Wireless Recognition Technologies LLC v. A9.com, Inc. et al Doc. 73

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

WIRELESS RECOGNITION TECHNOLOGIES LLC,	)	
	)	**CIVIL NO. 2:10-CV-00364-TJW-CE**
Plaintiff,	)	
	)	
vs.	)	
	)	
A9.COM, INC., AMAZON.COM, INC., GOOGLE INC., NOKIA, INC., and RICOH INNOVATIONS, INC.,	)	
	)	
Defendants.	)	
	)	

REPLY OF DEFENDANTS A9.COM, INC., AMAZON.COM, INC., GOOGLE INC., NOKIA INC., AND RICOH INNOVATIONS, INC. IN SUPPORT OF THEIR MOTION TO TRANSFER TO THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA PURSUANT TO 28 U.S.C. § 1404(a)

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 1

A. Given The Complete Absence Of Witnesses And Evidence In The Eastern District Of Texas, The Private Interest Factors Show That The Northern District Of California Is Clearly More Convenient 1

1. WRT Has Failed To Identify Any Sources Of Proof Located Within The Eastern District Of Texas 1

2. WRT Has Failed To Identify A Single Witness That Would Be Within The Compulsory Power Of The Eastern District Of Texas 5

3. Northern California Is More Convenient For Third-Party And Party Witnesses 6

4. Trial In Northern California Will Be Easier, More Expeditious, And Less Expensive 8

B. WRT Failed To Rebut That Public Interest Factors Also Weigh In Favor Of Transferring The Case To The Northern District Of California 8

1. It Is Undisputed That The Average Time To Trial In The Northern District Of California Is Less Than The Time To Trial For This Case In The Eastern District Of Texas 9

2. Given That WRT Fails To Identify Any Local Interests In The Eastern District Of Texas, The Local Interests In The Northern District Of California Weigh In Favor Of Transfer 9

III. CONCLUSION 10

I. INTRODUCTION

In their opening brief and supporting declarations, Defendants identify specific witnesses and evidence located in the Northern District of California that relate to each of the Defendants and each of the accused products in this case. Those witnesses and evidence render that district a clearly more convenient venue for this litigation. In opposition to Defendants' motion, WRT fails to identify a single relevant witness or piece of evidence in the Eastern District of Texas. Because there is no material connection between this litigation and the Eastern District of Texas, WRT resorts to misdirection and arguments that have been rejected by this Court, the Fifth Circuit, and the Federal Circuit. In doing so, WRT fails to rebut Defendants' showing that the Northern District of California is a clearly more convenient venue, and therefore this case should be transferred.

II. ARGUMENT

WRT does not dispute that the threshold question for a motion to transfer – whether the claims in the complaint could have been brought in the requested transferee district – is satisfied. Thus, the Court must consider both the private and public interest factors to determine whether the Northern District of California would be a clearly more convenient venue. In light of the evidence offered by Defendants regarding witnesses and evidence in the Northern District of California, coupled with WRT's failure to identify a *single* witness or piece of evidence in the Eastern District of Texas, Defendants have satisfied their burden to demonstrate that this case should be transferred.

A. Given The Complete Absence Of Witnesses And Evidence In The Eastern District Of Texas, The Private Interest Factors Show That The Northern District Of California Is Clearly More Convenient

1. WRT Has Failed To Identify Any Sources Of Proof Located Within The Eastern District Of Texas

Defendants submitted evidence that relevant documents and source code relating to each of the accused products are located in the Northern District of California. (*See* Ex. B at ¶ 7; Ex.

C at ¶ 7; Ex. D at ¶¶ 7-8; Ex. E at ¶¶ 7-9; Ex. F at ¶ 6.)[1] In stark contrast, WRT fails to identify a single piece of relevant evidence located in the Eastern District of Texas. As discussed in more detail below, Defendants also identified numerous witnesses in the Northern District of California who are likely to be sources for relevant documents. Once again, in contrast, WRT fails to identify a single relevant witness in the Eastern District of Texas.

