

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

ROCKSTAR CONSORTIUM US LP)
AND NETSTAR TECHNOLOGIES LLC,)
)
Plaintiffs,)
)
v.)
)
GOOGLE INC.)
)
Defendant.)
)
)

Civil Action No. 13-cv-00893-RG
JURY TRIAL DEMANDED

**GOOGLE INC.'S UNOPPOSED MOTION FOR ISSUANCE OF LETTER ROGATORY
TO KSHITIJ BHATIA**

Introduction

Defendant Google Inc. (“Google”) requests that the Court issue the accompanying Letter Rogatory to Kshitij Bhatia, which requests documents and a deposition relevant to various issues in this litigation. Rockstar has indicated that it does not oppose Google’s request for issuance of the letter rogatory.

The issuance of this Letter Rogatory is necessary because the requested information is highly relevant to Plaintiffs Rockstar Consortium US LP and Netstar Technologies LLC’s (collectively “Rockstar’s”) infringement claims in the litigation, Google’s defenses of invalidity, inequitable conduct, and non-infringement, and to rebut Rockstar’s contentions on damages. Kshitij Bhatia is a former advisor to Nortel Networks Corporation and its affiliates (“Nortel”) and a former employee of Lazard Freres & Co. LLC (“Lazard”). As such, Mr. Bhatia has relevant information regarding analyses and evaluations of the patentability and value of the patents-in-suit, including Nortel’s efforts to sell, license, and otherwise monetize its patent assets, including through the 2011 auction of Nortel’s patent portfolio. Thus, because Mr. Bhatia possesses unique information relevant to the parties’ claims and defenses, Google respectfully requests that the Court grant this motion and issue the Letter Rogatory.

Relevant Background

Rockstar filed suit on October 31, 2013 (Dkt. No. 1; Ex. 1), accusing Google of infringing U.S. Patent Nos. 6,098,065¹, 7,236,969, 7,469,245, 7,672,970, 7,895,178, 7,895,183, and 7,933,883 (the “patents-in-suit”) which generally relate to Internet search and advertising on Internet search engines. Google asserted counterclaims and affirmative defenses of non-

¹ Rockstar has stated that it no longer accuses Google of infringing the ’065 patent but all other patents-in-suit claim priority to the ’065 patent and, to date, that patent is still included in the operative Complaint.

infringement, invalidity, and inequitable conduct, among others. (Dkt. No. 20; Ex. 2.)²

The patents-in-suit were previously assigned to Nortel. (Dkt. No. 1; Exs. 1, 3-9.) In connection with bankruptcy proceedings and exploration of asset liquidation, Nortel decided to hold an auction for its patent portfolio of over 6,000 patents, including the patents-in-suit. (Dkt. No. 1; Ex. 1.) Nortel hired several advisors to assist it with this endeavor, including but not limited to, Lazard, Global IP Law Group, and several individuals, including Mr. Kshitij Bhatia, a former employee of Lazard. (Ex. 10.) The auction participants included shareholders of the Plaintiffs' predecessor company, and Google. More specifically, in June 2011, Apple, Microsoft, and three other technology companies founded the Plaintiffs' predecessor company, Rockstar Bidco, LP. In July 2011, Rockstar Bidco participated in Nortel's patent auction, ultimately won, and subsequently transferred the patents to the Plaintiff, Rockstar Consortium US LP. (Dkt. No. 1; Ex. 1.)

Rockstar has identified Mr. Bhatia in its Initial Disclosures as "advis[ing] Nortel in the auction of its intellectual property assets" and thus "likely to have information related to Nortel's valuation and analysis of its patent assets and to the sale of the patents-in-suit." (Ex. 10.)

Relevant Procedural Background

On May 13, 2014, this Court entered a Docket Control Order ("DCO"). (Dkt. No. 68, Ex. 11.) Under the DCO, the parties were required to "substantially complete" their document productions by September 16, 2014. (*Id.*) In the interim, however, the Court also instructed the parties, that they "are expected to make good faith efforts to produce all required documents as soon as they are available and not wait until the substantial completion deadline." (*Id.*) Under the DCO, the deadline to complete fact discovery is January 7, 2015, and trial is set for June 8, 2015. (*Id.*) Prior to the September 16, 2014 deadline to substantially complete document

² Unless otherwise specified, all exhibits are attached to the Declaration of Michelle Ernst, filed concurrently herewith.

discovery, Rockstar had only produced about 10,000 pages of documents relating to conception and reduction to practice, and the file histories of the patents-in-suit. (Ernst Dec., ¶ 7.) On September 16, 2014 Rockstar started to produce documents related to the Nortel auction. (*Id.*)

