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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

VIPER NETWORKS, INC.,  
Plaintiff,  
v.  
RATES TECHNOLOGY INC.,  
Defendant.  
\_\_\_\_\_  
AND RELATED COUNTERCLAIMS.  
\_\_\_\_\_

Civil No. 09cv768 L(RBB)  
**ORDER GRANTING MOTION TO  
TRANSFER VENUE [doc. #15];  
DENYING MOTIONS FOR  
SUMMARY JUDGMENT [doc. #42];  
and FOR SANCTIONS [doc. #43]**

Defendant Rates Technology Inc.’s (“RTI” or “defendant”) moves for change of venue, for summary judgment and for sanctions under Rule 11. [doc. #15, 42, 43] The motions have been fully briefed and are considered without oral argument.

**1. Background**

Plaintiff Viper Networks, Inc. (“Viper”) a Nevada corporation, filed this action against RTI seeking a declaratory judgment that Viper’s technology does not infringe the RTI patents and that the patents are invalid. The two patents at issue relate to the routing of telephone calls. See United States Patent Nos. 5,425,085 and 5,519,769. RTI filed an amended answer and counterclaims alleging patent infringement by Viper with respect to both patents.

On April 24, 2009, RTI filed an action in the United States District Court for the Southern

1 District of New York, *Rates Technology Inc. v. Viper International, LLC.*, 1:09-cv-4068-LTS.  
2 Viper Networks, the plaintiff here, and Viper International, LLC are affiliated but are separate  
3 legal entities. The allegations in RTI's complaint involve the same patents and are based on the  
4 "same or very similar conduct and activity on the part of" the Viper as those alleged here.  
5 (Complaint at 7, ¶ 9.)

6 Because of the nature of the complaints filed in separate venues and convenience factors,  
7 RTI seeks transfer of the present case to the Southern District of New York. Viper opposes the  
8 motion.

## 9 **2. Motion for Change of Venue under 28 U.S.C. § 1404(a)**

10 Section 1404(a) of Title 28 of the United States Code provides that even when venue is  
11 proper, the court has discretion to transfer an action "[f]or the convenience of parties and  
12 witnesses, in the interest of justice, . . . to any other district or division where it might have been  
13 brought." 28 U.S.C. § 1404(a). The purpose of this section is to "prevent the waste 'of time,  
14 energy and money' and to 'protect litigants, witnesses and the public against unnecessary  
15 inconvenience and expense.'" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (*quoting*  
16 *Continental Grain Co. v. Barge F.B.L.-585*, 364 U.S. 19, 26-27 (1960)). The party requesting  
17 the transfer bears the burden of showing that the balance of conveniences weighs heavily in  
18 favor of the transfer in order to overcome the strong presumption in favor of the plaintiff's  
19 choice of forum. *Piper Aircraft v. Reyno*, 454 U.S. 235, 255-56 (1981); *Decker Coal Co. v.*  
20 *Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

21 To support a motion to transfer under § 1404(a), the moving party must first show the  
22 proposed transferee court possesses subject matter jurisdiction over the action, the parties would  
23 be subject to personal jurisdiction in the transferee court, and venue would have been proper in  
24 the transferee court. *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960); *A.J. Indus., Inc. v. United*  
25 *States Dist. Ct. for the Cent. Dist. of Cal.*, 503 F.2d 384, 386 (9th Cir. 1974). If this threshold  
26 requirement is established, the Court next looks at whether the convenience of parties and  
27 witnesses, and the interests of justice favor transfer. 28 U.S.C. § 1404(a). In the Ninth Circuit,  
28 courts weigh several considerations when determining whether transfer is appropriate: (1)

1 plaintiff's choice of forum; (2) convenience of the parties; (3) convenience of the witnesses and  
2 availability of compulsory process; (4) ease of access to the evidence; (5) feasibility of  
3 consolidation of other claims; (6) familiarity of each forum with the applicable law; (7) any local  
4 interest in the controversy; and (8) the relative court congestion and time to trial in each forum.  
5 *Decker Coal*, 805 F.2d at 843; *see Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th  
6 Cir.), *cert. denied*, 531 U.S. 928 (2000).

