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

ROCKSTAR CONSORTIUM US LP AND NETSTAR TECHNOLOGIES LLC,	)	
Plaintiffs,	)	Civil Action No. 13-cv-00893-JRG-RSP
v.	)	**JURY TRIAL DEMANDED**
GOOGLE INC.	)	
Defendant.	)	

DEFENDANT GOOGLE'S OBJECTIONS TO THE MAGISTRATE'S MEMORANDUM OPINION AND ORDER DENYING GOOGLE'S MOTION TO TRANSFER

NOTES ON CITATIONS

1. "Dubey" refers to the Declaration of Abeer Dubey in Support of Google's Motion To Transfer Venue to the Northern District of California, filed with Google's Motion To Transfer (Dkt. 18) on January 10, 2014.
2. "Dubey II" refers to the Second Declaration of Abeer Dubey in Support of Google's Motion To Transfer Venue to the Northern District of California, filed with Google's Reply in Support of Its Motion To Transfer (Dkt. 36) on March 10, 2014.

Google requests that the Court reconsider the Memorandum Order (Dkt. 165, the "Order") denying Google's Motion to Transfer to the Northern District of California. A district judge may reconsider a Magistrate's order on transfer if the order is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). In support of its motion, Google focused its argument on the sources of evidence in the Northern District of California (the "Northern District") and in this District. As Google indicated in its briefing, it did not address sources outside these two districts because it was operating under the assumption that the presence of other witnesses and documents dispersed around the world is not relevant to the transfer analysis; rather it is the sources of evidence in and around the transferor and transferee forums that matter. *In re Genentech, Inc.*, 566 F.3d 1338, 1344-45. (*See* Dkt. 36, 2-3; Dkt. 97, 1, 4 (citing same).) In denying transfer, the Order failed to address Google's repeated argument that under governing Federal Circuit law the location of sources of evidence in places removed from both forums is not relevant. That is clear error. *See In re Toyota Motor Corp*., 747 F.3d 1338, 1340 (Fed. Cir. 2014) ("The comparison between the transferor and transferee forums is not altered by the presence of other witnesses and documents in places outside both forums.").

Unfortunately, the Order suggests that Google was not being forthright because Google had not detailed the sources of evidence "in places outside both forums." Google apologizes for any misunderstanding, as it surely was not Google's—or counsel's—intent to omit any relevant facts. Rather, Google sought to provide what it believed to be the relevant information for the Court's decision by focusing on the sources in and close to this District and the Northern District. Google regrets any misunderstanding, and respectfully requests reconsideration. Under Fifth Circuit and Federal Circuit precedent, the undisputed facts show that this case has strong ties to the Northern District, and no meaningful, non-litigation or non-licensing connection to this District.

I. THE ORDER IMPROPERLY FOUND THAT THE PRIVATE INTEREST FACTORS WEIGH AGAINST TRANSFER.

Convenience of Non-Party Witnesses. The "convenience of witnesses is probably the single most important factor in a transfer analysis," with "the convenience of third-party witnesses

. . . given greater weight than the convenience of party witnesses." *In re Genentech*, 566 F.3d at 1342; *On Semiconductor Corp. v. Hynix Semiconductor,* No. 09-cv-390, 2010 WL 3855520, at *6 (E.D. Tex. Sept. 30, 2010). Google's motion to transfer identified several non-party co-founders and chief engineers in the Northern District that developed key prior art, including at Excite,[1] Yahoo!, WebCrawler, Infoseek, and AltaVista.[2] (Dkt. 18, 3-5.) Google further pointed to non-party witnesses in the Northern District, like Rockstar shareholder Apple who participated in the Nortel auction in 2011, as well as to non-party witnesses living near the Northern District, including employees of Microsoft (another Rockstar shareholder) and Daniel Sullivan, author of the Search Engine Report.[3] (*Id.*, 6) In contrast, Rockstar identified only one non-party witness that lives in this District, two former Nortel attorneys in Dallas (in the Northern District of Texas), and a prosecuting attorney in Austin (in the Western District of Texas). (Dkt. 33, 3.)

