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

WIRELESS RECOGNITION TECHNOLOGIES LLC,	)	
Plaintiff,	)	
v.	)	**C.A. No. 2:10-cv-00364-TJW-CE**
A9.COM, INC., **AMAZON.COM, INC.,** **GOOGLE, INC.,** **NOKIA, INC.** **and** **RICOH INNOVATIONS, INC.**	)	**JURY TRIAL DEMANDED**
Defendants.	)	

PLAINTIFF WIRELESS RECOGNITION TECHNOLOGIES LLC'S SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE TO THE NORTHERN DISTRICT OF CALIFORNIA UNDER 28 U.S.C. § 1404(a)

I. INTRODUCTION

Pending before the Court in the above-captioned proceeding is a motion to transfer venue ("Movants' Motion" or "Movants' Mot.") jointly filed by all Defendants (collectively, "Movants" or "Moving Defendants"). (Dkt. 62.) WRT filed its opposition ("WRT's Opp.") to their Motion (Dkt. 68), and Movants have recently submitted their reply ("Movants' Rep.) (Dkt. 73).[1] As the present Sur-Reply ("WRT's Sur-Reply") demonstrates, Movants' reply brief has failed to further Movants' proposed transfer case.[2]

II. ARGUMENT

A. The Private Interest Factors Do Not Render The Northern District of California Clearly More Convenient

1. Relative Ease of Access to Sources of Proof

Movants contest WRT on not having had opportunity for discovery, depicting it as WRT's choice not to take discovery.[3] Movants' position leaves out a number of facts pertaining to stipulations between the parties and the practical workings of the case.[4] Moreover, on this issue Movants are missing WRT's general point –that it is Movants, not WRT, who are offering up the identities and locations of Movants' witnesses they deem more relevant to plaintiff's infringement case, in a manner clearly calculated to win on the transfer issue.[5]

Notwithstanding this transparent attempt, in its opposition WRT used Movants' own

[1] The Court is respectfully directed to the fact that Movants' reply brief (i.e., Movants' Rep.) is ten pages, exceeding the five page limit set out in Local Rule CV-7(a)(2).

[2] As they have failed to show the balance of private and public interest factors for transfer is "clearly more convenient" than the present venue, transfer under § 1404(a) is not proper, and the Motion should be denied.

[3] Movants' Rep. at ¶ 3, 2.

[4] For example, Movants and WRT spent the period from February 23 until March 23, 2010 negotiating discovery deadlines for the Discovery Order and Docket Control Order. The Orders were jointly filed the same day as Movants' opening brief regarding transfer. Further, pursuant to the Orders, Parties' "Initial Disclosures" and "Plaintiff's Asserted Claims and Preliminary Infringement Contentions" were due on May 5, 2010, the same day Defendant filed its responsive brief regarding transfer. Accordingly, contrary to Movants' assertions, the case has been significantly developed.

[5] *See, e.g.*, WRT's Opp. at ¶ 1, 5.

supporting affidavits to show the flaw in their analysis.[6] Without wasting the Court's time by unnecessary repetition here, WRT demonstrated widespread national and international distribution of sources of proof.[7] In some cases, taking Google's accused infringing products as example, the sources of proof were demonstrated to reside nearer to the Eastern District of Texas than the Northern District of California.[8] For other Movants, such as Amazon, Nokia and RII, the sources were shown clustered throughout the world, in Seattle, Washington, Bangalore India, Silicon Valley, California, London, United Kingdom, Oulu, Finland, Costa Rica and Peru.[9] Accordingly, Movants' arguments regarding clustering around the Northern District of California is without merit.

To counter this fact, Movants falls back on what they had argued little in the opening brief – and rightly so because it is not particularly germane to the sources of proof – that multiple defendants are headquartered in the Northern District of California. However, of the five Movants, only Google is headquartered there, and RII has a principal place of business there but it is a subsidiary of a foreign entity in Japan.[10] None of the Movants are incorporated in California.

Movants also attempt to minimize WRT's ties to the Eastern District of Texas. They accentuate relatively recent incorporation before suit (i.e., three months) and ignore case law that finds four months incorporation before suit is not "recent."[11] Movants continue to portray WRT's presence in the Eastern District as "recent, ephemeral, and an artifact of litigation."[12] In this regard, they attempt to tie the role of Bradley Botsch to California based on unsupported

[6] WRT's Opp. at ¶ 1, 5 – ¶ 1, 8.
[7] WRT's Opp. at 5-8.
[8] WRT's Opp. at ¶¶ 3-4, 5, ¶¶ 1-2, 6.
[9] WRT's Opp. at 6-8.
[10] WRT's Opp. at ¶ 1, 2.
[11] Movants' Rep. at ¶ 1, 4.
[12] Movants' Rep. at ¶ 1, 4.

documentation and older records.[13]

In fact, Mr. Botsch is an employee of Acacia Research Group, LLC ("ARG"), with the title of Vice President.[14] ARG, the successor of Acacia Patent Acquisition LLC, is a Texas limited liability company.[15] ARG is also the parent of WRT, owning WRT in its entirety.[16] The entities ARG and WRT are further tied closely together by Mr. Botsch's dual role, as not only as a Vice President of ARG, but also for WRT.[17]

Moreover, as a parent entity, ARG provides important support for its subsidiaries. In fact, ARG's presence in the Eastern District of Texas is anything but ephemeral, virtual or any other derogatory terms used by Movants. First, ARG is located in the Eastern District of Texas, namely in Frisco, Texas, where WRT and other subsidiaries are located. Second, ARG's headquarters in the Eastern District of Texas currently include nine individuals, including its Chief Executive Officer.[18]

Given that WRT is located in the present forum, that through its corporate structure it is closed tied with its parent ARG, and that WRT's parent has a substantial presence in the Eastern District by virtue of its headquarters, personnel supporting its subsidiaries, corporate management, and that the entity is indeed incorporated in Texas, there is simply no merit to Movants' arguments that WRT's presence here is anything but real and substantive.