Unable to identify any relevant evidence located in this district, WRT resorts to untenable arguments. First, WRT argues that technological advances have lightened any inconveniences for the Defendants in transporting documents to the Eastern District of Texas. (Opp. Br. at p. 4.) This argument has been rejected by the Court of Appeals for the Fifth Circuit. *In re Volkswagen of America, Inc.*, 545 F.3d 201 (5th Cir. 2008) (the fact "that access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous").

WRT next argues that it has not had the opportunity to take any discovery. (Opp. Br. at p. 4.) That is false. WRT has had the opportunity to conduct discovery (*see* Fed. R. Civ. P. 26(d)(1)), but has chosen not to do so. WRT also tries to minimize the influence of this Court's decision in *Optimum Power Solutions LLC v. Apple, Inc.*, claiming that the *Optimum* defendants had served their initial disclosures, which enabled the Court to "make a meaningful evaluation of which persons bear relevant knowledge . . ." (Opp. Br. at pp. 4-5.) Here, Defendants submitted sworn declarations that identified the relevant witnesses and evidence located in the Northern District of California and the lack of any relevant witnesses or evidence in the Eastern District of Texas. Those declarations allow the Court to make a meaningful evaluation of the relevant witnesses in this case. *See*, *e.g.*, *In re Genentech, Inc.*, 566 F.3d 1338, 1344 (Fed. Cir. 2009) (concluding that "[t]he petitioners have identified witnesses relevant to [issues that might be relevant at trial], and the identification of those witnesses weighs in favor of transfer. It was not

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[1] Exhibits A-O were submitted with Defendants' opening brief (Dkt. No. 62-1 to 62-15).

necessary for the district court to evaluate the significance of the identified witnesses' testimony."). Regardless, WRT's argument is rendered moot because, in accordance with the Discovery Order, Defendants have served their initial disclosures concurrent with the filing of this reply brief. The initial disclosures once again identify numerous relevant witnesses in the Northern District of California, and not a single relevant witness in the Eastern District of Texas.

WRT next argues that the sources of proof are not clustered in the Northern District of California. (Opp. Br. at pp. 5-8.) That is false. While there are relevant witnesses and other sources of proof located in various locations inside and outside the United States, there are far more relevant witnesses and other sources of proof located in the Northern District of California than anywhere else. (*See* Ex. B at ¶ 5; Ex. C at ¶ 5; Ex. D at ¶¶ 4-6, 8; Ex. E at ¶ 6; Ex. F at ¶ 5.)

Even if we accept as true WRT's argument that the sources of proof are widely distributed, this case should not remain in the Eastern District of Texas. That is because it is undisputed that multiple defendants are headquartered in the Northern District of California, a large number of witnesses and other sources of proof are located there, and there are no identified witnesses or evidence located in the Eastern District of Texas. *See Genentech*, 566 F.3d at 1343-44. This holds true even if the Eastern District of Texas were "centrally located" amongst the witnesses, which it is not. *Id.* (concluding that a district court may not "use[] its central location as a consideration in the absence of witnesses within the plaintiff's choice of venue"). Thus, that there may be some relevant sources of proof spread outside of the Northern District of California does not rebut Defendants' showing that the Northern District of California is a clearly more convenient forum. *See In re Acer America Corp.*, Misc. Docket No. 384, 2010 U.S. App. LEXIS 24678 (Fed. Cir. Dec. 3, 2010) ("Our prior orders in venue transfer cases make clear that the combination of multiple parties being headquartered in or near the transferee venue and no party or witness in the plaintiff's chosen forum is an important consideration.").

WRT next argues that its choice of forum "is still a factor to be considered" and that its "specific ties to the Eastern District of Texas, and general ties to Texas as opposed to California cannot be easily dismissed . . ." (Opp. Br. at p. 8.) These arguments should be disregarded.

