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8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 OAKLAND DIVISION

12 GOOGLE INC.,
 13 Plaintiff,
 14 v.
 15 ROCKSTAR CONSORTIUM US LP and
 MOBILESTAR TECHNOLOGIES LLC,
 16 Defendants.

CASE NO. 13-cv-5933-CW
**GOOGLE INC.’S OPPOSITION TO
 DEFENDANTS’ MOTION TO DISMISS
 OR TRANSFER**
**REDACTED VERSION OF DOCUMENT
 SOUGHT TO BE SEALED**
 Date: Thursday, March 13, 2014
 Time: 2:00 p.m.
 Courtroom: Courtroom 2, Fourth Floor
 Judge: Hon. C.J. Claudia Wilken

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 23
 24
 25
 26
 27
 28

TABLE OF CONTENTS

| | <u>Page</u> |
|----|--|
| 1 | |
| 2 | |
| 3 | INTRODUCTION..... 1 |
| 4 | BACKGROUND..... 2 |
| 5 | A. Apple, Microsoft, and Other Investors Acquire Nortel’s Licensing Operation 2 |
| 6 | B. Rockstar Sells Patents to Its Owners, and Reorganizes Itself 2 |
| 7 | C. Rockstar Forms MobileStar and Files Actions Against Android Makers..... 3 |
| 8 | D. Google Files This Action, and Rockstar Responds By Belatedly Suing Google..... 5 |
| 9 | ARGUMENT 5 |
| 10 | I. This Court Has Personal Jurisdiction Over Rockstar 5 |
| 11 | A. Rockstar Cannot Escape Jurisdiction Through Its Litigation Subsidiary 6 |
| 12 | B. Rockstar Holds Itself Out As Standing in Nortel’s Shoes 7 |
| 13 | C. Rockstar’s Contacts With Apple Require Personal Jurisdiction 9 |
| 14 | D. Rockstar’s Licensing Business Also Gives This Court Personal Jurisdiction 12 |
| 15 | E. Venue is Proper in This District 18 |
| 16 | II. This Court is the Correct Forum for this Action 18 |
| 17 | A. Google’s Suit Serves the Purposes of the Declaratory Judgment Act 18 |
| 18 | B. Google, Not Rockstar, Was First to File 19 |
| 19 | C. Rockstar, Not Google, is Forum Shopping 21 |
| 20 | D. Proceeding With This Action Will Prevent Duplicative Litigation 22 |
| 21 | E. This District is the Appropriate Venue for This Action 22 |
| 22 | 1. Convenience and Availability of Witnesses Favors This District 23 |
| 23 | 2. This Court Has Jurisdiction Over All Parties to the Halloween Actions 23 |
| 24 | 3. The Halloween Actions Should Be Stayed or Consolidated Here 24 |
| 25 | 4. The Interests of Justice Strongly Favor This District..... 24 |
| 26 | 5. The Remaining Factors All Favor This District..... 25 |
| 27 | CONCLUSION 25 |
| 28 | |

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Affinity Labs of Texas v. Samsung Elecs. Co., Ltd.,
No. 12-CV-557, 2013 WL 5508122 (E.D. Tex. Sept. 18, 2013) 24

Akro Corp. v. Luker,
45 F.3d 1541 (Fed. Cir. 1995)..... 10, 22

Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.,
846 F.2d 731 (Fed. Cir. 1988)..... 18

ASUSTeK Computer Inc. v. AFTG-TG LLC,
No. 11-0192, 2011 WL 6845791 (N.D. Cal. Dec. 29, 2011) 6

Avocent Huntsville Corp. v. Aten Int’l Co., Ltd.,
552 F.3d 1324 (Fed. Cir. 2008)..... 10, 15, 19

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 5, 10, 15, 17

Campbell v. Miale,
542 F.3d 879 (Fed. Cir. 2008)..... 17

Capo, Inc. v. Dioptrics Med. Prods., Inc.,
387 F.3d 1352 (Fed. Cir. 2004)..... 18

Catalyst Assets LLC v. Life Techs. Corp.,
No. 11-3537, 2012 WL 2289728 (N.D. Cal. June 18, 2012) 21, 22

Checkpoint Sys., Inc. v. U.S. Int’l Trade Comm’n,
54 F.3d 756 (Fed. Cir. 1995)..... 7

Codex Corp. v. Milgo Elec. Corp.,
553 F.2d 735 (1st Cir. 1977) 21

Daimler A.G. v. Bauman, et. al.,
571 U.S. —, 134 S. Ct. 746 (2013) 13

1 Dainippon Screen Manufacturing. Co., Ltd. v. CFMT, Inc.,
2 142 F.3d 1266 (Fed. Cir. 1998)..... 7, 9

3 Electronics For Imaging, Inc. v. Coyle,
4 340 F.3d 1344 (Fed. Cir. 2003)..... 6, 10, 24

5 EMC Corp. v. Norand Corp.,
6 89 F.3d 807 (Fed. Cir. 1996)..... 18

7 Futurewei Techs., Inc. v. Acacia Research Corp.,
8 737 F.3d 704 (Fed. Cir. 2013)..... 20

9 Genentech, Inc. v. Eli Lilly & Co.,
10 998 F.2d 931 (Fed. Cir. 1993)..... 19

11 Genentech, Inc. v. GlaxoSmithKline LLC,
12 No. 10-4255, 2010 WL 4923954 (N.D. Cal. Dec. 1, 2010)..... 19

13 Goodyear Dunlop Tires Operations, S.A. v. Brown,
14 564 U.S. —, 131 S. Ct. 2846 (2011)..... 13

15 Helicopteros Nacionales de Colombia, S.A. v. Hall,
16 466 U.S. 408 (1984)..... 13

17 Hertz Corp. v. Friend,
18 559 U.S. 77 (2010)..... 25

19 In re Genentech, Inc.,
20 566 F.3d 1338 (Fed. Cir. 2009)..... 23

21 In re Hoffman-La Roche,
22 587 F. 3d 1333 (Fed. Cir. 2009)..... 24, 25

23 In re Microsoft,
24 630 F.3d 1361 (Fed. Cir. 2011)..... 25

25 In re TS Tech USA Corp.,
26 551 F.3d 1315 (Fed. Cir. 2008)..... 25

27 In re Zimmer Holdings, Inc.,
28 609 F.3d 1378 (Fed. Cir. 2010)..... 23, 25

| | | |
|----|--|----------------|
| 1 | Inamed Corp. v. Kuzmak, | |
| 2 | 249 F.3d 1356 (Fed. Cir. 2001)..... | 6, 15 |
| 3 | Ingeniador, LLC v. Adobe Sys. Inc., | |
| 4 | No. 12-00805, 2014 WL 105106 (E.D. Tex. Jan. 10, 2014)..... | 23 |
| 5 | <i>Int’l Shoe Co. v. Washington,</i> | |
| 6 | 326 U.S. 310 (1945)..... | 5 |
| 7 | Intersearch Worldwide, Ltd. v. Intersearch Group, Inc., | |
| 8 | 544 F. Supp. 2d 949 (N.D. Cal. 2008)..... | 20 |
| 9 | JetBlue Airways Corp. v. Helferich Patent Licensing, LLC, | |
| 10 | No. 12-5847, 2013 WL713929 (E.D.N.Y. 2013)..... | 14 |
| 11 | Juniper Networks, Inc. v. Juniper Media, LLC, | |
| 12 | No. 11-03906, 2012 WL 160248 (N.D. Cal. Jan. 17, 2012)..... | 9 |
| 13 | Katz v. Lear Siegler, Inc., | |
| 14 | 909 F.2d 1459 (Fed. Cir. 1990)..... | 21 |
| 15 | <i>Kyocera Commc’ns, Inc. v. ESS Techs. Int’l, Inc.,</i> No. | |
| 16 | 12-01195 2012 WL 2501119 (N.D. Cal. June 27, 2012)..... | 22 |
| 17 | LSI Indus. Inc. v. Hubbell Lighting, Inc., | |
| 18 | 232 F.3d 1369 (Fed. Cir. 2000)..... | 5 |
| 19 | Mabbett v. Tandy Corp., | |
| 20 | 847 F.2d 841 (Fed. Cir. 1988)..... | 3 |
| 21 | Merial Ltd. v. Cipla Ltd., | |
| 22 | 681 F.3d 1283 (Fed. Cir. 2012)..... | 20 |
| 23 | Microchip Tech., Inc. v. United Module Corp., | |
| 24 | No. 10-4241 2011 WL 2669627 (N.D. Cal. July 7, 2011)..... | 20 |
| 25 | Micron Tech., Inc. v. Mosaid Techs., Inc., | |
| 26 | 518 F.3d 897 (Fed. Cir. 2008)..... | 19, 20, 22, 24 |
| 27 | Nortel Networks Inc. v. State Bd. of Equalization, | |
| 28 | 191 Cal. App. 4th 1259 (2011)..... | 8 |

