HIGHLIGHTING ADDED

EXHIBIT 36

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

ROCKSTAR CONSORTIUM US LP AND MOBILESTAR TECHNOLOGIES, LLC Plaintiffs, v. SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, GOOGLE INC., Defendants.	§ § § § § § § § § § § § § § §	Civil Action No. 13-cv-0900-JRG **JURY TRIAL DEMANDED**

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO TRANSFER TO THE NORTHERN DISTRICT OF CALIFORNIA OR, IN THE ALTERNATIVE, TO STAY

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INTRODUCTION

Rockstar's patents in this action will be tested and, if necessary, tried to a jury in *Google Inc. v. Rockstar Consortium US LP*, No. 13-5933 (N.D. Cal.) (the "Google Action"). The Court in the Google Action has already ruled that (1) the Google Action was the first-filed action between Rockstar and Google; (2) all of Rockstar's actions in this District are "customer suits" that should be stayed or transferred to the venue of the manufacturer, Google; (3) the § 1404 venue factors favor hearing this dispute in the Northern District of California; and (4) the Google Action should proceed in that Court. Despite this ruling, Rockstar has not withdrawn its opposition to Defendants' motion to transfer, and now evidently seeks wasteful, duplicative litigation in both this Court and the Northern District. Rockstar's arguments against transfer cannot withstand scrutiny, and the Northern District already considered and rejected them. This Court should prevent wasteful and overlapping parallel actions by transferring this case to the Northern District of California or, in the alternative, staying it until that action is resolved.

ARGUMENT

I. The Court Should Transfer This Case to the Northern District of California

A. Rockstar Has No Meaningful Connection to This Forum

Rockstar claims "meaningful, longstanding connections" to this District (Opp. at 6-7), but cannot dispute that it created MobileStar only one day before filing this action (Dkt. 52-9), in circumstances the Northern District found "strongly suggest that Rockstar formed MobileStar as a sham entity" that was "created solely for litigation purposes." (894 Dkt. 71-1 at 9 and 17.) Rockstar's brief does not address or even mention MobileStar's creation, and Rockstar no longer trumpets MobileStar's "separate" corporate form as anchoring this case in this District. (Declaration of Kristin Madigan ("Madigan Decl.") Exs. 1 at 6-9; 2 at 2-5.) Instead, Rockstar focuses on its small office of five people in Plano, Texas. (Opp. at 6-7.) But this office is

irrelevant for at least three reasons. First, it only opened in December 2012, just ten months before Rockstar filed this suit. (Dkt. 61-7 ¶ 20.) To avoid just this kind of manipulation, "the recent opening of an office" by a plaintiff cannot affect the venue analysis. *In re Toyota Motor Corp.*, — F.3d —, 2014 WL 1316595, at *2 (Fed. Cir. Apr. 3, 2014). Second, despite Rockstar's contrary claim (Dkt. 1 ¶¶ 1-2), "Rockstar's 'nerve center,' or the place where its 'officers direct, control, and coordinate the corporation's activities,'" is not here but in Ottawa, Canada. (894 Dkt. 71-1 at 3.) Third, even if the Plano office *were* important to Rockstar (and it is not), it *cannot* be important to this litigation or even part of it, because it is conflicted from participation. One of its three attorneys is Alfi Guindi, now Senior IP Counsel at Rockstar but a former attorney at Samsung. (Madigan Decl. Ex. 3.) Rockstar has confirmed that Mr. Guindi "will not be involved now or in the future in the litigation." (*Id.* Ex. 4.) The two other attorneys in Rockstar's tiny Plano office are similarly conflicted. Texas Disc. Rule 1.09(b) & Preamble.

B. The Private Interest Factors Strongly Favor Transfer

In their motion to transfer, Google and Samsung explained in detail why the private interest factors favor the Northern District. (Mot. at 7-15.) Rockstar's response assembles cherry-picked facts, often in a conflicting manner. For example, in its latest attempt to argue there are relevant documents in this District, Rockstar now directs the Court toward "documents from Rockstar equity owners BlackBerry and Ericsson, who reside in the Dallas area" (Opp. at 9), but only one page later argues that "Rockstar equity owners and Nortel bidders will be irrelevant" to this action. (Opp. at 10.) And Rockstar seeks to avoid transfer using documents in its conflicted Plano office (*id.* at 9 n.1), but neglects to mention that it moved those documents there *itself*, ten months before filing its complaint, an action this Court should "closely scrutinize" to determine "whether any venue manipulation exists." *InMotion Imagery Techs., LLC v. Imation Corp.*, 2013 U.S. Dist. LEXIS 41830, at *7-8 n.1 (E.D. Tex. Mar. 25, 2013).

Most importantly, however, Rockstar entirely ignores its majority equity owner, Apple, which resides in the Northern District of California. (Dkt. 52-5.) As the Northern District has recognized, there is a "direct link between Apple's unique business interests, separate and apart from mere profitmaking, and Defendants' actions against Google and its customers." (894 Dkt. 71-1 at 18.) As Defendants have already explained, Rockstar will likely argue that Google's bids for the Nortel portfolio show value of the patents-in-suit; to combat this argument, Defendants must obtain discovery from Apple showing its motivations and reasoning behind its own bids as well as the creation of Rockstar itself. (Mot. at 12.) Rockstar says nothing against this point, except to note that other equity owners may be equally relevant. (Opp. at 10.) This argument ignores Rockstar's telling focus on Android, ignores Apple's status as its majority owner, and ignores the Northern District's finding of a "direct link" between them. (894 Dkt. 71-1 at 18.)

