Courtland L. Reichman (SBN 268873)
creichman@mckoolsmithhennigan.com
McKool Smith Hennigan, P.C.
255 Shoreline Drive, Suite 510
Redwood Shores, California 94065
Telephone: (650) 394-1400
Facsimile: (650) 394-1422

ADDITIONAL COUNSEL LISTED
ON SIGNATURE PAGE

Attorneys for Defendants
Rockstar Consortium US LP and
MobileStar Technologies LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND

Google, Inc.,

Plaintiff,

v.

Rockstar Consortium US LP and MobileStar Technologies LLC,

Defendants.

Case No. 4:13-cv-5933-CW

DEFENDANTS' REPLY TO GOOGLE'S RESPONSE TO DEFENDANTS' MOTION TO TRANSFER UNDER 28 U.S.C. 1404(A) OR, IN THE ALTERNATIVE, TO STAY

Hon. Claudia Wilken

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I. INTRODUCTION

In its response to Defendants Rockstar Consortium US LP ("Rockstar") and Mobilestar Technologies LLC's ("MobileStar") (collectively "Defendants") Motion to Transfer Under 28 USC § 1404(a) or, In The Alternative, To Stay, Google fails to address—or even attempt to address—the many considerations reflecting that judicial efficiency favors transferring this case to the Eastern District of Texas. For the reasons discussed below, the § 1404 factors, on balance, favor transfer to the Eastern District of Texas—but ultimately the avoidance of duplicative litigation and judicial efficiency considerations weigh dispositively in favor of transfer. Google's arguments to the contrary avoid the facts and the substance of the analysis. Instead, Google relies on the Court's findings in the personal jurisdiction context. Google also attempts to cast the corporate form by attempting to amalgamate various entities (including Rockstar, Rockstar Consortium LLC, Rockstar Bidco GP, LLC, and Rockstar Consortium Inc.) into a unitary entity for purposes of the transfer analysis. Accordingly, in the interests of judicial efficiency and for the convenience of the parties and the witnesses, the Court should transfer this case to the Eastern District of Texas, or in the alternative, stay this case pending resolution of Defendants' cases against Google in the Eastern District of Texas.

II. THIS IS DEFENDANTS' FIRST MOTION TO TRANSFER BASED ON CONVENIENCE UNDER § 1404

This is Defendants' first motion to transfer pursuant to § 1404. It is also undisputedly Defendants' first request that the Court stay this action. Defendants' prior motion to dismiss on the basis of improper venue was brought pursuant to § 1391 and the first-to-file rule. *See* Dkt. 39-4 at 15. Indeed, the prior motion nowhere invokes "28 U.S.C. § 1404." *See id.* at 15:10-11 ("Defendants have not yet filed a motion to transfer venue under 28 U.S.C. § 1404(a)"); *id.* at 15:21-22 ("Defendants, of course, reserve the right to file [a motion to transfer pursuant to § 1404(a)], if necessary, at an appropriate time"). While Google hyperbolizes that "there is *no such thing* as a

motion to transfer venue" under § 1391, the vehicle for challenges based on § 1391 is § 1406. *Williams v. Clark County Pub. Adm'r*, 487 F. App'x 413, 414 (9th Cir. 2012) (non precedential).

The first-to-file rule is a judicial creation designed to serve the purposes of comity and judicial efficiency. *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1161 (9th Cir. 2011); *Church of Scientology v. United States Dep't of Army*, 611 F.2d 738, 750 & n.7 (9th Cir. 1979). While the first-to-file rule is a non-statutory judicial creation distinct from § 1404, the first-to-file analysis incorporates consideration of some—but not all—of the § 1404 factors. *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1299 (Fed. Cir. 2012); *Micron Tech., Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 905 (Fed. Cir. 2008). Thus, it is no surprise that Defendants' prior discussion of the first-to-file rule in the context of their § 1391 motion to dismiss discussed the first-to-file factors that overlap with *some* of the § 1404 factors.

Ultimately, the simple reality—which Google tries to avoid based on irrelevant statutory nuance—is that Defendants did not bring their first motion to transfer pursuant to § 1404. It was a motion to dismiss under § 1391 that discussed the first-to-file rule. This motion is a motion to transfer, or alternatively to stay, raised within the framework of § 1404.