| | | |
|----|--|--------------|
| 1 | <i>Nuance Commc'ns, Inc. v. Abbyy Software House,</i> | |
| 2 | 626 F.3d 1222 (Fed. Cir. 2010)..... | 5, 17 |
| 3 | <i>Pacesetter Sys., Inc. v. Medtronic, Inc.,</i> | |
| 4 | 678 F.2d 93 (9th Cir. 1982)..... | 19, 20 |
| 5 | <i>Proofpoint, Inc. v. InNova Patent Licensing, LLC,</i> | |
| 6 | No. 11-2288, 2011 WL 4915847 (N.D. Cal. Oct. 17, 2011)..... | 20, 21 |
| 7 | <i>Quill Corp. v. North Dakota,</i> | |
| 8 | 504 U.S. 298 (1992)..... | 15 |
| 9 | <i>Radio Sys. Corp. v. Accession, Inc.,</i> | |
| 10 | 638 F.3d 785 (Fed. Cir. 2011)..... | 16, 17 |
| 11 | <i>Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.,</i> | |
| 12 | 148 F.3d 1355 (Fed. Cir. 1998)..... | 10, 15, 19 |
| 13 | <i>Refac Int'l, Ltd. v. Lotus Dev. Corp.,</i> | |
| 14 | 81 F.3d 1576 (Fed. Cir. 1996)..... | 7 |
| 15 | <i>Reflex Packaging, Inc. v. Audio Video Color Corp.,</i> | |
| 16 | Case No. 13-03307, 2013 WL 5568345 (N.D. Cal. Oct. 9, 2013)..... | 23 |
| 17 | <i>Silent Drive, Inc. v. Strong Indus., Inc.,</i> | |
| 18 | 326 F.3d 1194 (Fed. Cir. 2003)..... | 15 |
| 19 | <i>Smugmug, Inc. v. Virtual Photo Store LLC,</i> | |
| 20 | No. 09-2255, 2009 WL 2488003 (N.D. Cal. Aug. 13, 2009)..... | 5, 6, 11, 12 |
| 21 | <i>Teva Pharms. USA, Inc. v. Eisai Co.,</i> | |
| 22 | 620 F.3d 1341 (Fed. Cir. 2010)..... | 22 |
| 23 | <i>Times Networks, Inc. v. Nortel Networks Corp.,</i> | |
| 24 | No. 06-00532 (N.D. Cal. July 7, 2006)..... | 8 |
| 25 | <i>Trintec Indus. v. Pedre Promotional Prods.,</i> | |
| 26 | 395 F.3d 1275 (Fed. Cir. 2005)..... | 6, 18 |
| 27 | <i>U.S. Ethernet Innovations, LLC v. Acer, Inc.,</i> | |
| 28 | No. 10-3724, 2013 WL 4049572 (N.D. Cal. Aug. 7, 2013)..... | 12 |

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2
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17
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19
20
21
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23
24
25
26
27
28

VE Holding Corp. v. Johnson Gas Appliance Co.,
917 F.2d 1574 (Fed.Cir.1990)..... 18

Wilton v. Seven Falls Co.,
515 U.S. 277 (1995) 19

1 **INTRODUCTION**

2 There is only one reasonable place to conduct this litigation: California. In this action,
3 Plaintiff Google Inc. (“Google”) asks for a declaration that its Android platform and products do
4 not infringe seven patents held by Defendants Rockstar Consortium US LP and MobileStar
5 Technologies LLC (collectively, “Rockstar”). Android is designed, developed, tested, and built
6 primarily here in California—including the features Rockstar accuses of infringement, which arise
7 from work done in California. California is the locus of Rockstar’s accusations, and the logical
8 site for their resolution. Nonetheless, engaging in blatant forum-shopping, Rockstar seeks to
9 litigate its claims in the Eastern District of Texas, where it claims to have a working office, as
10 verified by a declaration signed by a Rockstar executive working at Rockstar’s office—in Canada.

11 Rockstar makes three arguments to justify moving this action from California (which holds
12 the overwhelming majority of evidence regarding Google’s alleged infringement) to Texas (which
13 holds a tiny Rockstar office established to bolster its claim of jurisdiction there). First, relying on
14 cherry-picked facts and a carefully worded declaration from its Canadian executive, Rockstar
15 argues that this Court has no personal jurisdiction. But this Court has both general and specific
16 jurisdiction over Rockstar, due at least to Rockstar’s significant and pervasive contacts with its
17 majority owner, Apple, as well as its conduct of its admitted sole business, patent licensing and
18 enforcement, throughout this State. Second, Rockstar claims priority based on its filing, on
19 October 31, 2013, of infringement actions against Android manufacturers, and its amendment of
20 one of those actions, on December 31, to add Google. But the Court can quickly dismiss both
21 Rockstar’s Halloween actions and its New Year’s Eve amendment, because Rockstar admittedly
22 sued Google only after Google brought this action, making this action the first-filed one. Finally,
23 briefly and desperately, Rockstar argues that the Eastern District of Texas is the most convenient
24 location for this action. This argument fails: the overwhelming majority of Google’s records and
25 witnesses are in Mountain View, California, and Rockstar’s records and witnesses are in Canada.

26 Rockstar’s arguments fail so completely that the Court can and should deny Rockstar’s
27 motion outright. If the Court is not inclined to do so, however, it should at a minimum order
28 jurisdictional discovery, so that the Court can decide these issues using a full record.

1 **BACKGROUND**

2 **A. Apple, Microsoft, and Other Investors Acquire Nortel’s Licensing Operation**

3 Nortel Networks (“Nortel”) was Canada’s primary telephone provider until deregulation,
4 and later became a successful manufacturer of telecommunications equipment. (Declaration of
5 Kristin J. Madigan (“Madigan Decl.”) Exs. 1-2.) Although Nortel’s headquarters was in Ottawa,
6 Canada, it had offices across the United States, including a substantial campus in Santa Clara,
7 California. (Id. Ex. 3.) On January 14, 2009, Nortel filed for bankruptcy. (Id. Ex. 4.) The
8 bankruptcy court ordered an auction of Nortel’s patent licensing operation, to occur in June 2011.
9 (Id. Ex. 5, at 2.) Nortel described the auction as “approximately 6,000 U.S. and foreign patents
10 and patent applications spanning wireless, wireless 4G, data networking, optical, voice, internet,
11 service provider, semiconductors and . . . nearly every aspect of telecommunications and
12 additional markets as well, including Internet search and social networking.” (Id. Ex. 6 ¶ 9.)
13 During this auction, five of the world’s largest technology companies—including Apple,
14 Blackberry, and Microsoft—manufactured and bankrolled an entity called “Rockstar Bidco LP,” a
15 Delaware limited partnership, which placed the winning bid of \$4.5 billion. (Id. Exs. 7-8.)
16 According to its filings with the Securities and Exchange Commission, Apple contributed
17 “approximately \$2.6 billion” to Rockstar Bidco, or 58% of that sum. (Id. Ex. 9, at 34.)

18 **B. Rockstar Sells Patents to Its Owners, and Reorganizes Itself**

19 In addition to Nortel’s patent portfolio, the auction also included Nortel’s patent licensing
20 team, led by then-Nortel executive and current Rockstar CEO John Veschi. (Id. Exs. 10-11.) As
21 Mr. Veschi explained in an interview, following the auction his team made an “immediate
22 switchover” from Nortel to Rockstar: “when the Nortel transaction closed and Rockstar became
23 the acquirer, at that point, my team and myself all came over to Rockstar.” (Id. Ex. 11.) Mr.
24 Veschi’s team of former Nortel licensing executives remains based in Nortel’s old headquarters
25 town of Ottawa, Canada, and still forms the core of Rockstar’s executive ranks. (Id. Ex. 12.)

26 Once it took control of Nortel’s licensing operation, Rockstar Bidco transferred thousands
27 of patents to its owners, which it refers to as “founding licensees.” (Id. Exs. 13-14.) Of the
28 “approximately 6,000 U.S. and foreign patents and patent applications” included in the sale (Id.

1 Ex. 6 ¶ 9), Rockstar Bidco transferred at least 1,147 U.S. patents to Apple, according to records
2 filed with the Patent & Trademark Office. (Id. Ex. 14.) Apple is headquartered in Cupertino,
3 California. (Id. Ex. 9.) Because patent owners need not record their transfers, however, this
4 number could be much higher. *Mabbett v. Tandy Corp.*, 847 F.2d 841 (Fed. Cir. 1988). Published
5 reports indicate that Rockstar Bidco transferred about 2,000 patents to its owners, leaving it with
6 4,000 remaining. (Madigan Decl. Ex. 7.) Then, in a transaction that remains murky, Rockstar
7 Bidco reorganized itself into Defendant Rockstar Consortium US LP (“Rockstar Consortium”), a
8 Delaware limited partnership. (Id. Exs. 7, 15.) Rockstar Consortium is admittedly a “patent
9 licensing business” that produces no products, but exists solely to assert its patents. (Id. Ex. 13.)
10 In the first two months following its creation, Rockstar sought licenses from as many as 100
11 companies (Id. Ex. 7), and since then has sought licenses from many more. (Id. Exs. 16-18; Dean
12 Decl. ¶¶ 18-21.) Rockstar Consortium claims its principal place of business is at Legacy Town
13 Center 1, 7160 North Dallas Parkway, Suite No. 250, Plano, Texas (Dean Decl. ¶ 5), but the
14 substantial majority of its employees, including all its senior management, are based in Ottawa,
15 Canada. (Madigan Decl. Ex. 19.) Tellingly, when pressed to provide a declaration supporting its
16 motion to dismiss or transfer this action to Texas, Rockstar could submit only a declaration from
17 the “VP of IP Licensing for Rockstar Consortium,” Afzal Dean, who admits that he “reside[s] and
18 work[s] from Rockstar’s Ottawa, Canada location.” (Dean Decl. ¶ 28.)

19 **C. Rockstar Forms MobileStar and Files Actions Against Android Makers**

20 On October 30, 2013, Rockstar formed a wholly owned subsidiary, Defendant MobileStar
21 Technologies LLC (“MobileStar”). (Madigan Decl. Ex. 20.) MobileStar, a Delaware limited
22 liability corporation, purports to have its “principal place of business” in the same office suite as
23 Rockstar Consortium. (Dean Decl. ¶¶ 5, 15.) Although Rockstar’s motion asserts that
24 “MobileStar’s Texas roots are long-standing and substantial” (Mot. at 5), again MobileStar could
25 submit only a declaration from the same Afzal Dean, who is not only a Rockstar VP but also “the
26 President of MobileStar Technologies LLC.” (Dean Decl. ¶¶ 2-3.) Mr. Dean further avers that
27 “MobileStar is based in Texas,” but identifies zero employees of MobileStar, instead listing only
28 three officers and one board member, all of whom also work for Rockstar Consortium, and all of

1 whom live and work in Canada—except for one in Colorado.¹

2 On October 31, the second day of MobileStar’s existence, Rockstar Consortium transferred
3 five of the seven patents at issue in this case to MobileStar, and apparently executed exclusive
4 licenses for the other two.² Later that same day, Rockstar filed infringement actions in the Eastern
5 District of Texas against ASUS, HTC, Huawei, LG, Pantech, Samsung, and ZTE—but, notably,
6 not Google.³ Although Rockstar did not file a complaint against Google, its seven Halloween
7 actions each alleged infringement by “certain mobile communication devices having a version (or
8 an adaption thereof) of [the] Android operating system” developed by Google.⁴ Rockstar limited
9 its allegations to products using Android, although each of the defendants to its actions also makes
10 other devices. (Madigan Decl. Ex. 21.) Indeed, even for U.S. Patent No. 5,838,551, which
11 addresses hardware and not software, Rockstar limited its assertions to devices running Google’s
12 Android, and spared all other devices.⁵ Media and industry observers immediately viewed
13 Rockstar’s Halloween actions as an attack, by Microsoft and Apple, on Android and Google.⁶

14
15
16 ¹ (Dean Decl. ¶¶ 9, 24.) Afzal Dean is a Vice President of Patent Licensing at Rockstar and
17 resides in Ottawa, Canada. (Dean Decl. ¶¶ 2-3.) Chad Hilyard is Rockstar’s Chief Intellectual
18 Property Counsel and resides in Colorado. (Id. Exs. 10, 19.) Michael Dunleavy is outside Chief
19 Corporate Counsel for Rockstar and resides in Ottawa, Canada. (Id. Exs. 10, 23.) John Veschi is
20 the Chief Executive Officer of Rockstar and resides in Ottawa, Canada. (Id. Ex. 10.)