Defendants showed that dozens of prior artists for the asserted patents reside in the Northern District. (Dkt. 52 at 11 n.3.) In response, Rockstar identifies *two* non-party witnesses in this District, and relies primarily on affidavits from potential witnesses, residing *in Canada*, who aver that trial here would be convenient for them. (Dkt. Nos. 61-2 ¶¶ 6-7; 61-6 ¶¶ 6-7; 61-8 ¶¶ 6-7.) The Court should ignore these dubious declarations, which provide no rationale for their statements that this Court would be more convenient than the Northern District—where Rockstar's witnesses carefully do not say that they would be *unwilling* to attend trial. Rockstar identifies a few former Nortel employees and a single former Samsung employee (Opp. at 11), but none are in this District and none have strong connections to the action. Availability of compulsory process and cost of attendance of trial thus strongly favor transfer. (Mot. at 11-13.)

Finally, this Court should transfer this action to avoid the "existence of duplicative suits involving the same or similar issues" and "practical difficulties" presented here. *Ctr. One v. Vonage Holdings Corp.*, 2009 WL 2461003, at *22 (E.D. Tex. Aug. 10, 2009). Rockstar itself

stressed this point in its opposition brief (Opp. at 13-14) and before the Northern District (Madigan Decl. Ex. 1 at 4-5, 19). Now that the Google Action will proceed, Rockstar cannot suddenly demand *two* sets of actions supervised by *two* courts in *two* districts.

C. The Public Interest Factors Also Favor Transfer or Are Neutral

As the Northern District of California has already found, that Court "has the greater interest in this litigation because the claims here will 'call into question the work and reputation of several individuals residing in or conducting business in this community.'" (894 Dkt. 71-1 at 27 (citing *In re Hoffman-La Roche*, 587 F.3d 1333, 1336 (Fed. Cir. 2009)).) This District has much less interest: although Rockstar claims "to have substantial ties to Texas, their headquarters appear to be in Canada." (*Id.*) Rejecting the arguments Rockstar makes here, the Northern District found the remaining public interest factors "are either neutral or favor Google" because both "cases are in early stages," much evidence is in California, and each "forum is familiar with patent law, and both have similar court congestion and time to trial." (*Id*. at 28.)

II. In the Alternative, the Court Should Stay This Case

Should the Court decline to transfer venue to the Northern District of California, the Court should stay this action pending final resolution of the Google Action. Rockstar argues that it is not subject to personal jurisdiction in the Northern District (Opp. at 6), but the Northern District itself has already resolved that issue, against Rockstar. (894 Dkt. 71-1 at 19-20.) Rockstar's remaining objections to a stay are similarly meritless.

A. The Google Action Will Resolve Major Issues in Dispute

As the Northern District already found, the Google Action will resolve major issues in this case. (*Id*. at 26.) Rockstar only briefly argues otherwise, and those arguments fall flat. Rockstar first contends that "Samsung has not agreed to be bound" by resolution of the Google action, but that is irrelevant if the Google Action itself would resolve major issues here, which

the Northern District has already found. (Opp. at 5; 894 Dkt. 71-1 at 26.) Rockstar also suggests that "individualized questions of damages" might remain (Opp. at 6), but this is *always* true in *every* customer suit; if damages issues were sufficient to avoid consolidating duplicative litigation under the customer-suit exception, no litigation could ever fall under the customer-suit exception. *See Spread Spectrum Screening LLC v. Eastman Kodak Co*., 657 F.3d 1349, 1358 (Fed. Cir. 2011). Finally, Rockstar briefly mentions "major, hardware-specific issues raised by Rockstar's infringement claims against Samsung"—but fails to describe them. (Opp. at 6.)

B. The Customer-Suit Exception Applies to Google's Customers

After targeting only Android OEMs and asserting infringement only by Android devices, Rockstar now tries to run from its prior allegations, stating that "this case is *not* about Android." (Opp. at 4.) But this case *is* about Android: Rockstar sued only Android OEMs, accused only Android devices (Mot. at 2), and Rockstar's infringement contentions cite directly to code excerpts from Google's Android website. (Madigan Decl. Ex. 5.) As a result, the "relationship between Google and the [Texas] defendants is one of manufacturer and customer" and "the customer-suit exception to the first-to-file rule would apply." (894 Dkt. 71-1 at 24.) If the Court declines transfer, it should stay this action pending resolution of the Google Action.[1]

CONCLUSION

For the forgoing reasons, this Court should transfer this matter to the Northern District of California or, in the alternative, stay this case pending the resolution of that action.

[1] Rockstar claims that *Spread Spectrum* limits the exception to "mere resellers." (Opp. at 4.) But "the guiding principles in the customer suit exception cases are efficiency and judicial economy." *Spread Spectrum*, 657 F.3d at 1357 (citation omitted). *Spread Spectrum* clarified that the manufacturer suit "need only have the potential to resolve the 'major issues' concerning the claims against the customer—not every issue—in order to justify a stay of the customer suits." *Id.* at 1358. Courts routinely find stay appropriate where the manufacturer's technology is the focal point of the litigation, as in where the manufacturer "has primary and final control of any design and manufacturing process that might infringe upon [plaintiff]'s patents." *Delphi Corp. v. Auto. Techs. Int'l, Inc.*, 2008 WL 2941116, at *4 (E.D. Mich. July 25, 2008).

Dated: April 25, 2014 Respectfully submitted,

/s/ J. Mark Mann

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record have consented to electronic service and are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on April 25, 2014.

/s/ *J. Mark Mann*
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