III. GOOGLE BASES ITS TRANSFER ARGUMENTS ON THE COURT'S PERSONAL JURISDICTION CONCLUSIONS

Both in support of its motion to transfer filed in the Eastern District of Texas and in its response to Defendants' Motion to Transfer Venue Under 28 U.S.C. § 1404 in this Court, Google has sought to rely upon conclusions made by the Court in the context of resolving the question of personal jurisdiction, and thus decided under the deferential standard[1] for personal jurisdiction. *See* Ex. 36 at 1, 3. Defendants therefore brought this legal standard to the attention of the Texas Court.

[1] *Smugmug, Inc. v. Virtual Photo Store LLC*, 2009 U.S. Dist. LEXIS 112400, at *5 (N.D. Cal. Nov. 16, 2009) (Wilken, J.) (Noting the deferential standard utilized in the personal jurisdiction analysis, specifically that the "district court must construe all pleadings and affidavits in the light most favorable to the plaintiff and resolve any factual conflicts in the affidavits in the plaintiff's favor.").

Here too, Google seeks to apply the Court's personal jurisdiction findings to the § 1404 transfer analysis. For example, Google argues that the Court has already resolved that Apple is a majority shareholder in Rockstar and that the Court has accepted Google's argument that "Apple is central to this action." Dkt. 72 at 17:25-18:2, 18:25-27. Google also argues that the Court "has already found" that Rockstar's creation of the MobileStar entity "was a sham." *Id*. at 7:19-21 (citing Dkt. 58 at 7:19-10:21). While the Court plainly does not need the parties' commentary to interpret its own order, it appears that the Court arrived at these conclusions in the context of its personal jurisdiction analysis. *See id.* As the Court stated in its order, it rendered these conclusions "with conflicts in the allegations and evidence resolved" in Google's favor. *Id*. at 19:17-18. These personal jurisdiction conclusions cannot simply be imported into the fact-intensive § 1404 venue analysis, as advocated by Google.[2]

IV. TRANSFER BEST SERVES JUDICIAL ECONOMY

While, on balance, the § 1404 convenience factors favor transfer of this case to the Eastern District of Texas, in the unique circumstances at issue here, judicial economy should be the overriding concern. Contrary to Google's assertions (resting on *Micron* alone), courts in the Northern District of California have repeatedly held that that the factor of judicial efficiency may prove dispositive. *See Eli Lilly & Co. v. Genentech, Inc.*, 2013 U.S. Dist. LEXIS 114460, at *19 (N.D. Cal. Aug. 13, 2013); *Bristol-Myers Squibb Co. v. Genentech*, 2013 U.S. Dist. LEXIS 103836, at *16 (N.D. Cal. July 23, 2013) ("plaintiff has failed to show that the convenience factors overcome the weight of judicial efficiency"); *Arete Power, Inc. v. Beacon Power Corp.*, 2008 U.S. Dist. LEXIS 111000, at *29-31 (N.D. Cal. Feb. 22, 2008); *see also In re Google Inc.*, 412 F. App'x 295, 296 (Fed. Cir. 2011) (non-precedential) ("Courts have consistently held that judicial economy plays a paramount role in trying to maintain an orderly, effective, administration of justice and having one trial court decide all of these claims clearly furthers that objective."); *In re Vistaprint Ltd*., 628 F.3d

[2] This is particularly true here, where Defendants have explained that Google's pleaded factual allegations were false. *See* Dkt. 67 at 7:13-8:12; Dkt 66 at 2 n.1-2, 3 n.3. As set forth below, Google does not materially dispute the falsity of its pleaded factual allegations.

1342, 1346 (Fed. Cir. 2010) ("[C]ourts have consistently held that judicial economy plays a paramount role in trying to maintain an orderly, effective, administration of justice."); *Oasis Research, LLC v. Go Daddy.com, Inc.*, 2012 U.S. Dist. LEXIS 118014, at *16 (E.D. Tex. Aug. 21, 2012) ("The Court may deny motions to transfer based on judicial economy alone."). Here judicial economy weighs decisively in favor of transfer to the Eastern District of Texas.