21 ² Four of the Halloween complaints initially alleged Rockstar to be the owner of “all rights,
22 title, and interest” to three of the seven asserted patents; the others alleged Rockstar to own only
23 two. Compare Mot. Ex. D ¶ 15 with Mot. Ex. G ¶ 14. Rockstar has since amended two of these
24 complaints to state that Rockstar owns “all rights, title, and interest” as to only two of the asserted
25 patents. See, e.g., Rockstar Consortium US LP v. ZTE Corp., No.13-0901 (Dkt. No. 17 ¶ 14).

26 ³ Rockstar Consortium US LP v. ASUSTek Computer, Inc., No. 13-0894; Rockstar Consort-
27 ium US LP v. HTC Corp., No. 13-0895; Rockstar Consortium US LP v. Huawei Investment & Hol-
28 ding Co., No. 13-0896; Rockstar Consortium US LP v. LG Electronics Inc., No. 13-0898; Rock-
star Consortium US LP v. Pantech Co., No. 13-0899; Rockstar Consortium US LP v. Samsung
Electronics Co., No. 13-0900; and Rockstar Consortium US LP v. ZTE Corp., No. 13-0901.

⁴ See Mot. Ex. A ¶ 14; Ex. B ¶ 15; Ex. C ¶ 20; Ex. D ¶ 16; Ex. E ¶ 14; Ex. F ¶ 15; Ex. G ¶ 15;
Ex. H ¶¶ 25, 27.

⁵ E.g., Rockstar Consortium US LP v. ZTE Corp., No. 13-0901 (Dkt. No. 17 ¶¶ 15-16.)

⁶ “[Rockstar’s] stockpile was finally used for what pretty much everyone suspected it would
be used for—launching an all-out patent attack on Google and Android.” (Madigan Decl. Ex. 24);
“This is an all out assault on Google and the Android smartphone ecosystem and it would be fair
to say that most experts expected those patents would rear their ugly head sometime in the future.”
(Id. Ex. 25); “Some legal experts expect the lawsuits will trigger new attention to Rockstar, largely
because it gives the appearance that three leading competitors to Android are teaming up against it
. . . ‘Alarm bells have to be going off at the Justice Department . . .’” (Id. Ex. 26).

1 **D. Google Files This Action, and Rockstar Responds By Belatedly Suing Google**

2 On December 23, 2013, Google filed this action, seeking a declaration that Google’s
 3 Android platform and the Nexus 5, Nexus 7 and Nexus 10 devices do not directly or indirectly
 4 infringe any claim of any of the seven patents Rockstar asserted against others in the Halloween
 5 actions. (Dkt. No. 1.) On December 31, 2013, Rockstar responded by amending one of the
 6 Halloween actions, Rockstar v. Samsung, No. 13-0900 (E.D. Tex.), to add allegations that Google
 7 infringes three of the asserted patents: U.S. Patent Nos. 6,037,937, 6,463,131, and 6,765,591.
 8 (Mot. Ex. H ¶ 27.) Rockstar did not allege that Google infringed the other four patents at issue in
 9 the Halloween actions, U.S. Patent Nos. 5,838,551, 6,128,298, 6,333,973 and 6,937,572. (Id.)

10 **ARGUMENT**

11 **I. This Court Has Personal Jurisdiction Over Rockstar**

12 In considering a motion to dismiss for lack of personal jurisdiction, the Court must decide
 13 two related but separate questions: whether the Court can now find that it has jurisdiction and, if
 14 not, whether the Court should allow jurisdictional discovery.⁷ Under the Due Process Clause, the
 15 “constitutional touchstone” for personal jurisdiction “remains whether the defendant purposefully
 16 established ‘minimum contacts’ in the forum State.” Burger King Corp. v. Rudzewicz, 471 U.S.
 17 462, 474 (1985) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Personal
 18 jurisdiction takes two forms, general and specific, both of which exist here.

19 “General jurisdiction arises when a defendant maintains ‘continuous and systematic’
 20 contacts with the forum state even when the cause of action has no relation to those contacts.” LSI
 21 Indus. Inc. v. Hubbell Lighting, Inc., 232 F.3d 1369, 1375 (Fed. Cir. 2000). There is no “specific
 22 test to follow when analyzing whether a defendant’s activities within a state are ‘continuous and
 23 systematic.’ Instead, a court must look at the facts of each case to make such a determination.” Id.

24 _____
 25 ⁷ See, e.g., *Smugmug, Inc. v. Virtual Photo Store LLC*, No. 09-2255, 2009 WL 2488003 (N.D.
 26 Cal. Aug. 13, 2009) (denying motion to dismiss without prejudice and granting jurisdictional
 27 discovery). “The law of the Federal Circuit, rather than that of the regional circuit in which the
 28 case arose, applies to determine whether the district court properly declined to exercise personal
 jurisdiction over an out-of-state accused infringer.” *Nuance Commc ’ns, Inc. v. Abby Software
 House*, 626 F.3d 1222, 1230 (Fed. Cir. 2010).

1 “Specific jurisdiction exists where the cause of action arises out of or relates to a
2 defendant’s contacts with the forum state, even if those contacts are isolated and sporadic.”
3 ASUSTeK Computer Inc. v. AFTG-TG LLC, No. 11-0192, 2011 WL 6845791, at *5 (N.D. Cal.
4 Dec. 29, 2011) (citing *Trintec Indus. v. Pedre Promotional Prods.*, 395 F.3d 1275, 1279 (Fed. Cir.
5 2005)).⁸ The Federal Circuit applies the following three-part test to determine if specific
6 jurisdiction exists: “(1) whether the defendant ‘purposefully directed’ its activities at residents of
7 the forum; (2) whether the claim ‘arises out of or relates to’ the defendant’s activities with the
8 forum; and (3) whether assertion of personal jurisdiction is ‘reasonable and fair.’” *Inamed Corp.*
9 *v. Kuzmak*, 249 F.3d 1356, 1360-1361 (Fed. Cir. 2001). “The first two factors correspond with the
10 ‘minimum contacts’ prong of the International Shoe analysis, and the third factor corresponds
11 with the ‘fair play and substantial justice’ prong of the analysis.” *Id.*

12 Finally, although the Court should deny Rockstar’s motion, at minimum it should order
13 jurisdictional discovery. “Where a district court concludes that the existing record is insufficient
14 to support personal jurisdiction and the plaintiff demonstrates that it can supplement its jurisdic-
15 tional allegations through discovery, the plaintiff is entitled to jurisdictional discovery.” *Smugmug*,
16 2009 WL 2488003, at *2 (N.D. Cal. Aug. 13, 2009) (citing *Trintec Indus.*, 395 F.3d at 1283).

17 **A. Rockstar Cannot Escape Jurisdiction Through Its Litigation Subsidiary**

18 Rockstar’s lead argument for dismissal would, if accepted by this Court, upend the normal
19 rules of litigation by giving patentees total control over location of litigation. Rockstar argues that
20 because it formed MobileStar, a wholly owned shell company made solely for litigation, one day
21 before filing the Halloween actions, and because it gave MobileStar rights in the asserted patents
22 the same day it filed the Halloween actions, the Court cannot consider any contacts that anyone
23 else had with California, ever—because “[i]n the absence of jurisdiction as to MobileStar, this
24 action must be dismissed.” (Mot. at 1; see also *id.* at 8-9.) Rockstar’s argument would replace the

25 _____
26 ⁸ There are actually two separate inquiries: “whether a forum state’s long-arm statute permits
27 service of process, and whether the assertion of jurisdiction would be inconsistent with due
28 process.” *Electronics For Imaging, Inc. v. Coyle*, 340 F.3d 1344, 1349 (Fed. Cir. 2003). In this
case, however, the two inquiries collapse into one because “California’s long-arm statute permits
service of process to the limits of the due process clauses of the federal Constitution.” (*Id.*)

1 normal rules and allow any patentee company to make up a litigation subsidiary like MobileStar,
2 transfer patent rights to it, and use the resulting immunity-by-subsiary to bar any action about
3 the transferred patents except in the litigation subsidiary’s carefully chosen jurisdiction. That
4 would be an awfully neat trick—had the Court of Appeals not already considered and rejected it.
5 In *Dainippon Screen Manufacturing. Co., Ltd. v. CFMT, Inc.*, 142 F.3d 1266 (Fed. Cir. 1998),
6 patentee “CFM incorporated CFMT under Delaware law as a holding company for its intellectual
7 property, and “assigned all of its patents to CFMT.” *Id.* at 1267. When Dainippon Screen sued in
8 this District, CFM and CFMT made precisely the same argument Rockstar makes here:

9 Stripped to its essentials, CFM contends that a parent company can incorporate a holding
10 company in another state, transfer its patents to the holding company, arrange to have
11 those patents licensed back to itself by virtue of its complete control over the holding
12 company, and threaten its competitors with infringement without fear of being a
declaratory judgment defendant, save perhaps in the state of incorporation of the holding
company. This argument qualifies for one of our “chutzpah” awards.

