZTE, the defendants in the other cases, and members of the public. *See* Exs. 21, 22, 42, 43.

⁹ Claims 14, 15, 19, 23, 24, 27, 28, and 31 of the ’298; claims 1, and 5 of the ’131.

¹⁰ 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.

¹¹ 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.

¹² Claims 17, 19, 23, and 30 of the ’298; claim 20 of the ’572.

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

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. 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.¹⁴

As in *Virtualagility*, here ZTE is “far more than just an ‘ordinary user’ of the accused products.” *Id.* While ZTE argues that “Android manufactures Google” (Dkt. 44 at 5), the reality is that Android is an open-source software project with many non-Google contributors. Each of the defendants, including ZTE, develops and contributes to the source code to create its own, unique version of the Android platform. *See* Ex. 21, 22, 42, 43; Samsung Action, Dkt. 52-30, Kang Decl. ¶ 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 own mobile devices—and those changes are material to the claims of infringement in this case.¹⁵

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

ZTE does not attempt to show how the NDCA Action (to which ZTE is not a party) would resolve the “major issues” in this case. *Spread Spectrum*, 657 F.3d at 1358; *see* Dkt. 44 at 5. Nor can they—ZTE has not agreed to be bound by the resolution of the NDCA Action (*i.e.*

¹⁴ *See also Lodslys 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).

¹⁵ 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. 41.

infringement and invalidity).¹⁶ In any event, the NDCA Action cannot resolve the major, hardware-specific issues raised by Rockstar’s infringement claims against ZTE.

Even if resolution of the claims against Google would resolve the issues of infringement and invalidity against ZTE 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. 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 [ZTE] 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

ZTE relies heavily on one unreported case from Michigan. *See* Dkt. 44 at 10 (citing *Delphi Corp. v. Auto. Techs. Int’l, Inc.*, 2008 U.S. Dist. LEXIS 56463, at *14 (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 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. Ex. 39.

¹⁶ *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”).

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.¹⁷

A. Rockstar's Meaningful, Longstanding Connections to the EDTX

Plaintiffs' principal place of business is in Plano. Contrary to Defendants' unsupported allegations, *see* Dkt. 44 at 14, 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 Decl. at ¶¶ 20-23. 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.¹⁸ 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.¹⁹ *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.²⁰ 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.²¹ Powers Decl. ¶ 23; *see In re Microsoft Corp.*, 630 F.3d 1361,

¹⁷ *See, e.g., Thomas Swan & Co. v. Finisar Corp.*, 2014 U.S. Dist. LEXIS 773, at *4-6 (E.D. Tex. Jan. 6, 2014).

¹⁸ Google 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* Samsung Action, Dkt. 52 at 8; Powers Decl. ¶ 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”).

¹⁹ ZTE highlights the Canadian office, employees, and licensing letters for Rockstar Consortium Inc. *See* Dkt. 44 at 14. 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 Decl. ¶ 6.

²⁰ *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 . . .”).

²¹ 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 Decl. ¶ 20; *see In re Toyota Motor Corp.*, No. 2014-113, slip op. at 2-3 (Fed. Cir. April 3, 2014).

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 of a legitimate pursuit of business within the EDTX.²² 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).

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

1. ZTE Cannot Show That Access to Sources of Proof Favors Transfer

ZTE Fails to Describe its Sources of Proof with Specificity. ZTE 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). Surprisingly, ZTE makes no mention of its own sources of proof. Instead, ZTE relies entirely on Google’s assertion that *Google’s* documents are “*managed and maintained*” and are “*accessible*” from California. Dkt. 44 at 8 (citing Samsung Action, Dkt. 52-29 at ¶ 3 (emphasis added)). Google’s Dubey Declaration, also relied on by ZTE, 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 Decl. ¶ 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

²² 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. 23, *Bright Response LLC v. SAS Institute, Inc.*, No. 2:12-cv-280-JRG, Dkt. 28 at 5-8 (E.D. Tex. March 26, 2013).

reading of these statements “suggests more than is actually true.” Ex. 24, *Personal Audio LLC v. CBS Corp.*, No. 2:13-CV-270-JRG-RSP, Dkt. 41 at 13 (E.D. Tex. Mar. 20, 2014). ZTE 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.²³ As in *U.S. Ethernet Innovations*, “[p]roblematically, the Court is asked to presume the bulk of relevant evidence would 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, ZTE, and Third-Parties’ Sources of Proof Weigh Against Transfer. Even wrongly assuming that almost all of Google’s documents (upon which ZTE relies) are in the NDCA, this factor still weighs against transfer. First, ZTE’s Motion makes no mention of ZTE’s sources of proof—which will be far more relevant to this Action than Google’s documents. ZTE’s sources of proof will likely be found at its Richardson headquarters in the EDTX.²⁴ 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.²⁵ *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; ZTE’s customers, including Verizon and AT&T, with facilities in Dallas; and third parties related to the Nortel auction in New York. *See* Exs. 25, 26.

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

²³ *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.”).

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

²⁵ Relevant documents in Plano include historical Nortel files relating to patent licenses, patent licensing efforts, and payment of royalties. Powers Dec. ¶ 29.

witnesses identified by ZTE should be accorded little weight because either they are either within Defendants' 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.²⁶ 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.