A. Transfer of the Six Eastern District Cases to This Court Would Disserve Judicial Economy And Uproot Defendants from Their Home State

Google agrees that judicial economy favors moving forward with this action and the Eastern District of Texas cases in the same forum—the dispute is over which forum is the proper one. Dkt. 72 at 11:3-7. Google recognizes that "there is nothing controversial" about Defendants' point that it would be more efficient for one court to supervise this case and the Eastern District of Texas cases. *Id*. at 11:5-7. Google argues, however, that in lieu of transferring this case to the Eastern District, the Court should proceed with the expectation that each of the six cases pending in the Eastern District of Texas will be transferred to this Court.[3] Google cannot offer any reasonable basis for its expectation—the Texas Court has yet to rule on the pending motions to transfer.

Even in light of the Court's determination that this case constitutes the first filed case vis-à-vis Defendants' case against Google in the Eastern District of Texas and that the customer suit exception applies, transferring the six separate Eastern District of Texas cases to this Court would not serve judicial economy or the convenience of the parties. None of the Eastern District of Texas defendants have agreed to be bound by any ruling in this case. Google's response does not even address this enormously important point, raised in Defendants' motion (and in Defendants' oppositions to the Eastern District of Texas defendant's motions to transfer). *See* Dkt. 67 at 11:13-26; Dkt. 57. When the purported "customers" refuse to be bound by any determinations in the

[3] Google avers that Defendants propose a "rule" under which, when parties in two actions move to transfer each action to join the other, the court in the first filed case must always transfer its action to the other forum. Defendants propose no such rule. Here considerations of judicial efficiency counsel that under the specific facts of these cases, this declaratory judgment case and Defendants' Texas case against Google should be consolidated in the Eastern District of Texas.

"manufacturer" case, the bottom falls out and all of the justifications Google puts forth for transferring the six Eastern District of Texas cases to join Google's case here disappear. *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 Telecom, LLC v. Neiman Marcus Group, Inc.*, 2012 U.S. Dist. LEXIS 189149, at *8 (E.D. Tex. Nov. 20, 2012) (observing that "it appears there is still some indecision regarding agreements to be bound by the defendants").

Additionally, there is no dispute that Samsung is headquartered in the Eastern District of Texas and ZTE is headquartered in the Northern District of Texas, close to the boundary of the Eastern District of Texas. There is no reason to uproot either of these cases which involve Texas Plaintiffs (Rockstar and MobileStar) suing Texas defendants (Samsung and ZTE). Additionally, Google has not moved to sever its case from its co-defendant, Samsung, in the Eastern District of Texas (Samsung's home forum)—therefore, and in the absence of severance, there is no option for the Eastern District of Texas to transfer Google's case without also transferring Samsung's case. Google's brand of "efficiency" thus leads to an inherently inefficient result: six earlier filed cases in the Eastern District of Texas would be transferred to the Northern District of California and two of the six defendants in the earlier filed cases who are resident in Texas would be transferred out of their home state to a jurisdiction halfway across the country.

B. The Case Against Google and Other Defendants In The Eastern District of Texas Has Advanced Farther Than This Case

The alleged judicial efficiency Google claims is inherent in transferring the Eastern District of Texas cases to this Court also fails in light of the status and stage of each of the cases in the litigation process. In this case, Google just recently filed its Answer and the case is set for a case management conference on June 26, 2014. Dkt. 68. In the Eastern District of Texas, in comparison, the court entered its scheduling order on April 29, 2014 and its discovery order on May 8, 2014. The parties, Defendants and the seven defendants that have been consolidated for pre-trial purposes, have

negotiated and filed a joint protective order and are proceeding with discovery. *See* Ex. 37. The Texas cases are set for trial in July of 2015, just over a year from now. *Id.*

C. Transferring or Staying the Eastern District of Texas Cases Would Accomplish Nothing Other Than Delay

Google's response offered no substantive response to the following considerations raised in Defendants' opening brief and supported by Defendants' infringement contentions favoring transfer to the Eastern District of Texas. First, as discussed in Defendants' opening brief and above, none of the Eastern District of Texas defendants have agreed to be bound by any findings or holdings in this case. *See* Dkt. 67 at 11. Therefore, resolution of the infringement issue (or the recently pleaded validity affirmative defenses) in Google's declaratory judgment action here would have no impact on the Eastern District of Texas defendants. Second, each Eastern District of Texas defendant makes its own proprietary changes to Android as it is implemented in their products, and these changes are material to infringement. *See id.* at 11-12. Thus, again, resolution of the infringement issue in Google's declaratory judgment action would have no impact on the Eastern District of Texas defendants. Third, Defendants' claims of infringement hinge on the distinct hardware used in each Eastern District of Texas defendant's accused products. *See id.* at 12-13. Consequently, again, resolution of this case would not affect the Eastern District of Texas cases. Fourth, nobody claims that this case could resolve any issues of damages with respect to the Eastern District of Texas defendants. *See id.* at 14-15. In light of these facts which Defendants raised in their opening brief and Google does not dispute, staying the Eastern District of Texas cases pending the outcome in this case would accomplish nothing more than delay.