13 *Id.* at 1271 (citing *Refac Int’l, Ltd. v. Lotus Dev. Corp.*, 81 F.3d 1576, 1584 (Fed. Cir. 1996);
14 *Checkpoint Sys., Inc. v. U.S. Int’l Trade Comm’n*, 54 F.3d 756, 763 n.7 (Fed. Cir. 1995)). The
15 Federal Circuit found that “a patent holding subsidiary . . . cannot fairly be used to insulate patent
16 owners from defending declaratory judgment actions in those fora where its parent company
17 operates under the patent and engages in activities sufficient to create personal jurisdiction and
18 declaratory judgment jurisdiction,” and held that the District Court “erred in holding that it lacked
19 personal jurisdiction.” *Dainippon Screen*, 142 F. 3d at 1271. Following this rule, this Court
20 should ignore Rockstar’s too-clever-by-half assertion of immunity by subsidiary, and proceed to
21 consider whether it has personal jurisdiction over Rockstar Consortium.

22 **B. Rockstar Holds Itself Out As Standing in Nortel’s Shoes**

23 This Court can and should find personal jurisdiction over Rockstar based solely on its own
24 decision, undertaken in its own interest, to hold itself out as standing in Nortel’s shoes. Nortel had
25 continuous and systematic contacts with California: it maintained its primary U.S. campus in
26 Santa Clara (Madigan Decl. Ex. 3), maintained a registered agent for service of process in
27 California (*Id.* Ex. 27), and routinely sued and was sued in California, without quibbling over
28 jurisdiction. See, e.g., *Times Networks, Inc. v. Nortel Networks Corp.*, No. 06-00532 (N.D. Cal.

1 July 7, 2006); Nortel Networks Inc. v. State Bd. of Equalization, 191 Cal. App. 4th 1259 (2011). If
2 Rockstar stands in Nortel’s shoes, then this Court has general jurisdiction over Rockstar.

3 Rockstar has consistently asserted that it does stand in Nortel’s shoes. On its website,
4 Rockstar states it is “[b]ased on Nortel Networks’ groundbreaking innovation engine,” and
5 Rockstar’s sales materials boast that “Nortel, a prolific inventor, conducted a great deal of high
6 quality research and development in the company’s 100+ year existence. The company had over
7 10,000 R&D employees and invested more than \$30 billion in R&D between 1995 and 2010.”
8 (Id. Ex. 28.) Across multiple interviews, Rockstar’s CEO John Veschi has always avoided calling
9 Rockstar a “non-practicing entity,” instead calling it a “former practicing entity.” (E.g., Id. Ex.
10 12.) But Rockstar admits it has never practiced anything, so it can be a “former practicing entity”
11 only if it is the same as Nortel. (Id.) Mr. Veschi has gone even further: in an interview
12 promoting Rockstar, he stated that, “even though the bankruptcy went through a certain path, you
13 could almost look at it as if, the IP continued, and the rest of the company was divested . . . The
14 business is exactly the same.” (Id. Ex. 11.) An article Rockstar posted on its website describes it
15 as “essentially a continuation of what was previously the Nortel licensing operation.” (Id. Ex. 22.)
16 Perhaps most significantly, in its Halloween actions against Android makers, Rockstar alleges that
17 each defendant received at least some notice of infringement from its “predecessor-in-interest,
18 Nortel Networks Ltd., or Nortel Networks Inc.” (See Mot. Ex. A ¶ 100; Ex. B ¶ 116; Ex. C ¶ 121;
19 Ex. D ¶ 117; Ex. E ¶ 105; Ex. F ¶ 117; Ex. G ¶¶ 106; Ex. H ¶ 132.) Even in this action, Rockstar
20 invokes Nortel ties: Mr. Dean avers that he is “a former employee of Nortel” and that “Rockstar
21 also inherited the Nortel law department’s Richardson office space, many of Nortel’s employees in
22 Richardson responsible for licensing activities, and historical Nortel files.” (Dean Decl. ¶¶ 4, 27.)

23 Rockstar has rested firmly on its ties to Nortel, and these ties bind. This Court does not
24 allow parties to make representations in their normal business, and then avoid jurisdiction arising
25 from those representations by saying, when sued, they are not really true. In Juniper Networks,
26 Inc. v. Juniper Media, LLC, the defendant, a Florida limited liability company, presented itself as
27 being in California: its website listed a telephone number with a 415 area code and an address in
28 Los Angeles, and it issued press releases using a San Jose address. Juniper Networks, Inc., No.

1 11-03906, 2012 WL 160248, at *2 (N.D. Cal. Jan. 17, 2012). The defendant argued that these
2 representations were mistakes and should not affect the jurisdictional analysis, but the court
3 disagreed: “[g]iven the nature of its services, defendant is undoubtedly cognizant of the
4 technology market’s concentration in California’s ‘Silicon Valley.’ Intentionally creating an aura
5 of local presence is sufficiently encouraging to residents to constitute purposeful direction.” Id. at
6 *3. This rule applies here: Rockstar was “undoubtedly cognizant” of widespread negative views
7 about non-practicing entities. Seeking to avoid those opinions, Rockstar chose to wrap itself in
8 Nortel’s mantle. Having done so, Rockstar must accept Nortel’s jurisdictional contacts as well.

9 **C. Rockstar’s Contacts With Apple Require Personal Jurisdiction**

10 Apple and Rockstar are inextricably intertwined, and Rockstar’s contacts with Apple
11 provide a separate and independent basis for both general and specific jurisdiction. In its motion,
12 Rockstar is tellingly mum on its creation, and on how it came to acquire its portfolio. Rockstar
13 repeatedly states that Nortel Networks “owned the patents in suit prior to Rockstar,” but omits any
14 mention of Rockstar Bidco, its mysterious predecessor and namesake, for which Apple provided
15 \$2.6 billion of the \$4.5 billion purchase price, or 58% of the total. (See supra at 2.) Rockstar
16 Bidco also transferred at minimum 1,147 U.S. patents to Apple, at least 1/6 of its total stock of
17 U.S. patents, and probably significantly more. (See supra at 2-3.) This transaction alone gives
18 this Court personal jurisdiction over Rockstar, which cannot hide behind its reorganization from
19 Rockstar Bidco any more than its creation of MobileStar. Like a subsidiary, a predecessor
20 company “cannot fairly be used to insulate patent owners from defending declaratory judgment
21 actions in those fora where its” predecessor, here Rockstar Bidco, “engages in activities sufficient
22 to create personal jurisdiction and declaratory judgment jurisdiction.” *Dainippon Screen*, 142 F.
23 3d at 1271. Were it otherwise, companies like Rockstar could, again, exert full control over the
24 location of litigation, simply by reorganizing after forming contacts they wished to avoid. (See
25 supra at 6-7.) Immunity by reorganization cannot exist any more than immunity by subsidiary.

26 This Court also has jurisdiction over Rockstar for another reason: Apple’s ongoing
27 ownership of Rockstar, and Rockstar’s concomitant and continuing obligations to Apple. Apple is
28 either the majority owner of Rockstar or a significant one, and Rockstar does not argue otherwise.

1 Rockstar is closely held, with only five limited partners: Apple, Microsoft, Blackberry, Ericsson,
2 and Sony. (Dean Decl. ¶ 35.) Rockstar CEO Veschi “schedules periodic calls and meetings with
3 the owners—mainly with their respective heads of intellectual property—and, he says, they work
4 well together.” (Madigan Decl. Ex. 12.) The purpose of these meetings is to show that Rockstar
5 is marshalling its owners’ patents on their behalf: “I have to show them progress and that real
6 work is being done.” (Id.) Rockstar does not run from this article, instead featuring it on its
7 website. (Id. Ex. 13.) Rockstar and its CEO thus admit that they are subject to “continuing
8 obligations” to a forum resident—Apple—sufficient to support personal jurisdiction. *Akro Corp.*
9 *v. Luker*, 45 F.3d 1541, 1546 (Fed. Cir. 1995); see also, e.g., *Elecs. For Imaging*, 340 F.3d at 1350
10 (quoting *Burger King*, 471 U.S. at 476) (jurisdiction lies where defendants “created continuing
11 obligations between [themselves] and residents of the forum—and ‘proximately result from the
12 actions by the defendant[s] themselves,’ such that it is ‘presumptively not unreasonable to require
13 [defendants] to submit to the burdens of litigation in that forum as well.’”). It does not matter that,
14 while the licensee in *Akro* was exclusive, Apple is (at least) a non-exclusive Rockstar licensee and
15 significant owner: as the Court of Appeals later explained, “[w]hat was critical was that the
16 patentee had contacts with that resident in the forum state.” *Red Wing Shoe Co., Inc. v.*
17 *Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1362 (Fed. Cir. 1998) (citing *Akro*, 45 F.3d at 1546).
18 See also *Avocent Huntsville Corp. v. Aten Int’l Co., Ltd.*, 552 F.3d 1324, 1335 (Fed. Cir. 2008)
19 (“[U]ndertakings that impose enforcement obligations on a patentee or its licensee reflect the kind
20 of ‘other activities’ that support specific personal jurisdiction in a declaratory judgment action.”).

21 Finally, Rockstar apparently holds itself out as Apple’s representative. For example, in
22 July and December 2013, Rockstar sold patents to an NPE called Spherix, and took in return at
23 least \$60 million in Spherix stock, making it the largest shareholder of Spherix. (Madigan Decl.
24 Exs. 29-30.) Anthony Hayes, CEO of Spherix, explained in an interview that “[w]e’re really
25 partners with Rockstar,” and touted Spherix stock because “Rockstar is Apple, Sony,
26 Microsoft . . . they vetted these patents.” (Id. Ex. 30.) Mr. Hayes repeated that “who you’re kind
27 of now partnering with is the biggest tech giants in the industry” and confirmed that obtaining this
28 partnership was “was really one of the big impetuses behind us doing this deal.” (Id.)