First, WRT relies on outdated cases (*id.*), and ignores binding precedent making clear that the plaintiff's choice of forum is *not* a distinct factor to be weighed by courts in deciding whether to transfer a case. *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320 (Fed. Cir. 2008); *On Semiconductor Corp. v. Hynix Semiconductor, Inc.*, No. 6:09-CV-390, 2010 U.S. Dist. LEXIS 104616 at *2 (E.D. Tex. Sept. 30, 2010) ("The plaintiff's choice of venue is not a factor in this analysis."). Rather, the plaintiff's choice of forum merely establishes the burden of proof, such that the moving party must show that the transferee forum is clearly more convenient, which the Defendants have done. *Id.* Second, WRT has not provided any evidence of ties to the Eastern District of Texas, other than its incorporation there just three months before this suit was filed. As Defendants pointed out in their opening brief (at p. 4) and WRT does not deny, WRT's alleged "business address" in Frisco is simply the address of Regus, a provider of "virtual offices." WRT also does not deny that it is governed by Acacia, which is based in Newport Beach, California. (*See* Ex. G (to Defendants' motion).) Indeed, the only declaration submitted on WRT's behalf that attests to facts about WRT as an entity (Dkt. No. 68-1) was submitted by Bradley J. Botsch, who is an officer of Acacia located in Newport Beach, California. (*See* Exs. P-Q.) Thus, WRT has failed to rebut that its presence in the Eastern District of Texas is recent, ephemeral, and an artifact of litigation, and therefore should not be considered as part of the motion to transfer analysis. *See In re Microsoft Corp.*, 630 F.3d 1361, 1365 (Fed. Cir. 2010) (rejecting the plaintiff's attempt to rely upon an office that "staffed no employees, w[as] recent, ephemeral, and a construct for litigation and appeared to exist for no other purpose than to manipulate venue.").

WRT also makes much of the fact that Craig Yudell, whom WRT describes as the "current prosecuting attorney for the '287 patent," is located in Austin, Texas. (Opp. Br. at p. 9.) It appears, however, that Mr. Yudell had little if any actual involvement with the prosecution of the '287 patent, because his current role did not begin until more than seven months after the '287 patent was granted. Moreover, he is located outside of the Eastern District of Texas and almost 300 miles from Marshall.

In sum, WRT has failed to identify a single witness or piece of evidence located in the Eastern District of Texas, while Defendants have identified numerous witnesses and substantial evidence located in the Northern District of California. Therefore, the "relative ease of access to sources of proof" factor weighs heavily in favor of granting the motion to transfer.

2. WRT Has Failed To Identify A Single Witness That Would Be Within The Compulsory Power Of The Eastern District Of Texas

As noted in *Optimum Power*, the "compulsory power" factor weighs more heavily in favor of transfer when more third-party witnesses reside within the transferee venue. *Optimum Power Solutions LLC v. Apple, Inc.*, Memorandum Opinion and Order, Case No. 6:10-cv-61 at p. 4 (E.D. Tex. Dec. 6, 2010) (previously submitted as Ex. N). And this factor weighs heaviest in favor of transfer when the transferee venue has absolute subpoena power – subpoena power for both deposition and trial. *Id*.

WRT does not dispute that Defendants identified three non-party witnesses that reside in the Northern District of California and within 100 miles of all of the Northern District of California courts and, therefore, are subject to the absolute subpoena power of the Northern District of California. By contrast, WRT fails to identify any third-party witnesses that reside within the Eastern District of Texas or within 100 miles of Marshall, and therefore has failed to identify a single witness over which the Eastern District of Texas has absolute subpoena power.