V. THE EASTERN DISTRICT OF TEXAS IS ROCKSTAR AND MOBILESTAR'S HOME FORUM, AND THE COURT SHOULD REJECT GOOGLE'S REQUEST TO CAST ASIDE ALL REGARD FOR THEIR CORPORATE STRUCTURES

Texas is the home forum of the two entities that are parties to this litigation: Rockstar and MobileStar. *See* Dkt. 67 at 2 and 5. Rockstar's only office is in the Eastern District of Texas and it has no Canadian location. Dkt. 67-43, Powers Decl. ¶ 26. Rather, 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.* ¶ 25. Further, Rockstar's quarterly operations reviews occur in Plano, Texas—not Canada, and its strategy sessions are held at its headquarters in the Eastern District of Texas—not Canada. *Id.* ¶ 26. And the evidence, as opposed to Google's unsupported assertions, shows that the decisions that direct Rockstar as a company are made from within the Eastern District of Texas. Each of Google's attempts to peg Rockstar to Canada must fail.

First, Google again improperly attempts to import the Court's personal jurisdiction conclusions into the § 1404 analysis, arguing that the Court's personal jurisdiction conclusions have resolved this issue. Dkt. 72 at 8:4. They have not: the analyses require different levels of scrutiny and the Court should decline Google's invitation to conflate these differing legal analyses.

Second, Google also (again) seeks to avoid the clear requirements of piercing the corporate veil necessary to impose the contacts of a corporate parent onto its subsidiary entity. *See generally* Dkt. 66. "[A]s a general rule, in a suit involving a subsidiary corporation, the court looks to the subsidiary's place of citizenship without reference to that of its parent corporation." *Peralta v. Countrywide Home Loans, Inc.*, 2009 U.S. Dist. LEXIS 112387, at *15 (N.D. Cal. Nov. 16, 2009) (citing *Breitman v. May Co. California*, 37 F.3d 562, 564 (9th Cir. 1994)); *see also Danjaq, S.A. v. Pathe Communications Corp.*, 979 F.2d 772, 775 (9th Cir. 1992) ("The general rule. . . is that in a suit involving a subsidiary corporation, the court looks to the state of incorporation and principal place of business of the subsidiary, and not its parent."). This principle holds true in the venue context, just as in the personal jurisdiction context. *See Henson v. Fid. Nat'l Fin., Inc.*, 2014 U.S. Dist. LEXIS 20777, at *31 (E.D. Cal. Feb. 18, 2014) ("'It is well-established that a parent-subsidiary relationship alone is insufficient to attribute the contacts of the subsidiary to the parent for jurisdictional purposes.' *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003) . . . The Court finds that same should be true in matters of venue where a party's contacts with the forum are relevant."). Just two exceptions to that general rule exist: where the subsidiary is the parent's alter ego, or where the subsidiary acts as the general agent of the

parent. *See Harris Rutsky*, 328 F.3d at 1134. And, as Google concedes in opposing Defendants' request for interlocutory review of the Court's Order denying Defendants' Motion to Dismiss, agency and alter ego are not at issue here. Dkt. 71 at 5-6 (conceding that Google is not asserting that "alter ego or agency theories are at issue.").

Although making no attempt to address the factors to satisfy the "alter ego" or "general agent" exceptions necessary attribute the contacts of Rockstar Consortium LLC to Rockstar, Google asks this Court to impose the corporate residence and forum contacts of Rockstar and MobileStar's Canadian-based corporate affiliates onto Rockstar and MobileStar. Google's reliance on a misapprehension of the Dean declaration, MobileStar's one-month delay in registering with the Texas Secretary of State (which the Texas Court held to be immaterial, *see* dkt. 69-1 at 7), and the location of the execution of a patent assignment falls far short of the showing necessary to pierce the corporate veil or find alter ego. *See* Dkt. 66. Under Google's logic, any entity's home forum for purposes of venue would be the home forum of its parent entity or the location from which one or two of its board members work remotely. This logic would eviscerate the meaning of corporate structures, the venue analysis, and the authorities cited above.