1 Apple's acquisition of more than 1/6 of Rockstar's patents, as well as Rockstar's
2 continuing obligations to Apple and its holding itself out as Apple's representative, are each
3 sufficient to provide both general and specific jurisdiction over Rockstar. Each provides general
4 jurisdiction because of its scope and importance to Rockstar, as well as specific jurisdiction
5 because Google's "cause of action arises out of or relates to a defendant's contacts with the forum
6 state," in this case, Rockstar's relationship with Apple. Rockstar's Halloween actions specifically
7 targeted Android products, even when asserting a purely hardware patent. (See supra at 4.) As
8 was widely reported at the time, the industry considered this to be an attack by Apple on Android
9 and Google. (See supra at 4 n.6.) Rockstar's litigation strategy of suing Android device makers
10 but not Google, Android's primary developer, is exactly the kind of "scare-the-customer-and-run"
11 tactic that advances the interests of its majority shareholders, including Apple. Apple's anti-
12 Android litigation campaign famously began with the publicly disclosed statements of its founder
13 to "destroy" Android by launching a "thermonuclear war." (Madigan Decl. Ex. 31.) Given this
14 context for Apple's \$2.6 billion investment in Rockstar's litigation business, it strains credulity to
15 suggest that Rockstar's goals are separate from Apple's wish to interfere with the Android
16 platform. Google's claims in this action thus relate directly to Rockstar's Apple connection.

17 The Court thus has enough information to find that Apple's ties to Rockstar provide it with
18 personal jurisdiction. Should the Court conclude otherwise, however, it should allow Google
19 jurisdictional discovery into this relationship, because Google "can supplement its jurisdictional
20 allegations through discovery." *Smugmug*, 2009 WL 2488003, at *2. Particularly around Apple,
21 Rockstar's motion raises more questions than it answers. For example, the motion states that
22 "Rockstar's shareholders do not direct or control Rockstar's licensing efforts" and instead that
23 "these activities are directed and controlled by Rockstar's management team"—but, tellingly, the
24 accompanying declaration says that Rockstar's "limited partners neither direct nor control
25 Rockstar's licensing efforts in California or anywhere else," but only that "Rockstar's
26 management directs Rockstar's licensing efforts." (Dean Decl. ¶ 35.) Mr. Dean is silent regarding
27 control, and with good reason: Rockstar is admittedly a "Delaware limited partnership" (id. ¶ 15)
28 and is therefore controlled by its general partner—about which Mr. Dean's declaration, and

1 Rockstar’s motion, say precisely nothing. See Del. Code Ann. Tit. 6, § 17-403 (“Except as
2 provided in this chapter or in the partnership agreement, a general partner of a limited partnership
3 has the rights and powers and is subject to the restrictions of a partner in a partnership that is
4 governed by the Delaware Uniform Partnership Law in effect on July 11, 1999 (6 Del. C. § 1501
5 et seq.).”). Delaware’s limited public records reveal the general partner is Rockstar Consortium
6 LLC, which has a mailing address at a New York law firm and was formed by an associate there.
7 (Madigan Decl. Exs. 32-33.) Another document shows that the President of Rockstar Consortium
8 LLC, is Kasim Alfahali, Ericsson’s Chief Intellectual Property Officer. (Id. Ex. 15.) That
9 confirms that the Rockstar partners control Rockstar through the G.P. LLC, but not how they do
10 so, or how they allocate control among themselves. Nor does any of this appear in Rockstar’s
11 motion, which deliberately elides the entity that matters most, discovery regarding which would
12 allow Google to supplement its jurisdictional allegations. Discovery into Rockstar’s relationship
13 with Apple will reveal that Apple, indeed, exerts control over Rockstar commensurate to its
14 ownership interest—unless Apple simply decided to give someone else \$2.6 billion without any
15 means to protect this massive investment. Of course that is vanishingly unlikely; the size of
16 Apple’s investment and its board members’ fiduciary obligation to protect it are, together, enough
17 to require jurisdictional discovery. See, e.g., *Smugmug*, 2009 WL 2488003, at *4 (N.D. Cal. Aug.
18 13, 2009) (granting jurisdictional discovery where patentee “Defendant admits to having
19 nonexclusive licenses with three California companies,” and the terms and extent of the licenses
20 and defendant’s enforcement activities were unknown); *U.S. Ethernet Innovations, LLC v. Acer,*
21 *Inc.*, No. 10-3724, 2013 WL 4049572, at *3 (N.D. Cal. Aug. 7, 2013) (same where the defendant
22 admitted assumption of certain past sales but there was not “presently evidence of ongoing sales”).

23 **D. Rockstar’s Licensing Business Also Gives This Court Personal Jurisdiction**

24 “Rockstar is a patent licensing business.” (Madigan Decl. Ex. 13.) Except for litigation,
25 “patent licensing and sales” comprise Rockstar’s entire business. (Id.) As Rockstar executives
26 have explained to the media, once Rockstar identifies commercially successful products, it
27 approaches the companies behind those products to seek licenses to Rockstar’s patents. (Id. Ex. 7;
28 see also Dean Decl. ¶¶ 18-21.) Rockstar has cast a broad net: as of May 2012, Rockstar

1 confirmed that it had “started negotiations with as many as 100 potential licensees,” (Madigan
2 Decl. Ex. 7) and has since sent letters to many more. (Id. Ex. 17.) Many of these letters are surely
3 to companies in California—a topic Rockstar’s motion carefully does not address.

4 And Rockstar’s business works. Rockstar admits that it receives income from licensees to
5 its portfolio but, tellingly, does not reveal what income arises from California, and does not
6 explain how much of this income it keeps and how much it returns to its owners, including Apple.
7 (Dean Decl. ¶ 25.) Instead Rockstar argues that the Court should ignore its entire business, at least
8 for general jurisdiction purposes, because “mere licensing revenue” cannot confer general
9 jurisdiction. (Mot. at 15 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. —,
10 131 S. Ct. 2846, 2856 (2011) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S.
11 408, 411 (1984)).) But these cases cannot help Rockstar. *Goodyear* involved companies that “do
12 not solicit business in North Carolina or themselves sell or ship tires to North Carolina custom-
13 ers,” and took no “affirmative action to cause tires which they had manufactured to be shipped
14 into North Carolina.” *Goodyear*, 131 S. Ct. at 2848. Although “a small percentage” of tires for
15 foreign markets, which “differ in size and construction from tires ordinarily sold in the United
16 States,” reached North Carolina, the Court did not adopt a “sprawling view of general jurisdiction”
17 under which any “seller of goods would be amenable to suit, on any claim for relief, wherever its
18 products are distributed.” *Id.* at 2856. These concerns do not apply here: Rockstar intentionally
19 solicited California companies for their California revenues—that is Rockstar’s entire business.
20 Nor can Rockstar find aid in *Helicopteros*, where the party resisting jurisdiction “never solicited
21 business,” “never had any employee,” “never recruited an employee,” and “has no shareholders”
22 in the forum state. *Helicopteros*, 466 U.S. at 411. Rockstar does all of the above in California.

23 Finally, Rockstar argues that its contacts with California, no matter how pervasive, cannot
24 give rise to general jurisdiction because they do not render it “essentially at home” in this District,
25 “comparable to a domestic enterprise.” (Mot. at 13, citing *Daimler A.G. v. Bauman, et. al.*, 571
26 U.S. —, 134 S. Ct. 746, 758 n.11 (2013).) But Rockstar’s motion confirms that, under Rockstar’s
27 preferred standard, this Court has general jurisdiction over Rockstar because Rockstar’s contacts
28 with California make it equally “at home” here as in its claimed domicile of Texas. Although

1 Rockstar’s motion baldly asserts that it “resides in Texas” (Mot. at 3) and is a “Texas enterprise”
2 (id. at 7), the declaration accompanying its motion confirms that Rockstar’s Texas presence is for
3 litigation purposes only. Mr. Dean names not a single Texas-based employee, let alone any senior
4 management. None of Rockstar’s owners reside in Texas, and its general partner is a mail drop at
5 a Midtown Manhattan law firm. (See supra at 12.) Mr. Dean’s declaration describes no business
6 whatsoever at Rockstar’s Texas office except holding meetings with prospective licensees—but
7 also confirms that Rockstar executives often hold these same meetings in other states, including in
8 California. (Dean Decl. ¶¶ 18-21.) Even Rockstar’s letters come from its Ottawa office, or from
9 San Jose, California. (Madigan Decl. Ex. 17.) If it is “essentially at home” in Texas as it
10 contends, Rockstar must also be “essentially at home” in California, where it does all the same
11 things it does in Texas—except more so, because the technology industry, Rockstar’s area of
12 focus, is concentrated here. (See infra at 15.)

13 Rockstar’s sole business is patent licensing; it directs its licensing efforts into California;
14 and it receives California revenue from those efforts. These facts are sufficient to provide this
15 Court with general jurisdiction. *JetBlue Airways Corp. v. Helferich Patent Licensing, LLC*, No.
16 12-5847, 2013 WL713929 (E.D.N.Y. Feb. 28, 2013). In *JetBlue* as here, the patentee was a non-
17 practicing entity that had no “permanent physical presence” in the forum state, but derived income
18 by notifying “those it accuses of patent infringement of the alternatives of entering a licensing
19 agreement or facing litigation.” *Id.* at *2. After the patentee sent a letter, *JetBlue* filed a declar-
20 atory action and the patentee moved to dismiss. *Id.* at *3. The court found general jurisdiction:

21 The Federal Circuit has distinguished, in the context of specific personal
22 jurisdiction, between “[a]n offer to license” and “an arms-length negotiation in
23 anticipation of a long-term continuing business relationship.” *Red Wing Shoe Co.*,
24 148 F.3d at 1361 (citing *Burger King*, 471 U.S. at 479, 105 S. Ct. 2174). But
25 where, in the context of general jurisdiction, a patentee not only offers to license
but also negotiates, enters into agreements, and derives substantial economic
benefit from companies in a forum state, it has begun a “long-term business
relationship.” These efforts “in the aggregate justify the exercise of general
jurisdiction.” *Avocent*, 552 F.3d at 1335-36 & n. 5.