ZTE Fails to Identify its Witnesses with Specificity. ZTE fails to identify a single party witness. Instead, ZTE vaguely refers to unidentified "Google witnesses" (Dkt. 44 at 12) allegedly "concentrated" in California, which warrants no evidentiary weight because it lacks the required level of specificity.²⁷ "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.1.²⁸

Prior Artists. At the outset, ZTE 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, ZTE implies that prior art authors are concentrated in the NDCA. *See* Dkt. 44 at 13 n.4. But of the *hundreds* of inventors on the prior art patents, only 39 reside in the NDCA. *See* Dkt. 44 at 13 n.4. The remainder are scattered throughout the world, including at least 12 in Texas, 91 on the East

²⁶ ZTE argues that transfer is appropriate because Apple witnesses "may be necessary." *See* Dkt. 44 at 8. But, if necessary, ZTE could present evidence regarding Apples' valuation of the Nortel patent portfolio through video deposition. ZTE 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 Bidco. *See* Exs. 25, 26.

²⁷ *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 identify witnesses who would require compulsory process); *Core Wireless Licensing v. Apple, Inc.*, 2013 U.S. Dist. LEXIS, at *9-10 (E. D. Tex. Feb. 22, 2013) (finding assertion that "the alleged infringing products were ... developed in Cupertino, CA and the employees responsible for that development are based in the Cupertino area" to be vague such that "weighing [them] ... would be merely speculative").

²⁸ *See Invensense*, 2014 U.S. Dist. LEXIS 3311, at *20 ("The Court does not significantly weight the availability of compulsory process for witnesses in the parties' control . . .").

Coast, and 24 outside the U.S. Budwin Decl. ¶¶ 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 more important to examine other categories of witnesses.²⁹

Rockstar Equity Owners and Nortel Bidders Will Be Irrelevant. Defendants’ 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 Decl. ¶ 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.³⁰ Ericsson maintains its headquarters in the EDTX and Blackberry is headquartered in the Dallas area, just a few miles from the EDTX. Exs. 25, 26.

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 Decl. ¶ 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, pending determination of the trial date.³¹ *See* Wooten Decl., Poisson Decl., St. George Decl., Egan Decl., and Colvin Decl.

Prosecuting Attorneys. The attorneys who prosecuted the patents-in-suit are likely to have material information related to this case.³² 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 Decl. ¶ 6.

²⁹ *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.

³⁰ 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. 27, 28.

³¹ *See* Ex. 29, 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).

³² *See In re Acer Am. Corp.*, 626 F.3d 1252, 1255 (Fed. Cir. 2010) (prosecuting attorneys are likely witnesses).

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 Decl. ¶ 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.

ZTE's Customers in EDTX. ZTE'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.³³ *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.

3. The Cost of Attendance for Willing Witnesses Favors Plaintiffs

ZTE Again Fails to Meet its Burden of Proof. ZTE fails to identify a single party witness. Instead, ZTE relies on Google's 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. Samsung Action, Dkt. 52-29 at ¶ 6. Although Google maintains that 85% of its U.S. employees in the Android group work in the NDCA area, Google fails to address whether the other 15% work in its Texas offices. Contrary to Google's 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. 35.

ZTE Witnesses. The majority of relevant ZTE witnesses will likely be in Richardson,

³³ 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. 30-34.

where ZTE maintains its U.S. headquarters. *See, e.g.*, Ex. 36. For example, according to LinkedIn, Rongqin Yan lives in Richardson and is ZTE's "Vice President of Product Development." Mr. Yan's testimony will no doubt prove important for damages, willfulness, and indirect infringement issues. ZTE's job listings for its Texas facilities also suggest that it conducts much (if not all) of its extensive Android development efforts within the EDTX. *See, e.g.*, Ex. 7.

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.

4. The Judicial Economy 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 or against transfer (in order to try duplicative suits in the same venue).

ZTE intentionally omits any reference to the practical problems that would be associated with transferring this case. *See* Dkt. 44 at 8-9. 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. Dkt. 42. 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 Decl. ¶ 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.³⁴ 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 *22.³⁵

Moreover, instead of intervening in this previously-pending case to protect the interests of its alleged customers—as ZTE asserts Google 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.

C. The Public Interest Favors Venue in the EDTX

Despite the fact that all parties to this Motion have their headquarters squarely within the

³⁴ More of the Defendants are closer to the EDTX. *See* Budwin Decl. ¶ 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 Fed. App’x 907, 909 (Fed. Cir. 2012).

³⁵ *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).

EDTX, ZTE argues that the NDCA “has a greater interest in this case.”³⁶ *See* Dkt. 44 at 9. ZTE is simply wrong. “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: from the EDTX, ZTE researches and develops infringing devices. Ex. 38. And Plaintiffs run their business from the EDTX. Powers Decl. ¶ 23. 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.³⁷

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.

³⁶ Defendants’ argument essentially “amounts to ‘California has a localized interest in resolving this dispute because its jurors will be biased toward the defendant.’” *Ingeniador*, 2014 U.S. Dist. LEXIS 3308, at *10-11. But “[a] predisposition toward one party, independent of the merits of the case, cannot be the kind of ‘local interest’ cognized by the federal rules, and this Court gives this consideration no weight in its analysis.” *Id.*

³⁷ *See Thomas Swan*, 2014 U.S. Dist. LEXIS 773, at *16; *Virtualagility*, 2014 U.S. Dist. LEXIS 12015, at *23.

Dated: April 14, 2014.

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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

Joshua W. Budwin