Movants also argue that WRT has failed to identify any witness or evidence in the

[13] Movants' Rep. at ¶ 1, 4; Exs. P, Q to Movants' Rep.
[14] Ex. T at ¶ 2.
[15] Ex. T at ¶ 3.
[16] Ex. T at ¶ 4.
[17] Ex. T at ¶¶ 1, 5.
[18] Ex. T at ¶¶ 6-8. The following individuals are employed full-time by ARG: Dooyong Lee (CEO), Marvin Key (Senior Vice President), Robert Rauker (Vice President of Business Development), Phil Mitchell (Vice President of Engineering), Fahim Aftab (Vice President of Engineering), Tisha Stender (Vice President of Licensing), Annie LeBlanc (Attorney), Christin Johnston (Executive Assistant to CEO), Skyler Mejia (Receptionist).

Eastern District of Texas, while Defendants have identified numerous ones. First, Movants are once again engaging in the quantitative exercise of counting witnesses on behalf of WRT. Also, Movants' approach fails to emphasize the quality of the witnesses, the practicalities of which versus how many witnesses to depose, the current state of discovery, and the numerous reasons WRT provided in its opposition that other jurisdictions, closer to Texas, provide more valuable witnesses.[19]

Secondly, the correct test is not to add and compare the number of witnesses in the Eastern District of Texas versus the Northern District of California.[20] Therefore, Movants have not met their substantial burden, and transfer under § 1404(a) is not appropriate under this factor.

2. Availability of Compulsory Process

Movants attempt to emphasize the Northern District of California's absolute subpoena power over non-parties to render the compulsory process factor in their favor. First, Mr. Griffith is a single prosecuting attorney among several, and the role of other prosecuting attorneys, such as Mr. Lazar, who works in the Washington, DC area, and Mr. Yudell, who works in Austin, Texas, were substantially greater in the case than his.[21] Numerous other prosecuting attorneys, all residing much closer to the Eastern District of Texas than the Northern District of California, are apparent from the file history of the patent-in-suit.[22]

Second, of seven individuals offered by RII as designer/developers, and obviously

[19] *See, e.g.*, WRT's Opp. at 5-8.

[20] The present burden is not on WRT, but rather on the Defendants seeking transfer, to show *good cause* for the transfer. *In re Volkswagen of Am., Inc. (Volkswagen II)*, 545 F.3d 304, 315 (5th Cir. 2008); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320 (Fed. Cir. 2008) (emphasis added). Under the good cause standard, "when the transferee venue is not clearly more convenient, the plaintiff's choice [of venue] should be respected." *Volkswagen II*, 545 F.3d at 315; *see also In re TS Tech*, 551 F.3d at 1320.

[21] WRT's Opp. at 10.

[22] Mr. Jakobsen is listed as formerly with Pillsbury Winthrop in McLean, Virginia. Mr. Moore was formerly at the same office of Pillsbury Winthrop and on information and belief, currently works at Kelley Drye in Stamford, Connecticut. On information and belief, Ms. Lisa K. Norton, Mr. Lazar's colleague, currently works at DLA Piper in Reston, Virginia. This information has been provided to Moving Defendants in WRT's "Initial Disclosures," served on May 5, 2011.

calculated to help its present transfer case, four are employees, one is a former employee, and two are the above noted contractors, referred to in Movants' affidavit as "consultants."[23] Accordingly, Movants desire to exploit the fact that the consultants are technically non-parties, and the Northern District of California may have subpoena power over them. The problem with Movants' position is the extreme unlikelihood that two of seven individuals, serving as contractors and working for RII, would be required as witnesses, or would provide any issues in their cooperation with counsel given their working status with RII.

The necessity of these allegedly non-party witnesses is clearly a legal fiction devised to win on the compulsory process factor, and the factor is at best neutral for Movants under § 1404(a).

II. CONCLUSION

Movants have failed to met their burden of showing that transfer to the Northern District of California is warranted under § 1404(a).[24]

[23] Ex. E to Movants' Mot.

[24] Perhaps there is no better way for WRT to express how factually mythical at this stage, wasteful of time and resources, and actually inconvenient is Moving Defendants' proposed transfer motion for the "convenience" of the parties than by quoting his Honor Judge John D. Love:

> Once again, the Court laments, as shown by the cited list, the enormous amount of time and resources the Court and the parties invest in § 1404 convenience issues, issues that have absolutely nothing to do with the merits of the cases. . . . As the list shows, the Court, when confronted by a dizzying array of venue 'facts' at the earliest stages of cases, has granted some motions while denying others. But the point is the utter waste of resources over just the past three years that has gone into resolving where it is more 'convenient' to litigate a case.

NovelPoint Learning LLC v. LeapFrog Enterprises, Inc., et al., Memorandum Opinion and Opinion, Case No. 6:10-cv-229 (E.D. Tex. Dec. 6, 2010) (Ex. Q to WRT's Opp. at 15).

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Respectfully submitted,

By: /s/ William E. Davis, III

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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 the 16th day of May, 2011.

/s/ William E. Davis, III
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