Google's arguments regarding whether or not MobileStar is a "sham" entity is a sideshow that relies on inflammatory language devoid of legal significance. Rockstar has explained that MobileStar is its mobile device licensing entity. *See* Dkt. 67 at 4:12-20. Corporations routinely create subsidiaries for a myriad of legitimate reasons: Google itself formed a wholly owned subsidiary—Ranger, Inc.—solely to bid on Nortel's patent portfolio. Ex. 38. Google operates other wholly owned subsidiaries, such as Google Ireland Limited, Google Netherlands Holdings, and Google Ireland Holdings. The purpose of these entities is to minimize Google's tax burden. *See* Ex. 39. Google is unlikely to characterize any of its own subsidiaries as "shams" created, for example, for the purpose of tax manipulation.

Third, Google attempts to create a contradiction in Defendants' declarations where there is none. The Powers declaration's statement that the Plano office is Rockstar's only office is correct.

Afzal Dean works for Rockstar Consortium Inc. and serves as the President of MobileStar. Although the Dean declaration admittedly could have used more precise language (using the general form of "Rockstar" when it should have more specifically stated "Rockstar Consortium Inc."), the fact remains that Dean works at the Ottawa office of Rockstar Consortium Inc. Dean never represents in his sworn declaration that Rockstar Consortium US LP (the entity relevant here) maintains an "office" in Ottawa.

Rockstar Consortium Inc., which is not a party to this litigation, is a different (although affiliated) entity from Rockstar. Dkt. 67-43, Powers Dec. ¶ 6. Rockstar Consortium Inc. is a British Columbia corporation. *Id*. ¶ 6. Rockstar is a Delaware limited partnership. *Id*. ¶ 6. When Rockstar Bidco acquired Nortel's patent portfolio in 2011, in many ways Rockstar simply continued the work of Nortel's well-established patent licensing division in Richardson, Texas. Similarly, in many ways Rockstar Consortium Inc. stepped into the shoes of Nortel's Canada division. *See id*. ¶ 22. Unlike Rockstar Consortium LLC, Rockstar Consortium Inc. is not a parent company to Rockstar. Ex. 40.

Fourth, Google relies heavily on a magazine article that purports to identify Rockstar's senior management.[4] But Google is incorrect—the following individuals are employed by Rockstar and comprise its senior management—all of them reside in the United States, not Canada:

- John Veschi, CEO – Pennsylvania, United States;
- Gillian McColgan, CTO – Florida, United States;
- John Garland, Vice President, Patent Licensing – New Jersey, United States;
- Shival Virmani, Vice President, Patent Licensing – Pennsylvania, United States; and
- Chad Hilyard, Chief IP Counsel – Colorado, United States.

Fifth, Google claims that the transfer of five patents-in-suit from Rockstar to MobileStar was executed "by two members of Rockstar's senior management, both Canadians" (dkt. 72 at 10). Not

[4] The article lists John Veschi, Gillian McColgan, David Smith, John Garland, Afzal Dean, Shival Virmani, Chad Hilyard, Michael Dunleavy, Hinta Chambers, Mark Wilson, and David Smith. The list is incorrect in many respects. For example, Michael Dunleavy is outside counsel (Ex. 42), Mark Wilson is a former independent contractor (dkt. 67 at 5 n.5); Afzal Dean, David Smith, and Hinta Chambers work for Rockstar Consortium Inc., not Rockstar (dkt. 72-10 at 2).

so. The agreement was signed by John Veschi—an American citizen who lives in Pennsylvania. *See* Powers Decl. ¶ 30; Supp. Veschi Decl. ¶¶ 2, 3.