7 RTI asserts, and Viper does not dispute, that the United States District Court for the  
8 Southern District of New York possesses subject matter jurisdiction, Viper would be subject to  
9 personal jurisdiction in the transferee court, and venue would be proper in the Southern District  
10 of New York.

#### 11 **A. Convenience of the Parties and Witnesses**

12 “The general rule is that a plaintiff's choice of forum is afforded substantial weight.”  
13 *Williams v. Bowman*, 157 F. Supp.2d 1103, 1106 (N.D. Cal. 2001). “In judging the weight to be  
14 accorded [plaintiff]'s choice of forum, consideration must be given to the extent of both  
15 [plaintiff]'s and the [defendants]' contacts with the forum, including those relating to [plaintiff]' s  
16 cause of action. If the operative facts have not occurred within the forum and the forum has no  
17 interest in the parties or subject matter, [plaintiff]'s choice is entitled to only minimal  
18 consideration.” *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir.1987) (citation omitted).

19 In the present case, plaintiff indicates it is a Nevada corporation with Michigan as its  
20 principal place of business; RTI is incorporated in Delaware and has its principal place of  
21 business in New York. (Complaint at 1. ¶¶ 1, 2.) Initially plaintiff contends venue is proper in  
22 this district because “RTI resides in this District” but fails to provide any discussion as to the  
23 factual basis of this statement. *Id.* at 1-2, ¶ 11 (citing 28 U.S.C. §§ 1391(b) & (c) and 1400.) In  
24 opposition to RTI's motion to transfer venue, Viper shifts its argument and states that it “has  
25 significant and primary contacts in the San Diego area.” (Opp. at 2.) Those contacts are:  
26 Viper's Chairman resides and works in the San Diego area; Viper's CEO, who is a resident of  
27 Saudi Arabia, “splits his time between working in San Diego, Saudi Arabia and Michigan;” and  
28 its “outside accounting firm and corporate counsel . . . maintain offices solely in San Diego.” *Id.*

1 It is undisputed that Viper does not have an office in San Diego. Viper is silent as to the  
2 location of its equipment that performs the internet telephone services it provides to its  
3 customers which suggests San Diego is not that location. Further, the amount of time spent by  
4 and the location where Viper's CEO works in San Diego is undisclosed. The Court notes, the  
5 location of outside counsel and/or accountants is of no import to a determination of the  
6 convenience and appropriateness of a particular forum. Given this situation, it is not reasonable  
7 to find that Viper has any significant connection to San Diego. Further, no facts have been set  
8 forth that indicate RTI has alleged infringement of its patents by Viper specifically in San Diego.  
9 The subject matter of the litigation therefore is not substantially connected to this forum. Thus,  
10 there is no showing that San Diego has an interest in the parties or the subject matter of the  
11 patents-at-issue other than the general interest in patented products being protected from  
12 infringement. Accordingly, no particular interest is served by the selection of this particular  
13 forum.

14 The Court finds that plaintiff's selection of this forum is entitled to only minimal weight  
15 and the convenience of the parties weighs in favor of transfer of this action to the Southern  
16 District of New York.

17 **B. Location of Witnesses and Documentary Evidence**

18 Litigation in the Southern District of California would not be more convenient for either  
19 party in this case. As noted above, plaintiff is a Nevada corporation with Michigan as its  
20 principal place of business, and RTI is incorporated in Delaware and has its principal place of  
21 business in New York. RTI specifically states that it has "no offices, subsidiaries, divisions,  
22 officers, directors, or employees located within the state of California, or outside the state of  
23 New York." (Motion Memo. of Ps&As at 5 (citing Weinberger Decl., ¶ 4.))

24 Although Viper contends that its Chairman resides and works in the San Diego area and  
25 its CEO, a resident of Saudi Arabia, "splits his time between working in San Diego, Saudi  
26 Arabia and Michigan;" no other witnesses appear to be located within this judicial district.