26 *JetBlue*, 2013 WL713929, at *7. Rockstar is in precisely the same position as the patentee in
27 *JetBlue*. The Court should find personal jurisdiction for this reason or, in the alternative, allow
28 discovery into the full scope of Rockstar’s interactions with California. See *id.* at *8.

1 In addition to general jurisdiction, Rockstar’s licensing business provides this Court with
2 specific jurisdiction. The Federal Circuit has repeatedly held that licensing letters are purposefully
3 directed at the forum, and that a declaratory judgment action “arises out of” these letters. *Silent*
4 *Drive, Inc. v. Strong Indus., Inc.*, 326 F.3d 1194, 1202 (Fed. Cir. 2003) (citing *Red Wing Shoe,*
5 *148 F.3d at 1362*). That leaves only one question: “whether assertion of personal jurisdiction is
6 ‘reasonable and fair.’” *Inamed Corp.*, 249 F.3d at 1360-61, *supra* at 6. On this point, Rockstar
7 bears a heavy burden: “When a defendant seeks to rely on the ‘fair play and substantial justice’
8 factor to avoid the exercise of jurisdiction by a court that otherwise would have personal
9 jurisdiction over the defendant, ‘he must present a compelling case that the presence of some other
10 considerations would render jurisdiction unreasonable.’” *Id.* (quoting *Burger King*, 471 U.S. at
11 475-76). Rockstar thus bears the burden of demonstrating that jurisdiction is unreasonable here.
12 The Federal Circuit has found this “compelling case” where a patentee shows it has engaged in no
13 “‘other activities’ in addition to cease and desist letters.” *Avocent Huntsville Corp. v. Aten Int’l*
14 *Co., Ltd.*, 552 F.3d 1324, 1334 (Fed. Cir. 2008). But Rockstar has engaged in several “other
15 activities,” each precluding any finding of a “compelling case” against personal jurisdiction.

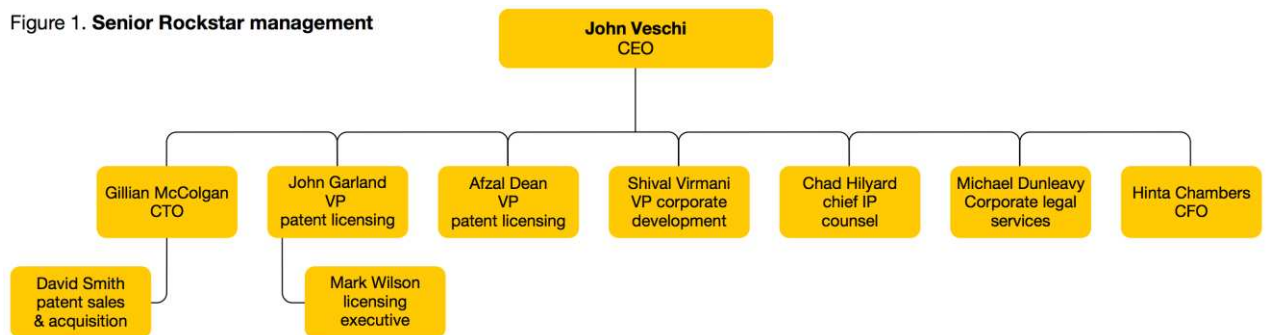
16 First, Rockstar has focused on the technology industry, which is concentrated heavily in
17 this District and this State. Rockstar has consistently warned the technology industry that “[p]retty
18 much anybody out there is infringing.” (Madigan Decl. Ex. 7.) John Veschi, Rockstar’s CEO, has
19 said that “[i]t would be hard for me to envision that there are high-tech companies out there that
20 don’t use some of the patents in our portfolio.” (*Id.*) Mr. Veschi has even publically called out
21 specific companies in California as likely infringers: “I’m definitely aware of many [Rockstar
22 patents] that ‘read on’ features that are in any social network, whether it’s Facebook [or] LinkedIn
23 or any other thing like that.” (*Id.* Ex. 16.) Of course Facebook is located in Menlo Park (*Id.* Ex.
24 34), and LinkedIn in Mountain View. (*Id.* Ex. 35.) Rockstar’s focus on technology means that
25 many of these contacts are directed toward California, whether or not they start here. *Quill Corp.*
26 *v. North Dakota*, 504 U.S. 298, 308 (1992) (“So long as a commercial actor’s efforts are
27 ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion
28 that an absence of physical contacts can defeat personal jurisdiction there.”). Given this focus on a

1 California-centric industry, “fair play and substantial justice” require Rockstar to be amenable to
2 jurisdiction in California as well.

3 Second, Rockstar’s significant and pervasive relationship with Apple, including many
4 “continuing obligations” flowing from Rockstar to Apple and Apple to Rockstar, provide more
5 than sufficient “other activities” to support jurisdiction. (See supra § I.C, at 9-12.)

6 Third, Rockstar’s use of a California licensing executive, Mark Wilson, also provides
7 sufficient “other activities.” Until Google filed this action, Mr. Wilson publicly listed himself as
8 “Licensing Consultant for Rockstar” (Madigan Decl. Ex. 36), and has sent letters for Rockstar
9 using an “ip-rockstar.com” email address, signing as “Licensing Executive, Rockstar Consortium”
10 and using a San Jose telephone number. (Id. Ex. 17.) Mr. Wilson also attended meetings as
11 Rockstar’s representative. (Id.) Rockstar’s motion and declaration seek to minimize Mr. Wilson’s
12 role, calling him a “part-time independent contractor who lives in California” with limited
13 authority. (Dean Decl. ¶ 34.) Only months earlier, Rockstar sang a different tune: an article in
14 the July/August 2013 issue of Intellectual Asset Management, evidently produced with Rockstar’s
15 cooperation, calls Mr. Wilson one of three licensing executives, and part of senior management:

16 Figure 1. Senior Rockstar management



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18
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21
22 (Madigan Decl. Ex. 12.) Rockstar evidently approved of this depiction, as it featured this article
23 prominently on its web site. (Id. Ex. 13.) After this lawsuit was initiated, Mr. Wilson removed
24 “Rockstar Consortium” from his professional profile. (Id. Ex. 37.) The Federal Circuit has upheld
25 personal jurisdiction over patentees which “retained agents in the forum state to assist in the
26 enforcement of its patent rights.” Radio Sys. Corp. v. Accession, Inc., 638 F.3d 785, 791 (Fed.
27 Cir. 2011). Whether he was an employee or an independent contractor, and whether he had
28 authority to execute agreements or merely to negotiate them, Mr. Wilson resided in California and

1 acted as Rockstar’s agent “to assist in the enforcement of its patent rights.” Id. Those facts alone
2 provide the required “other activities” in California. In addition, Rockstar concedes that it
3 conducted licensing meetings in California with ██████████, and tellingly does not say it
4 has held no other meetings in California.⁹ Rockstar has admitted that it or Nortel notified the
5 Halloween defendants of its infringement assertions; one of the LG defendants, and one of the
6 ASUS defendants, each hail from California. (Mot. Ex. A ¶ 4; Ex. D ¶ 5.) These, too, are “other
7 activities” sufficient to support personal jurisdiction.

8 Finally, Rockstar’s Halloween actions, and the enforcement campaign underlying them,
9 are directed exclusively and entirely against “mobile communication devices having a version (or
10 an adaption thereof) of [the] Android operating system” developed by Google—and therefore at
11 Google itself. (See supra at 5.) Even for the purely hardware patent it asserts, Rockstar has
12 consistently limited its claims to devices running Android software. (See supra at 4 n.5.) The
13 conclusion is inescapable and unsurprising, given Rockstar’s owners: Rockstar’s true intent is to
14 interfere with Google’s Android platform by disrupting its customer relationships. This too
15 provides grounds for personal jurisdiction. *Campbell v. Miale*, 542 F.3d 879, 887 (Fed. Cir. 2008)
16 (finding jurisdiction where the patentee “took steps to interfere with the plaintiff’s business”).

17 For all these reasons, Rockstar “‘deliberately’ has engaged in significant activities” within
18 California and “manifestly has availed [itself] of the privilege of conducting business” here,
19 making it reasonable for Rockstar to submit to the burdens of litigation in California. *Nuance*, 626
20 F.3d at 1230 (citing *Burger King Corp.*, 471 U.S. at 475-76). Should the Court disagree, however,
21 it should at minimum order jurisdictional discovery into these issues. Rockstar’s brief and
22 declaration provide a carefully curated presentation, omitting critical facts. For example, Mr.
23 Dean avers that “Including ██████████, Rockstar has met with or sent notice letters to 18
24 entities outside of California to discuss licensing of the patents-in-suit. None of these 18 entities
25 are headquartered in California.” (Dean Decl. ¶ 21.) But Rockstar does not explain what it means

26
27 ⁹ (Dean Decl. ¶ 18). Rockstar’s motion also mentioned another meeting subject to a non-
28 disclosure agreement. (Mot. at 6-8, 10, 19.) Google does not contend that this meeting alters the
Court’s jurisdictional analysis.

1 by “outside of California,” or whether those entities also have presences in California—as does,
2 for example, Samsung—that might affect this Court’s personal jurisdiction. (Id.) Similarly,
3 Rockstar spills much ink stating what it has not done (e.g., id. ¶¶ 6-8, 22-23, 29, 33) but does not
4 fully describe what it does do in California, let alone Texas or Canada. (Id.) If the Court cannot
5 now decide personal jurisdiction, jurisdictional discovery will resolve these open issues.

6 **E. Venue is Proper in This District**

7 Oddly, Rockstar also moved to dismiss this action for improper venue. (Mot. at 16.)
8 These arguments, however, collapse into Rockstar’s failed arguments regarding jurisdiction.
9 “Venue in a patent action against a corporate defendant exists wherever there is personal
10 jurisdiction.” *Trintec Indus.*, 395 F.3d at 1280 (citing *VE Holding Corp. v. Johnson Gas*
11 *Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990)). For the same reasons that this Court has
12 personal jurisdiction over Rockstar and MobileStar, venue is also proper.