VI. THE § 1404 CONVENIENCE FACTORS FAVOR TRANSFER

A. Google's Choice of Forum Merits No Deference

Google seeks to rely on the general preference for maintaining venue in the plaintiff's choice of forum, but cannot justify its forum shopping: filing this declaratory judgment in this Court in lieu of intervening in the Texas actions—the alleged motivation for instigating this suit. Dkt. 72 at 12-13; *see JACO Envtl. Inc. v. Appliance Recycling Ctrs. of Am.*, 2007 U.S. Dist. LEXIS 27421, at *7 (N.D. Cal. Mar. 27, 2007). Google does not dispute that it could have simply moved to intervene in the Eastern District of Texas pursuant to Federal Rule of Civil Procedure 24, but chose not to do so. "The intervention rule is intended to prevent multiple lawsuits where common questions of law or fact are involved but is not intended to allow the creation of whole new lawsuits by the intervenors." *Deus v. Allstate Ins.*, 15 F.3d 506, 525 (5th Cir. 1994) (citation omitted). "The purpose of the rule allowing intervention is to prevent a multiplicity of suits where common questions of law or fact are involved." *Washington Electric Coop., Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 922 F.2d 92, 97 (2d Cir. 1990) (citing *Reich v. Webb*, 336 F.2d 153, 160 (9th Cir. 1964)). In contravention of the clear purpose of Rule 24, Google chose not to intervene, instead filing its declaratory complain in the forum of its choosing and instigating the high likelihood of duplicative litigation. *JACO Envtl.*, 2007 U.S. Dist. LEXIS 27421, at *7 (emphasizing that if there is any indication that a plaintiff is forum shopping, its choice of forum will be given little deference).

B. The Convenience of Parties And Witnesses Weigh In Favor of Transfer

Rockstar's Headquarters and Only Office is in the Eastern District of Texas, Not Canada. As discussed above, Google's argument that Rockstar's principal place of business is Canada is untrue. Three of Rockstar's full-time employees in Plano have relevant knowledge about this suit and will likely be called as witnesses to testify at trial:

- Donald Powers, Litigation Counsel (Powers Decl. ¶ 30);
- Bernard Tiegerman, Senior Intellectual Property Counsel (*id.*); and
- Mark Hearn, Senior Licensing Counsel (*id.*).

Google Does Not Dispute the Relevance of Its Texas Offices or the Presence of Android Software Engineers in Texas. Google does not dispute that it maintained an office in the Eastern District of Texas until 2013, and now maintains at least two relevant Texas offices, in Dallas (approximately 20 miles from the Eastern District of Texas) and Austin. Exs. 5, 6. Nor does Google deny that 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. 24. Google tries to minimize the importance of Google's Android engineers in Texas by noting that Mr. Hamilton is not listed on Defendants' Rule 26(b)(1) disclosures. But, without having yet conducted discovery, the veracity of Google's self-identification of selected employees cannot be verified, and, in any event Rockstar has not yet listed *any* Google employee in its Rule 26(b)(1) disclosures. *See* Dkt. 72-10.

Attendance of Named Inventors Favors Transfer. Google's suggestion that the Court should be swayed by the location of the inventors of the patents-in-suit, notwithstanding their sworn testimony establishing that they are willing to appear at trial in the Eastern District of Texas and that it would be inconvenient to appear in the Northern District of California (Dkt. 72 at 15), is at odds with Google's own arguments. Google attempts to brush aside the sworn statements of five named inventors of the patents-in-suit. Dkt 72 at 14. But by Google's own admission, the attendance of inventors is an important factor that must be considered. Dkt. 72 at 16. These inventors have committed to attend trial in the Eastern District of Texas, yet may be unwilling to attend if the trial is held in the Northern District of California. *See* Wooten Decl., Colvin Decl., Poisson Decl., St. George Decl., and Egan Decl. The willing attendance of these inventors to trial in Texas counsels in favor of transfer.

C. **The Availability of Compulsory Process Does Not Weigh Against Transfer**

Apple Is Not a Majority Shareholder of Any Rockstar Entity. Google's assertion that "Apple controls Rockstar" (Dkt. 78 at 18) ignores the actual proof before the Court. In particular, the Powers declaration makes clear that "[n]either Apple nor any other limited partner of Rockstar has a majority stake of either Rockstar or MobileStar." Dkt. 67-43 ¶ 35. Contrary to Google's repeated representations (Dkt. 72 at 17-18), Apple is not the majority shareholder of Rockstar, Rockstar Consortium LLC, or Rockstar Consortium Inc. Supp. Powers Decl. ¶ 2. Apple has no ability to control Rockstar's litigation decisions. Dkt. 67-43 ¶ 35. Moreover, Apple and Google have called a litigation cease-fire "agreeing to dismiss all lawsuits against each other." Ex. 41. If Apple were truly pulling the puppet strings at Rockstar, the parties would be obligated to end this litigation. But this case continues, confirming the sworn testimony before this Court and further discrediting Google's arguments.