Because WRT cannot dispute the fact that the Northern District of California's compulsory power is more significant than that of the Eastern District of Texas in this case, WRT resorts to arguing that some third-party witnesses (two individuals that reside in Austin, Texas, and two former prosecuting attorneys in Washington, D.C. and McLean, Virginia) are located *closer to* the Eastern District of Texas than the Northern District of California. Even if true, WRT's argument does not address the availability of compulsory process with regard to those witnesses and, therefore, is irrelevant to the analysis of this factor.

Thus, this factor weighs in favor of transfer.

3. Northern California Is More Convenient For Third-Party And Party Witnesses

Notably absent from WRT's opposition brief is the identification of a single relevant witness located in the Eastern District of Texas. This stands in stark contrast to numerous party and relevant third-party witnesses located in the Northern District of California.

Relevant Witnesses in the Northern District of California[2]	Relevant Witnesses in the Eastern District of Texas
Matt Casey (Google)	None
Ashkot Popat (Google)	
Richard Hung (Google)	
G.D. Ramkumar (A9/Amazon)	
Gautam Bhargava (A9/Amazon)	
Keshav Menon (A9/Amazon)	
Arnab Dhua (A9/Amazon)	
Jonathan Hull (RII)	
Jamey Graham (RII)	
Jorge Moraleda (RII)	
Timothee Bailloeul (RII)	
Xu Liu (former RII employee)	
Michael Hill (RII consultant)	
Michael Simbirsky (RII consultant)	
20 Nokia employees and/or contractors	

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2 (*See* Ex. B at ¶ 5; Ex. C at ¶ 5; Ex. D at ¶¶ 4-6, 8; Ex E at ¶ 6; Ex. F at ¶ 5.)

Relevant Witnesses in the Northern District of California[2]	Relevant Witnesses in the Eastern District of Texas
John F. Griffith (original prosecuting attorney)[3]	

Incredibly, despite Defendants' identification of 35 potential witnesses in the Northern District of California and WRT's failure to identify one witness in the Eastern District of Texas, WRT argues that this factor either favors denying the motion or is neutral. WRT's argument is based upon witnesses in other jurisdictions or countries, but the Federal Circuit rejected a similar argument in *Genentech*. There, the Federal Circuit stated that "[t]he witnesses from Europe will be required to travel a significant distance no matter where they testify. In contrast to the foreign witnesses, there are a substantial number of witnesses residing within the transferee venue who would be unnecessarily inconvenienced by having to travel away from home to testify in the Eastern District of Texas." *Genentech*, 566 F.3d at 1344. The Federal Circuit also rejected the plaintiff's reliance upon U.S. witnesses in other jurisdictions in light of the number of witnesses in the proposed forum and the lack of witnesses in the plaintiff's chosen forum. *Id.* at 1345 ("Because a substantial number of material witnesses reside within the transferee venue and the state of California, and no witnesses reside within the Eastern District of Texas, the district court clearly erred in not determining this factor to weigh substantially in favor of transfer.").

Thus, the sheer number of relevant witnesses located in the Northern District of California, compared to none in the Eastern District of Texas, demonstrates that this factor weighs heavily in favor of transfer.

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[3] WRT argues that because Defendants relied upon a nine-year-old invention disclosure form (Ex. K) to prove that Mr. Griffith is located in the Northern District of California, WRT should be allowed to rely upon that same document to show that the named inventor of the '287 patent resides in Plano, Texas. Not only is this argument nonsensical (WRT ultimately asserts that the inventor resides in Austin), but it misconstrues the facts. Defendants relied upon the invention disclosure form (Ex. K) to identify Mr. Griffith's status as the original prosecuting attorney, not to identify Mr. Griffith's current location. Defendants provided additional documentation from 2010 (Ex. L) to show that Mr. Griffith resides in the Northern District of California.