The Order found that the convenience of non-party witnesses weighed against transfer, stating that Google "cherry-picked" prior art. (Order, 11.) But Google did not cherry-pick art for venue purposes. The relevance of the prior art systems developed by WebCrawler, Infoseek, and AltaVista that Google pointed to was specifically noted during prosecution of the patents-in-suit.[4] (Dkt. 18, 4-5.) Also, the Order relied on the fact that non-party witnesses outside both the Northern

[1] The Order noted Rockstar's contention that Excite witnesses are "actually located in New York and not in California." (Order, 8.) But Rockstar contended only that IAC (in New York) acquired Ask.com which had acquired Excite. (Dkt. 33, 9.) Google's evidence that three Excite co-founders are in the Northern District was not rebutted. (Dkt. 18, 3.)

[2] Google relied on LinkedIn.com profiles to establish the location of several witnesses. (Order, 7-8.) The Order noted that these profiles are "replete with evidentiary (*e.g.* hearsay) problems" and questioned their reliability, although Rockstar did not. Rockstar itself cited to the Court an address from an unidentified website to show that a potential prior art witness is in Dallas (Dkt. 33-3, Ex. 15), which the Court relied on. (Order, 8; *see also id.*, 11.)

[3] The Order noted Rockstar's contention that this District is more convenient for the "equity investors of Rockstar" (Order, 11), but Rockstar's only support for this assertion was that two foreign Rockstar investors (Ericsson and Blackberry) have U.S. subsidiaries with Dallas offices. (Dkt. 33, 11, 13.) Rockstar provided no evidence of any pertinent employees there, and did not refute that the Northern District is more convenient for Apple and Microsoft witnesses.

[4] The Order stated further prior art in Google's later invalidity contentions was inconsistent with Google's "previous attestation that its entire world of prior art consisted of six references in California (five in the Northern District)." (Order, 15.) Google apologizes if the Court received this impression, but Google never intended to represent that. As the Order notes, citing Rockstar's argument, "Google filed its Motion before it served its invalidity contentions and 'Google makes no representation that this identified art is the only art on which it will rely." (Order, 8.)

District and this District are "distributed across the United States" (Order, 11-12), but the presence of witnesses distant from both forums is not relevant to the transfer analysis. *In re Genentech*, 566 F.3d at 1344-45; *see also In re Toyota*, 747 F.3d at 1340.

Convenience of Party Witnesses. The Order stated that Google presented "scant evidence as to its own technical, business, and financial witnesses." (Order, 6.) But it is undisputed that Google's accused search engine and AdWords products were principally developed at its headquarters in the Northern District and are largely maintained there today. (Dubey ¶¶ 5, 7.) Google also presented unrebutted evidence that key engineers and other decision makers on technical and business aspects of its products—and Google employees that were co-founders of the Excite and AltaVista prior art search engines—are based in the Northern District. (Dubey ¶¶ 5, 7-8.) Nor is it disputed that Google's small Frisco office closed in December 2013. (Dubey ¶ 6; Dubey II, ¶ 3.) The Order, however, discounted these facts, expressing concern that Google was not being forthright about the location of employees outside of Texas and the Northern District. (Order, 6-7.) Again, Google apologizes that the Court was left with this concern. There was no intent to hide anything. Rather Google did not include information concerning employees outside of Texas and the Northern District because Google believed it would not assist the Court in the relevant transfer analysis. *In re Genentech*, 566 F.3d at 1344-45; *see also In re Toyota*, 747 F.3d at 1340.

For its part, Rockstar's only contact with this District is a small litigation and licensing office in Plano. (Dkt. 33, 4-5.) The Order states that Rockstar provided evidence that its U.S. office is located in Plano, Texas, that it "leased the [Plano] office for 7 years, and that it moved into this office December of 2012, following a build-out of the office." (Order, 9.) But Rockstar incorporated in July 2011, slightly over two years before filing this litigation, and did not begin leasing its Plano office until August 2012. (Dkt. 18, 6; Dkt. 33, 4.) And although the Order states that the Plano office was not maintained only "for litigation purposes" (Order, 10), Rockstar does not dispute that the office's only other purpose is licensing efforts, and the law is clear that a plaintiff's establishment of a litigation and licensing office in a venue shortly before filing suit also should receive no weight in the transfer analysis. *In re Microsoft Corp.*, 630 F.3d 1361, 1364-65

(Fed. Cir. 2011); *EON Corp. IP Holdings v. Sensus,USA, Inc.*, No. 10-cv-448, 2012 WL 122562 at *5 (E.D. Tex. Jan. 9, 2012) (finding that defendants' presence in the Northern District, "where the decisions and events giving rise to this case likely were made or occurred," outweighed plaintiff's establishment of a "litigation and licensing" office in this District over two years before filing suit.)