13 **II. This Court is the Correct Forum for this Action**

14 **A. Google’s Suit Serves the Purposes of the Declaratory Judgment Act**

15 Rockstar argues in the alternative that the Court should decline to exercise its jurisdiction
16 over this action. (Mot. at 17.) In order to determine whether the exercise of jurisdiction under the
17 Declaratory Judgment Act is proper, the Court “must determine whether hearing the case would
18 serve the objectives for which the Declaratory Judgment Act was created.” *Capo, Inc. v. Dioptics*
19 *Med. Prods., Inc.*, 387 F.3d 1352, 1355 (Fed. Cir. 2004) (citing *EMC Corp. v. Norand Corp.*, 89
20 F.3d 807, 814 (Fed. Cir. 1996).) Where, as here, these objectives are served, “dismissal is rarely
21 proper.” (Id.) Rockstar admits that the purpose of the Act is to rescue parties from “in terrorem
22 choice between the incurrence of a growing potential liability for patent infringement and
23 abandonment of their enterprises; they could clear the air by suing for a judgment that would settle
24 the conflict of interests.” (Mot. at 17-18 (quoting *Elecs. For Imaging, Inc.*, 394 F.3d at 1346
25 (quoting *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 735 (Fed. Cir. 1988)).)
26 Precisely that happened here. When Rockstar filed the Halloween actions, for reasons of its own,
27 it declined to sue Google. But the Halloween actions explicitly target the Android platform
28 developed by Google, thus “infecting the competitive environment of the business community

1 with uncertainty and insecurity.” Elecs. for Imaging, 394 F.3d at 1346. In short, the Halloween
2 actions were precisely the type of allegations addressed by the Declaratory Judgment Act. See
3 Avocent, 552 F.3d at 1332 (“Thus, the nature of the claim in a declaratory judgment action is ‘to
4 clear the air of infringement charges.’”) (quoting Red Wing Shoe, 148 F.3d at 1360). The Federal
5 Circuit saw strikingly similar facts in Micron Tech., Inc. v. Mosaid Techs., Inc., 518 F.3d 897
6 (Fed. Cir. 2008). There, patentee Mosaid did not sue Micron, but did sue “other leading DRAM
7 manufacturers” and made “public statements” regarding “its intent to continue an aggressive
8 litigation strategy.” Id. at 901. Micron filed a declaratory action, and the next day Mosaid sued
9 Micron for infringement. Id. After this Court declined to exercise declaratory judgment
10 jurisdiction, the Federal Circuit reversed:

11 The record evidence at the time of the filing in the California district court strongly
12 suggested that MOSAID would sue Micron soon. Indeed, that suit, filed only one
13 day later, was actually pending in Texas at the time that the California district court
14 made its ruling. Thus, the parties in this dispute are really just contesting the
15 location and right to choose the forum for their inevitable suit. The Declaratory
16 Judgment Act exists precisely for situations such as this.

17 Id. at 901-02. This situation is exactly the same, except Rockstar took six days, not one, to file its
18 retaliatory case, and sued Google on only three of the seven patents in this action. Google should
19 be allowed to clear the air about all of Rockstar’s allegations against Android in this single action.

20 **B. Google, Not Rockstar, Was First to File**

21 Although Rockstar sued Google on New Year’s Eve, eight days after Google filed this
22 action, Rockstar spills substantial ink seeking dismissal because it was actually first to file. (Mot.
23 at 5, 19-24.) This is simply wrong. Under the “first-to-file rule,” district courts may decline
24 jurisdiction “when a complaint involving the same parties and issues has already been filed in
25 another district.”¹⁰ That is not true here, because Rockstar did not sue Google, choosing instead to

26 ¹⁰ Genentech, Inc. v. GlaxoSmithKline LLC, No. 10-4255, 2010 WL 4923954, at *1 (N.D.
27 Cal. Dec. 1, 2010) (quoting Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 94-95 (9th Cir.
28 1982).) Although the first-to-file rule is often called a “rule,” it is really more of a guideline,
subject to this Court’s discretion. See, e.g., Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 937-
38 (Fed. Cir. 1993), abrogated on other grounds by Wilton v. Seven Falls Co., 515 U.S. 277
(1995) (exceptions to the first-to-file rule “are not rare, and are made when justice or expediency
(footnote continued)

1 sue Google’s customers, the Android manufacturers named in the Halloween actions.
2 Acknowledging this, Rockstar argues that its Halloween actions can still count as first-filed
3 because they have “substantially the same” parties as here. (Mot. at 20-21 (citing Futurewei
4 Techs., Inc. v. Acacia Research Corp., 737 F.3d 704, 706 (Fed. Cir. 2013).) Rockstar stretches
5 “substantially” past the breaking point. In Futurewei, the “substantially similar” parties were the
6 plaintiff entities: a patent owner, its exclusive licensee, and the licensee’s wholly owned
7 subsidiary and assignee. Futurewei Techs., 737 F.3d at 705-06. Google and the Halloween
8 defendants share none of these attributes, and are not substantially the same parties. Rockstar
9 accuses them all of infringement, but if that accusation alone makes them “substantially similar,”
10 then “substantially similar” has no meaning.¹¹ And even Rockstar’s own accusations are
11 different: Rockstar asserts seven patents against the Android makers, but only three against
12 Google. (See supra at 5.)

13 Rockstar relies heavily on Proofpoint, Inc. v. InNova Patent Licensing, LLC, No. 11-2288,
14 2011 WL 4915847 (N.D. Cal. Oct. 17, 2011), which Rockstar claims applied the first-filed rule
15 across actions with different parties. (Mot. at 21.) Not so: Proofpoint found that “the first-filed
16

17 requires, as in any issue of choice of forum”); Merial Ltd. v. Cipla Ltd., 681 F.3d 1283, 1299 (Fed.
18 Cir. 2012) (finding that the rule should not be “rigidly or mechanically applied” and noting that
19 “an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to
20 the lower courts”). The Federal Circuit has cautioned district courts to look beyond categorical
21 rules in evaluating cases where the patentee and alleged infringer bring similarly timed suits:

22 [T]he district court judge faced with reaching a jurisdictional decision about a declaratory
23 judgment action with an impending infringement action either filed or on the near horizon
24 should not reach a decision based on any categorical rules. The first-filed suit rule, for
25 instance, will not always yield the most convenient and suitable forum. Therefore, the trial
26 court weighing jurisdiction additionally must consider the real underlying dispute: the
27 convenience and suitability of competing forums. In sum, the trial court must weigh the
28 factors used in a transfer analysis as for any other transfer motion.

Micron Tech., Inc., 518 F.3d at 904. Thus, although Google was first to file and deserves priority
for that reason, even if the Court finds that the rule favors Rockstar, the Court should still deny
Rockstar’s motion to dismiss or transfer because the convenience factors under § 1404(a).

¹¹ Rockstar’s remaining cases on this issue similarly fail to provide similar examples of
“substantially similar.” Pacesetter Sys., Inc., 678 F.2d at 94 (parties agreed that two actions
involved identical parties and issues); Microchip Tech., Inc. v. United Module Corp., No. 10-4241
2011 WL 2669627 (N.D. Cal. July 7, 2011) (“similar” parties were the wholly owned subsidiary
of an existing party and the patent owner); Intersearch Worldwide, Ltd. v. Intersearch Group, Inc.,
544 F. Supp. 2d 949, 958 (N.D. Cal. 2008) (all parties in the later-filed action had already
appeared in the first-filed action).

1 rule is not clearly applicable here because Proofpoint is not a party” to the earlier action, but
2 declined jurisdiction based on the “the considerable energy already invested” by the Texas court,
3 which had supervised its case for eleven months, and into claim construction. *Id.* at *7. That
4 rationale does not apply here, where no party to any of the Halloween actions has answered the
5 complaints, and the Texas court has yet to set a scheduling conference.

6 Finally, even if Rockstar’s action was first filed (which it was not), the first-to-file rule
7 would not apply. As Rockstar acknowledges, the defendants to the Halloween actions are
8 customers and partners of Google who use the Android platform in their devices. “[A]n exception
9 to the first-filed rule has developed in patent litigation where the earlier action is an infringement
10 suit against a mere customer and the later suit is a declaratory judgment action brought by the
11 manufacturer of the accused devices.” *Codex Corp. v. Milgo Elec. Corp.*, 553 F.2d 735, 738 (1st
12 Cir. 1977); see also, e.g., *Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1464 (Fed. Cir. 1990). “At the
13 root of the preference for a manufacturer’s declaratory judgment action is the recognition that, in
14 reality, the manufacturer is the true defendant in the customer suit.” *Codex*, 553 F.2d at 738.
15 Rockstar’s own complaints confirm this, restricting its allegations to “mobile communication
16 devices having a version (or an adaption thereof) of [the] Android operating system” developed by
17 Google. (See *supra* at 4.) Google is the true target of Rockstar’s allegations.

18 **C. Rockstar, Not Google, is Forum Shopping**

19 Rockstar next asserts that, because Google brought claims in the court nearest its
20 headquarters—this Court—it is somehow engaging in nefarious forum shopping. (Mot. at 18-19.)
21 This argument is disingenuous at best, because Rockstar’s presence in Texas is purely for
22 litigation, and has nothing to do with its actual business. (See *supra* at 3-4.) The evidence and
23 witnesses regarding Google’s alleged infringement are overwhelmingly in California. (See *infra*
24 at 23.) The only party to this action that is forum-shopping is Rockstar.¹² Rockstar argues that

26 ¹² Rockstar cites to only a single case, *Catalyst Assets LLC v. Life Techs. Corp.*, No. 11-3537,
27 2012 WL 2289728 (N.D. Cal. June 18, 2012). There, the question before the Court was whether
28 to grant a motion for voluntary dismissal of a patent infringement suit that the Court had already
stayed and administratively closed pending reexamination proceedings. *Id.* at *1. The Court
(footnote continued)

1 Google should have intervened in its Halloween actions, but if Rockstar had wished to include
2 Google in those actions, it could have included Google. Having declined to do so, Rockstar
3 cannot complain that Google has brought its claims in a much more convenient forum.