4. Trial In Northern California Will Be Easier, More Expeditious, And Less Expensive

In its opposition brief, WRT fails to rebut that trial will be easier, more expeditious, and inexpensive in Northern California because: three of the five Defendants are headquartered there; the relevant visual search technology for a fourth Defendant, Amazon, was developed there; and the majority of the documents and employees related to the development of the accused technology of the fifth Defendant, Nokia, are located there. Instead, WRT argues that judicial economy will be served by keeping the case in Texas due to the proceedings in this case to date. Most of what WRT references would simply transfer with the case, and therefore would not be lost, such as the service of the Defendants, the appearance of the Defendants, the answers to the complaint, the corporate disclosures, and the answer to counterclaims. The only thing that would require modification if the case were to be transferred would be the case and discovery schedule, which would simply need to be adjusted in light of the trial date provided by the Court in the Northern District of California. This adjustment of the schedule would not outweigh the savings that would occur based upon having the case venued where the majority of the Defendants, witnesses, and relevant documents are located.

WRT also argues that judicial economy would be lost because it filed three other related lawsuits in the Eastern District of Texas. As Defendants noted in their opening brief, they intend to move for the other three cases to be transferred for the same reasons as this initial case. Thus, judicial economy would be preserved.

B. WRT Failed To Rebut That Public Interest Factors Also Weigh In Favor Of Transferring The Case To The Northern District Of California

Both parties agree that two of the public interest factors – familiarity with the governing law and the avoidance of conflicts of law – are inapplicable or neutral in regard to this motion. In regard to the two other factors, WRT once again fails to rebut Defendants' showing that the factors weigh in favor of transfer.

1. It Is Undisputed That The Average Time To Trial In The Northern District Of California Is Less Than The Time To Trial For This Case In The Eastern District Of Texas

In their motion, Defendants demonstrated that the time to trial in this case, according to the schedule set forth by this Court, was 33 months from the date of Defendants' motion; by contrast, the average time to trial in the Northern District of California is only 24.5 months. In its opposition, WRT argues that Defendants are comparing apples to oranges by comparing the *actual* time to trial in this case with the *average* time to trial in the Northern District of California. But the comparison made by Defendants in the only sensical comparison that can be made. Obviously a comparison between the actual times to trial for this case in each jurisdiction cannot be made until after the case is transferred and an actual trial date is set in the Northern District of California. And it does not make sense to compare the average times to trial in each jurisdiction when it is already known that the time to trial for this case in the Eastern District of Texas will be much longer than the average time to trial. Therefore, Defendants made the only reasonable comparison possible, and that comparison shows that "court congestion" factor weighs in favor of transfer. WRT's argument to the contrary is simply illogical.

2. Given That WRT Fails To Identify Any Local Interests In The Eastern District Of Texas, The Local Interests In The Northern District Of California Weigh In Favor Of Transfer

In its opposition brief, WRT cites *Aloft Media, Inc. v. Yahoo!, Inc*., 2009 U.S. Dist. Lexis 48716 at *6 (E.D. Tex. Jun 10, 2009) for the proposition that if a defendant sells a product throughout the United States, then no specific venue has a dominant interest in resolving the issue of infringement. (Opp. Br. at p. 14.) What WRT ignores, however, is the last sentence of that same paragraph in *Aloft* in which this Court stated: "Nonetheless, where a forum has identifiable connections to the events giving rise to the suit, this factor may support litigating the case in that forum." *Aloft*, 2009 U.S. Dist. Lexis 48716 at *6; *see also In re Hoffman-La Roche, Inc.*, 587 F.3d 1333, 1338 (Fed. Cir. 2009) ("While the sale of an accused product offered nationwide does not give rise to a substantial interest in any single venue, if there are significant

connections between a particular venue and the events that gave rise to a suit, this factor should be weighed in that venue's favor.").

Defendants demonstrated in their opening brief that because of the concentration of Defendants in the Northern District of California as well as the relevant work there that led to each of the accused products, that forum has identifiable connections to the events giving rise to this suit that support litigating the case there. Thus, WRT's argument that "the Northern District of California has no greater interest in the action than do districts in which the non-Californian Defendants are located" (Opp. Br. at p. 14) is untenable.