27 Litigation in the Southern District of New York would be more convenient, however,  
28 because there is a related case pending within that district. Viper does not dispute that many of

1 the witnesses from the currently pending New York case will be required to appear in that  
2 venue. in New York and that many witnesses in this case are found in New York. *See*  
3 *Alexander v. Franklin Res., Inc.*, 2007 WL 518859, \*3 (N.D. Cal., Feb.14, 2007) (“With respect  
4 to the convenience of the parties, appearing in a single district is more convenient than appearing  
5 in two different districts on opposite coasts of the country.”). *Jolly v. Purdue Pharma L.P.*, 2005  
6 WL 2439197, \*2 (S.D. Cal., Sept.28, 2005) (“[G]iven the probable overlap between the  
7 witnesses called in Plaintiff’s case and the witnesses called in the sixty-six other cases currently  
8 pending against Purdue in the Southern District of New York, the convenience of the witnesses  
9 and of the parties would be better served if all cases were within one district, as opposed to  
10 scattered throughout the United States.”).

11 RTI notes that its documents and patent files are in New York and Viper has not  
12 identified where any of its relevant documents are located. The Court must conclude that  
13 relevant documents are not located in this district.

14 The convenience of witnesses and access to evidentiary materials weighs in favor of  
15 transfer to the Southern District of New York.

### 16 **C. Interest of Justice**

17 “The question of which forum will better serve the interest of justice is of predominant  
18 importance on the question of transfer, and the factors involving convenience of parties and  
19 witnesses are in fact subordinate.” *Madani v. Shell Oil Co.*, 2008 WL 268986, \*2 (N.D. Cal.,  
20 Jan.30, 2008) (quotation omitted); *see also Mussetter Distrib., Inc. v. DBI Beverage Inc.*, 2009  
21 WL 1992356, \*6 (E.D. Cal., July 8, 2009); *Amazon.com v. Cendant Corp.*, 404 F. Supp.2d 1256,  
22 1261 (W.D. Wash.2005).

23 “An important consideration in determining whether the interests of justice dictate a  
24 transfer of venue is the pendency of a related case in the transferee forum.” *Madani*, 2008 WL  
25 268986, \*2); *Bratton v. Schering-Plough Corp.*, 2007 WL 2023482, \*5 (D. Ariz., July 12, 2007)  
26 (“In general, cases should be transferred to districts where related actions are pending.”). “The  
27 feasibility of consolidation is a significant factor in a transfer decision, although even the  
28 pendency of an action in another district is important because of the positive effects it might

1 have in possible consolidation of discovery and convenience to witnesses and parties.” *A.J.*  
2 *Indus., Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 503 F.2d 384, 386-87 (9th Cir. 1974)  
3 (citations omitted). “In addition to the possible consolidation of discovery and the conservation  
4 of time, energy and money, centralizing the adjudication of similar cases will also avoid the  
5 possibility of inconsistent judgments.” *Mussetter Distrib.*, 2009 WL 1992356, \*5; *see also Jolly*,  
6 2005 WL 2439197,\*2 (“Litigation of related claims in the same tribunal is strongly favored  
7 because it facilitates efficient, economical and expeditious pre-trial proceedings and discovery  
8 and avoids duplic[ative] litigation and inconsistent results.”); *Argonaut Ins. Co. v. MacArthur*  
9 *Co.*, 2002 WL 145400, \*4 (N.D. Cal., Jan.18, 2002) (“The best way to ensure consistency is to  
10 prevent related issues from being litigated in two separate venues.”).

11 Here, it is undisputed that a related case is currently pending in the United States District  
12 Court for the Southern District of New York, 1:09-cv-4068-LTS. The New York case involves  
13 alleged infringement of RTI’s two patents by Viper International, LLC rather than Viper  
14 Networks; however, RTI states and Viper does not dispute, the two companies “market and sell  
15 substantially the same internet telephone services performed on what is believed to be the same  
16 equipment.” (Motion Ps&As at 17.) The Court finds that the transfer of this action to the  
17 Southern District of New York would serve the interest of justice due to the possible  
18 consolidation of discovery and the conservation of time, energy and money, and the avoidance  
19 of the possibility of inconsistent judgments.