D. **Feasibility of Consolidation Weighs Heavily In Favor of Transfer**

This case should be consolidated with the cases pending in the Eastern District of Texas for the reasons discussed in detail above. *See supra* at IV. In the interests of judicial efficiency, Defendants' cases against Google and Samsung in the Eastern District of Texas has already been consolidated with each of the other Texas cases for all pre-trial purposes other than venue. 2:13-cv-894, Dkt. 31.

At the time of the Court's Order denying Defendants' Motion to Dismiss, or In The Alternative, To Transfer, Defendants had not yet served infringement contentions in the Eastern District of Texas, had not yet elicited the position of the Eastern District of Texas defendants as to whether they would agree to be bound by any rulings in this case, and had not yet learned that Google does not have access to the "Android" source code used by the Eastern District of Texas defendants in their accused products. In light of this evidence that has recently come to light, it is now apparent that this case is unlikely to resolve *any* of the infringement issues for any of the Eastern District of Texas defendants, other than Google itself.

Google claims that "Rockstar's action in Texas will not resolve [allegations of infringement against Google's Android Platform], and Rockstar does not argue otherwise." Dkt. 72 at 20. Once again, Google is wrong. *See* Dkt. 67 at 11. Google's claim amounts to nothing more than word games—the term "Android Platform" as used in Google's complaint in this case is vague and undefined, and not tied to any particular product. *See* Dkt. No. 61 at ¶¶ 30-31 (Defendants' Answer explaining that "Google has not defined 'Google's Android Platform,' and its use of that phrase is vague, as it fails to identify a specific instance of any product.")). Regardless, the Eastern District of Texas may properly resolve all of the issues raised by Defendants and the Eastern Texas defendants (including Google). And, to the extent Google is concerned that what it terms the "Android Platform" is not at-issue in Texas, Google can seek leave to add a counterclaim of non-infringement.

While Google offers speculation regarding Defendants' pending motion for leave to amend to assert additional patents against Google in Texas (dkt. 72 at 20), Google's conjecture is baseless. The Supreme Court has stated that because it is "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities," leave to amend under Rule 15 "shall be freely given when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Federal Rule of Civil Procedure Rule 15(a) "evinces a bias in favor of granting leave to amend." *Martin's Herend Imports, Inc. v. Diamond & Gem Trading U.S. of Am. Co.*, 195 F.3d 765, 770 (5th Cir. 1999). The Eastern District of Texas court has not yet ruled on Defendants' motion. Therefore, Google's speculation as to what the Eastern District of Texas court may do is meritless and entitled to no weight. This factor favors transfer in light of "the positive effects it might have in possible consolidation of discovery and convenience to witnesses and parties." *Bite Tech, Inc. v. X2 Impact, Inc.*, 2013 U.S. Dist. LEXIS 31791, at *16 (N.D. Cal. March 7, 2013).

E. **Ease of Access to Evidence Favors Transfer**

Google claims that Rockstar's principal place of business is in Ottawa, and therefore "most of Rockstar's documents are likely there as well." Dkt. 72 at 20. As explained above (*see supra* at

V), both claims are demonstrably false. Rockstar's principal and only place of business is in Plano, Texas—not Ottawa, Ontario. Similarly, as already established (Hearn Decl. ¶ 6), many of Rockstar's relevant documents have resided in or near the Eastern District of Texas since the time of their creation. Other than speculation, Google has no substantive response.

F. **Local Interest Favors Transfer**

Despite Defendants' and Samsung's presence as Eastern District of Texas residents, Google asserts that the "Eastern District of Texas does not" have an interest in this controversy (dkt. 72 at 21:11). Google is wrong. Google's assertion that "Rockstar actually conducts the overwhelming majority of its business from Ottawa, Canada" (dkt. 72 at 22) is similarly baseless. As already established (Dkt. 67 at 5) and explained above (*supra* at IV.B), Rockstar's headquarters and only office is in Plano, Texas. Next, Google asserts that Defendants' claimed that "*all* of Nortel's research came from Texas." Dkt. 72 at 22. But—contrary to Google's accusation—no such statement was ever made. Finally, while Google quibbles over what percentage of Nortel's R&D originated in Ottawa, Google's own evidence shows that at least 38.5% of Nortel's R&D expenditures originated in the U.S., not Canada. *See* Dkt. 72-14 at ¶ 36(b).