WRT then argues that if California has an interest in this litigation, Texas also does by virtue of its citizens, WRT, the inventor, and Mr. Yudell. (Opp. Br. at p. 15.) But the relevant venue is the Eastern District of Texas, not the entire state of Texas. The only "citizen" in the Eastern District of Texas is WRT, and, as discussed above, WRT's presence is merely ephemeral and litigation driven, and therefore entitled to no weight. *Microsoft*, 630 F.3d at 1365.

Thus, the "local interest" factor also weighs in favor of the transfer.

III. CONCLUSION

The facts supporting Defendants' motion to transfer are compelling. Defendants have identified numerous witnesses and substantial evidence located in the Northern District of California; WRT cannot identify a single relevant witness or piece of evidence located in the Eastern District of Texas. Three of the Defendants are headquartered in the Northern District of California, while the technology underlying the accused products of the other two Defendants were developed there; WRT cannot identify a single employee in the Eastern District of Texas and its "office" is simply a Regus virtual office. Because of these facts and that all four of the private interest factors and two of the public interest factors weigh in favor of transfer (with the other two public interest factors being neutral), Defendants have carried their burden to demonstrate that the Northern District of California is a clearly more convenient forum for this matter. Therefore, Defendants respectfully request that the Court grant their motion to transfer.

Dated: May 5, 2011

Respectfully submitted,

By: *_____/s/ Daniel T. Shvodian_____*

James F. Valentine (admitted *pro hac vice*)
California State Bar No. 149269
Daniel T. Shvodian (admitted *pro hac vice*)
California State Bar No. 184576
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304-1212
Telephone: 650.838.4300
Facsimile: 650.838.4350
E-mail: JValentine@perkinscoie.com
E-mail: DShvodian@perkinscoie.com

Michael C. Smith
Texas State Bar No. 18650410
SIEBMAN, BURG, PHILLIPS & SMITH, LLP
P.O. Box 1556
Marshall, TX 75671-1556
Telephone: 903.938.8900
Facsimile: 972.767.4620
E-mail: michaelsmith@siebman.com

Attorneys for Defendants and Counterclaimants
A9.COM, INC., AMAZON.COM, INC., and GOOGLE INC.

By: *_____/s/ Michael C. Smith_____*

Michael C. Smith
Texas State Bar No. 18650410
SIEBMAN, BURG, PHILLIPS & SMITH, LLP
P.O. Box 1556
Marshall, TX 75671-1556
Telephone: 903.938.8900
Facsimile: 972.767.4620
E-mail: michaelsmith@siebman.com

Robert F. Perry (admitted *pro hac vice)*
Allison H. Altersohn (admitted *pro hac vice*)
KING & SPALDING LLP
1185 Avenue of the Americas
New York, NY 10036
Telephone: 212.556.2100
Facsimile: 212.556.2222
E-mail: rperry@kslaw.com
E-mail: aaltersohn@kslaw.com

Attorneys for Defendant
NOKIA INC.

By: *______/s/ Michael E. Jones___________*

Michael E. Jones
Texas State Bar No. 18650410
Allen Franklin Gardner
POTTER MINTON P.C.
110 N. College, Suite 500
P.O. Box 359
Tyler, TX 75710-0359
Telephone: 903.597.8311
Facsimile: 903.593.0846
E-mail: mikejones@potterminton.com
E-mail: allengardner@potterminton.com

Mark D. Rowland (admitted *pro hac vice*)
ROPES & GRAY LLP
1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
Telephone: 650.617.4016
Facsimile: 650.566.4144
Email: mark.rowland@ropesgray.com

Attorneys for Defendant and Counterclaimant
RICOH INNOVATIONS, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email, on this 5th day of May, 2011.

/s/ Daniel T. Shvodian
Daniel T. Shvodian