#### 20 **D. Conclusion**

21 Because the purpose of § 1404(a) is to "prevent the waste of time, energy, and money and  
22 to protect litigants, witnesses and the public against unnecessary inconvenience and expense,"  
23 *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964), the Court concludes that this purpose would be  
24 served best by transferring this action to the United States District Court for the Southern  
25 District of New York

### 26 **3. Motion for Summary Judgment**

27 RTI moves for summary judgment contending that Viper, a Nevada corporation, does not  
28 have the legal capacity to prosecute this action in California because it was dissolved in Nevada.

1 Viper argues, however, that it was never dissolved in Nevada. Instead, Viper was merely in  
2 default because it did not file a form disclosing its corporate officers from January 31, 2009 until  
3 July 22, 2009.

4 Federal Rule of Civil Procedure 56 empowers the court to enter summary judgment on  
5 factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327  
6 (1986). Summary judgment is appropriate “if the pleadings, depositions, answers to  
7 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
8 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter  
9 of law.” FED. R. CIV. P. 56(c). A fact is material when, under the substantive governing law, it  
10 affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986);  
11 *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

12 Because it is a Nevada corporation, Nevada laws determine the capacity of Viper to sue  
13 or defend in federal court. *See* FED. R. CIV. P. 17(b)(2) (“Capacity to sue or be sued is  
14 determined as follows: . . . (2) for a corporation, by the law under which it was organized.”) A  
15 defaulted corporation in Nevada may sue and be sued in any court of law for up to one year after  
16 the corporation enters default status. After one year, if the corporation fails to make the required  
17 filing, the corporation’s charter is revoked. N.R.S. §§ 78.060(2); 78.175(2).

18 Here, it is undisputed that Viper cured its default status with the Nevada Secretary of  
19 State on July 22, 2009 and is an active corporation under Nevada law.

20 RTI also argues that Viper lacks the capacity to sue or be sued in California for non-  
21 payment of the Franchise Tax. On July 30, 2009, the California Franchise Tax Board issued a  
22 Certificate of Rivivor confirming Viper’s good standing as an active foreign corporation.

23 Viper has come forward with admissible evidence demonstrating that it may sue and be  
24 sued in this court. Based on the foregoing, the Court denies RTI’s motion for summary  
25 judgment.

#### 26 **4. Motion for Rule 11 Sanctions**

27 RTI also moves for Rule 11 sanctions contending that the complaint Viper and its  
28 attorney filed is “replete with false statements.” (Motion at 9.) The allegations found in the

1 complaint that RTI characterizes as false attack statements concerning the invalidity of the  
2 patents or non-infringement by Viper. Finding such statements false for purposes of Rule 11 is  
3 premature and unwarranted given the state of the record in this case. RTI mere assertions that  
4 Viper's statements are false do not make the statements false particularly when viewed in the  
5 context of Rule 11 sanctions directed to the complaint.

6 Accordingly, the Court denies RTI's motion for Rule 11 sanctions.

7 **5. Conclusion**

8 Based on the foregoing, **IT IS ORDERED:**

9 1. Defendant RTI's motion to transfer venue to the United States District Court for  
10 the Southern District of New York is **GRANTED**;

11 2. RTI's motion for summary judgment is **DENIED**;

12 3. RTI's motion for Rule 11 sanctions is **DENIED**; and

13 4. The Clerk of the Court is directed to **TRANSFER** the above-captioned case to the  
14 Southern District of New York forthwith. Upon transfer, this action shall be closed.

15 **IT IS SO ORDERED.**

16 DATED: November 23, 2009

17   
18 M. James Lorenz  
United States District Court Judge

19 COPY TO:

20 HON. RUBEN B. BROOKS  
21 UNITED STATES MAGISTRATE JUDGE

22 ALL PARTIES/COUNSEL  
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