4 **D. Proceeding With This Action Will Prevent Duplicative Litigation**

5 Rockstar briefly argues that this Court should decline to hear this action because Rockstar
6 later sued Google, and also because Rockstar previously sued the Android manufacturers. This
7 argument fails for several reasons. Rockstar was not first to file against Google, and the customer-
8 suit exception overrides the first-to-file analysis. (See *supra* at 19-21.) In addition, the Federal
9 Circuit has confirmed that courts confronting competing actions must not simply defer to the one
10 with the earlier date, but must “consider the real underlying dispute: the convenience and
11 suitability of competing forums. In sum, the trial court must weigh the factors used in a transfer
12 analysis as for any other transfer motion.” *Micron Tech., Inc.*, 518 F.3d at 904. This Court, not
13 the Eastern District of Texas, easily prevails under those factors. Seeking to avoid this result,
14 Rockstar makes an unsupported leap: proceeding from the idea that only one court should hear all
15 the actions relating to these patents, Rockstar simply assumes it should be Texas, its preferred
16 forum, rather than this Court. But *Micron* does not allow the Court to make such an assumption,
17 and this Court, not Texas, would prevail under *Micron*.¹³

18 **E. This District is the Appropriate Venue for This Action**

19 The Court should also deny Rockstar’s motion to transfer this action under 28 U.S.C.

20 _____
21 dismissed the entire action, including the declaratory judgment counterclaims, and noted in dicta
22 that courts should discourage forum shopping—after concluding that no forum shopping had
23 occurred in that case. *Id.* at *2-3. *Catalyst Assets* thus has no bearing here, except as an
24 exhortation to behave well. Rockstar does not address *Akro*, 45 F.3d at 1549, which confirmed, in
25 ruling on a declaratory judgment action, “[t]hat it is to plaintiff’s advantage to adjudicate the
26 dispute in the district court that it has chosen does not militate against its right to have access to
27 that court.” *Id.* *Akro* further noted that the plaintiff’s home forum “has a manifest interest in
28 providing its residents with a convenient forum for redressing injuries inflicted by out-of-state
actors,” including “restraint of its production of goods” by a patent infringement suit. *Id.*
¹³ Rockstar cites cases that do it no service, or actually support Google. *Teva Pharms. USA, Inc. v. Eisai Co.*, 620 F.3d 1341, 1349 (Fed. Cir. 2010), held that the district court abused its discretion where it declined to exercise declaratory judgment jurisdiction. In *Kyocera Commc’ns, Inc. v. ESS Techs. Int’l, Inc.*, No. 12-01195 2012 WL 2501119, at *3 (N.D. Cal. June 27, 2012), unlike this case, the declaratory judgment plaintiff had already sought “the same declaratory judgments of non-infringement and invalidity” in an earlier-filed case.

1 § 1404(a). (Mot. at 22-24.) Rockstar addresses the four convenience factors discussed by Micron,
2 but ignores several other factors. *Reflex Packaging, Inc. v. Audio Video Color Corp.*, Case No.
3 13-03307, 2013 WL 5568345, at *2 (N.D. Cal. Oct. 9, 2013). The factors addressed by Rockstar,
4 as well as the remaining convenience factors, support keeping this action before this Court.

5 **1. Convenience and Availability of Witnesses Favors This District**

6 Convenience of witnesses is “probably the single most important factor” in the relevant
7 analysis. *In re Genentech, Inc.*, 566 F.3d 1338, 1343 (Fed. Cir. 2009). The majority of witnesses
8 are located in the Northern District. (Declaration of Abeer Dubey (“Dubey Decl.”) ¶¶ 3-8.) Most
9 employees involved in the design and development of the accused Android features are located at
10 Google’s headquarters in Mountain View, California. (*Id.* ¶ 6.) If the case were transferred to the
11 Eastern District, these witnesses “would be forced to travel more than 1,500 miles to attend trial.”
12 *Ingeniador, LLC v. Adobe Sys. Inc.*, No. 12-00805, 2014 WL 105106, at *3 (E.D. Tex. Jan. 10,
13 2014) (granting transfer to this Court where “most witnesses will likely come from California”).
14 Rockstar tepidly argues that “majority of the inventors of the patents-in-suit are listed on the
15 patents as being from Canada,” but does not say where those witnesses are now, years later. (Mot.
16 at 22.) In any event, from much of Canada air travel is more convenient to the Bay Area than it is
17 to Marshall, Texas. Rockstar further argues that it is located in Texas, but cannot assert that any
18 relevant witnesses reside there, making this location irrelevant. (Mot. at 22.) Rockstar’s primary
19 operations and headquarters are in Canada; its only employees in the Eastern District appear to be
20 legal staff. A venue is not convenient for transfer where it “is convenient only for [plaintiff]’s
21 litigation counsel.” *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010).

22 **2. This Court Has Jurisdiction Over All Parties to the Halloween Actions**

23 Without citation to a single authority, Rockstar argues that this Court does not have
24 jurisdiction over Google’s “customers who are defendants in the Texas Actions,” which Rockstar
25 asserts are “indispensable parties to this litigation.” (Mot. at 23.) Rockstar does not support the
26 second proposition, and those parties are not necessary to resolution of claims between Rockstar
27 and Google—but, in any event, Rockstar itself contends that this Court has jurisdiction. In its
28 Halloween complaints, Rockstar asserts jurisdiction over all defendants based on their placing

1 “one or more [allegedly] infringing products and/or services, as described below, into the stream
2 of commerce with the expectation that they will be purchased and used by consumers in the
3 Eastern District of Texas.” (See Mot. Ex. A ¶ 7; Ex. B ¶ 7; Ex. C ¶ 12; Ex. D ¶ 8; Ex. E ¶ 7; Ex. F
4 ¶ 8; Ex. G ¶ 8; Ex. H ¶¶ 16-17.) Those products are equally available in California, and if selling
5 products nationwide is enough for jurisdiction in Texas, it is enough for jurisdiction here.

6 **3. The Halloween Actions Should Be Stayed or Consolidated Here**

7 Rockstar argues that this action should be “consolidated” with its Halloween actions—but,
8 again, provides no support beyond its own ipse dixit. (Mot. at 23.) But the Court must consider
9 where this action should best occur, *Micron Tech., Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 904
10 (Fed. Cir. 2008), and that is here, not in Texas. The correct resolution of all issues would be to
11 stay or transfer the Halloween actions into this one. E.g., *Elecs. For Imaging, Inc.*, 340 F.3d at
12 1352 (finding that a pending patent infringement case in Nevada “can be consolidated with the
13 current action,” a declaratory judgment action in the Northern District of California.) This factor
14 therefore favors this district, which has already set a case management conference, and where the
15 parties will commence discussions under Fed. R. Civ. P. 26(f) in the coming weeks.

16 **4. The Interests of Justice Strongly Favor This District**

17 This Court has a much greater interest in this case than the Eastern District of Texas.
18 Rockstar’s litigation campaign has placed a cloud on Google’s Android platform, and threatened
19 Google’s business and relationships with its customers and partners, as well as its sales of Nexus-
20 branded Android devices. The Android platform is overwhelmingly designed, developed, and
21 maintained by Google in this District. (Dubey Decl. ¶¶ 3-9.) “The Northern District of California
22 has an interest in protecting intellectual property rights that stem from research and development
23 in Silicon Valley.” *Affinity Labs of Texas v. Samsung Elecs. Co., Ltd.*, No. 12-CV-557, 2013 WL
24 5508122, at *3 (E.D. Tex. Sept. 18, 2013). The claims in this action “call[] into question the work
25 and reputation of several individuals residing in or near that district and who presumably conduct
26 business in that community.” *In re Hoffman-La Roche*, 587 F. 3d 1333, 1336 (Fed. Cir. 2009). In
27 contrast, Rockstar’s contacts with the Eastern District of Texas could hardly be more minimal.
28 (See *supra* at 3-4.) Rockstar’s mere designation of Texas as its principal place of business does

1 not establish an interest in Texas. *Hertz Corp. v. Friend*, 559 U.S. 77, 97 (2010).

2 Rockstar proceeds from the “fallacious assumption” that courts “must honor connections to
3 a preferred forum made in anticipation of litigation.” *In re Microsoft*, 630 F.3d 1361, 1364-65
4 (Fed. Cir. 2011) (dismissing litigation-driven incorporation “under the laws of Texas sixteen days
5 before filing suit”); *In re Zimmer Holdings, Inc.*, 609 F.3d at 1381 (rejecting connections to Texas
6 as “recent, ephemeral, and an artifact of litigation”); *In re Hoffman-La Roche*, 587 F.3d at 1337
7 (transfer of documents to Texas should not affect venue as their location was a “fiction which
8 appears to have been created to manipulate the propriety of venue”). Rockstar’s litigation-driven
9 location aside, the citizens of the Eastern District have no more or less of a meaningful connection
10 to this case than any other venue, as the allegedly infringing devices are sold throughout the
11 United States. *In re TS Tech USA Corp.*, 551 F.3d 1315, 1321 (Fed. Cir. 2008).

12 **5. The Remaining Factors All Favor This District**

13 Rockstar does not address the remaining transfer factors, including plaintiff’s choice of
14 forum, convenience of the parties, ease of access to the evidence, familiarity of each forum with
15 the applicable law, local interest in the controversy, and the relative court congestion and time to
16 trial in each forum. These factors favor this Court. Google, plaintiff here, chose its home forum;
17 this District is far more convenient for both Google (based here) and Rockstar (based in Canada).
18 The vast majority of evidence is in this District. Both Courts are equally familiar with patent law.
19 Local interest in the controversy is paramount here, and minimal in the Eastern District.
20 Congestion is neutral and, although both cases are at early stages, this action is more advanced.

21 **CONCLUSION**

22 For all of the foregoing reasons, this Court should deny Rockstar’s motion to dismiss or
23 transfer. To the extent the Court is unable to decide either motion, it should allow jurisdictional
24 discovery, so that it can decide these questions on a full and complete record.

25 DATED: February 6, 2014

Respectfully submitted,

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