G. **Relative Time to Trial Favors Transfer**

Google concedes that the average time to trial favors the Eastern District of Texas. Dkt. 72 at 22 (acknowledging that the average time to trial is faster in the EDTX); *see also* Dkt. 72-17. Likewise, the evidence presented by Defendants (dkt. 67 at 22) establishes that the median time to trial also favors transfer. Dkt. 67 at 22. Earlier this year Google relied on the same study offered by Defendants here. Ex. 43. Google, attempting to duck the numbers, expresses concern over Judge Gilstrap's caseload. Dkt. 72 at 22. Google's concern is unwarranted. Judge Gilstrap has set the Eastern District of Texas cases for trial in July 2015—less than two years from their October 31, 2013 filing, barely a year from now and beating the statistics cited by the parties.

VII. IN THE ALTERNATIVE, THE COURT SHOULD STAY THIS ACTION PENDING RESOLUTION OF THE EASTERN DISTRICT OF TEXAS CASES

If the Court declines to transfer this action, it should stay this action and allow the Eastern District of Texas cases to proceed to judgment. While Google argues without support that "only this action will resolve all issues between Rockstar and Google" (dkt. 72 at 24), that is simply untrue. Each of Google's claims at issue in this case may also be resolved in the Eastern District of Texas action. *See* Dkt. 67 at 12. More importantly, and as emphasized above, the Eastern District of Texas litigation has the ability to resolve the "major issues" in this case *and* the cases against the other defendants in the Eastern District of Texas cases—and will ultimately obviate the need for this action altogether. *See supra* at IV.A-B.

Contrary to Google's assertion (dkt. 72 at 20), the Eastern District of Texas case will resolve both the infringement issue as to Google's open-source Android code, as well as the other Eastern District of Texas defendants' co-development with Google of infringing code and products. *See* Dkt. 67 at 12. Forcing Defendants to simultaneously litigate the same issues in both the Eastern District of Texas and the Northern District of California will present a major hardship—a hardship that will substantially prejudice Defendants. It will be dramatically less expensive for the parties to litigate Google's already-pending claims in the Eastern District of Texas than to proceed with duplicative, two-track parallel litigation of overlapping issues in two forums. Therefore, in the absence of transfer, the Court should stay this case pending resolution of the Eastern District of Texas cases.

VIII. CONCLUSION

For the foregoing reasons and those set forth in Defendants' Motion to Transfer Under § 1404(a) or, In the Alternative, To Stay, Defendants respectfully request that this Court transfer this case to the Eastern District of Texas in the interest of convenience to the parties and witnesses, and in the interest of judicial efficiency. In the alternative, Defendants request that the Court stay this case pending the resolution of Defendants' case pending against Google in the Eastern District of Texas, C.A. No. 2:13-cv-00900-JRG.

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Respectfully submitted,

By */s/ Josh Budwin*

Courtland L. Reichman
MCKOOL SMITH HENNIGAN, P.C.
255 Shoreline Drive Suite 510
Redwood Shores, CA 94065
(650) 394-1400
(650) 394-1422 (facsimile)

Mike McKool (Admitted *Pro Hac Vice*)
mmckool@McKoolSmith.com
Douglas A. Cawley (Admitted *Pro Hac Vice*)
dcawley@McKoolSmith.com
Ted Stevenson III (Admitted *Pro Hac Vice*)
tstevenson@McKoolSmith.com
David Sochia (Admitted *Pro Hac Vice*)
dsochia@McKoolSmith.com
McKool Smith, P.C.
300 Crescent Court, Suite 1500
Dallas, TX 75201
(214) 978-4000
(214) 978-4044 (facsimile)

Joshua W. Budwin (Admitted *Pro Hac Vice*)
jbudwin@McKoolSmith.com
McKool Smith, P.C.
300 W. 6th Street, Suite 1700
Austin, TX 78701
(512) 692-8700
(512) 692-8744 (facsimile)

Attorneys for Defendants
Rockstar Consortium US LP and MobileStar Technologies LLC