Availability of Compulsory Process. "The fact that [a] transferee venue is a venue with usable subpoena power . . . weighs in favor of transfer, and not only slightly." *In re Genentech*, 566 F.3d at 1345. There are several key non-party witnesses within the subpoena power of the Northern District, including prior art witnesses and Apple employees, that may require the exercise of subpoena power. (Dkt. 18, 3-6, 12.) In contrast, Rockstar identified no witnesses in Texas requiring compulsory process. Although the Order noted that a court's subpoena power extends outside of the venue but within the state, it failed to give proper weight to the non-party witnesses in the Northern District. (Order, 12-13.) The availability of compulsory process favors transfer.

Relative Ease of Access to Evidence. "In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant's documents are kept weighs in favor of transfer to that location." *In re Genentech*, 566 F.3d at 1345. Google presented unrebutted evidence that its documents, and documents held by Apple and non-party prior art witnesses, are more accessible from the Northern District. (Dkt. 18, 3-6, 13) Google established that "[a]ll or nearly all of the documents related to Google's search engine and Google AdWords are available in Mountain View, California, or are stored on Google's various secure servers, which are accessible and ultimately managed from Mountain View." (Dubey ¶ 10.) Google's former office in Frisco has been vacant since November 2013. (Dubey II ¶ 3.) Rockstar did not contest these facts. Yet, the Order stated that Google's employee declaration "was worded to avoid statements as to locations other than Google's Headquarters," and noted that a "significant[] concern[] [is] that Google is not being fully candid with the Court." (Dkt. 165, 6.) Again, Google was not seeking to hide anything. Rather, Google focused on the locations relevant to the transfer inquiry—*i.e.* offices within the transferee and transferor districts. *In re Genentech*, 566 F.3d at 1344-45; *see also In re Toyota*, 747 F.3d at 1340. The Order also did not give due

weight to evidence from third parties in the Northern District, such as Apple and prior art witnesses.

Rockstar contended that it stores documents from Nortel at its litigation and licensing office in Plano.[5] (Dkt. 33-1 ¶ 24.) Nortel, however, has moved for a protective order to shield these same documents from production (Dkt. 150; Dkt. 152), and Rockstar has produced only a small fraction of them to Google. (Dkt. 178, 5.) In any event, because the "bulk of the relevant evidence" will come from Google, the relative accessibility of the documents favors transfer.

II. THE ORDER IMPROPERLY FOUND THAT THE PUBLIC INTEREST FACTORS WEIGH AGAINST TRANSFER.

Local Interests. The Northern District has a strong local interest in this case given the location of Google's headquarters in the Northern District—the epicenter of operations for the accused products—together with Rockstar's largest shareholder, Apple, and numerous prior art witnesses located there. In contrast, Rockstar pointed to four former Nortel attorneys in this District. Still, the Order erroneously found that this factor weighs against transfer because Google was "unclear" on "what relative portion of Google's relevant activities occurs in the Northern District of California and what portion occurs in other districts." (Order, 14.) But Google's declarations recited that no portion of its relevant activities occur in this District, while its relevant activities are predominantly in the Northern District. (Dubey ¶¶ 3-10; Dubey II, ¶ 3.) While the Order pointed to Nortel's former office in Richardson (Order, 9-10), that office was in the Northern District of Texas, not this District. (Dkt. 33, 2.) Further, Rockstar failed to draw a single tie between this Richardson office and the technical development of the patented technologies. A comparison of local interests here and in the Northern District strongly favors transfer.

Court Congestion. Because average time to trial is slightly shorter in this District, but average time to termination is slightly shorter in the Northern District (Order, 13-14), this factor is neutral. While the Order noted "Google makes no representation that it does not intend to carry its case to trial," it is Rockstar, not Google, that filed this case.

Google respectfully requests the Court reconsider the Order and grant Google's motion.

[5] Rockstar noted a Google office in the Dallas area. But this office at 15303 Dallas Parkway, Suite 400, Addison, TX 75001, is in the Northern District of Texas, not this District.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on October 3, 2014.

/s/ *Sam Stake*

Sam Stake