Rockstar's Initial Disclosures identify several individuals as knowledgeable regarding the July 2011 auction for Nortel's intellectual property assets. (Ex. 10.) In particular, Rockstar identified Lazard Freres & Co. LLC ("Lazard") and several of Lazard's former employees, including Mr. Bhatia. (*Id.*) On August 6, 2014, Google served document subpoenas pursuant to Federal Rule of Civil Procedure 45 on Lazard and three former Lazard employees currently residing in the United States: David Descoteaux, Colin Keenan, and Justin Lux. (Ernst Dec., ¶ 8.) On August 20 and August 26, 2014, counsel for Lazard, Mr. Arthur Ruegger at the law firm, Dentons, advised that he would also be representing Messieurs Descoteaux, Keenan, and Lux in connection with Google's Subpoenas. (*Id.* at ¶ 9.) On August 27, 2014, Mr. Ruegger further advised that he would likely be able to accept service of a Rule 45 Subpoena on behalf of Mr. Bhatia as well, pending final confirmation from Lazard. (*Id.* at ¶ 10.) However, on September 15, 2014, Mr. Ruegger advised that he would not be able to accept service on behalf of Mr. Bhatia. (*Id.* at ¶ 11.)

Argument

I. LETTERS OF REQUEST ARE THE PROPER METHOD FOR A UNITED STATES COURT TO SEEK DISCOVERY IN THE REPUBLIC OF INDIA.

A Letter Rogatory is a formal written request sent by a court to a foreign court asking that a witness residing within that foreign court's jurisdiction either provide documents, a deposition, or both for use in a pending action before the requesting court. *U.S. v. Reagan*, 453 F.2d 165, 168, 171-74 (6th Cir. 1971) (affirming district court's issuance of Letter Rogatory seeking documents from investigation conducted by German authorities); *Barnes & Noble, Inc. v. LSI Corp.*, No. 11-02709, 2012 WL 1808849, at *1-2 (N.D. Cal. May 17, 2012) (granting motion for

issuance of Letter Rogatory seeking discovery from an entity in Taiwan); Wright, Miller, & Marcus, *Federal Practice and Procedure* (2007), § 2083. The decision to issue such a letter is within the Court’s discretion, *U.S. v. Mason*, No. 89-5675, 1990 WL 185894, at *2 (4th Cir. Nov. 29, 1990), and the proper inquiry for issuance is whether the discovery sought complies with the liberal standard of Federal Rule of Civil Procedure 26. *DBMS Consultants Ltd. v. Comp. Assocs. Int’l, Inc.*, 131 F.R.D. 367, 369 (D. Mass. 1990); *see also Barnes & Noble*, 2012 WL 1808849 at *2 (“A court’s decision whether to issue a letter rogatory [compelling deposition testimony] ... require[s] an application of Rule 28(b) in light of the scope of discovery provided for by the Federal Rules of Civil Procedure.”).

Here, Google’s use of Letter Rogatory is the appropriate and sanctioned method of obtaining discovery from Indian resident, Kshitij Bhatia.³ Both the United States and the Republic of India are parties to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters,⁴ which authorizes signing countries to issue letters of request to other signatories asking them to compel the requested discovery. *See Societe Nationale Industrielle Aeropastiale v. U.S. District Court*, 482 U.S. 522, 535 (1987) (“[A] judicial authority in one contracting state ‘may’ forward a Letter Rogatory to the competent authority in another contracting state for the purpose of obtaining evidence”). The Supreme Court has noted that “the text of the Convention draws no distinction between evidence obtained from third parties and

³ *See* Federal Rule of Civil Procedure 4(f)(2)(B); Federal Rule of Civil Procedure 28(b)(1)(B); the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the “Hague Evidence Convention”); the All Writs Act, 28 U.S.C. §§1651, 1781 (permitting “the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner”); Vienna Convention on Consular Relations, art. 5(j), Apr. 24, 1963; 21 U.S.T. 77; 596 U.N.T.S. 261; and T.I.A.S. 6820.

⁴ *See* Status Table of Members to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, http://www.hcch.net/index_en.php?act=conventions.status&cid=82; U.S. Department of State, India, International Judicial Assistance, Country Information, <http://travel.state.gov/content/travel/english/legal-considerations/judicial/country/india.html>.

that obtained from the litigants themselves.” *Id.* at 541.

II. GOOGLE SEEKS RELEVANT DISCOVERY VIA THE PROPOSED LETTER ROGATORY.

As the proposed Letter Rogatory attached hereto as Exhibit A demonstrates, the discovery requested from Kshitij Bhatia is relevant to the claims and defenses in this litigation.

In its Initial Disclosures, Rockstar identified Mr. Bhatia as having “advised Nortel in the auction of its intellectual property assets, and as such is likely to have information related to Nortel’s valuation and analysis of its patent assets and to the sale of the patents-in-suit.” (Ex. 10.) In connection with bankruptcy proceedings and exploration of asset liquidation, Nortel retained Lazard to analyze Nortel’s portfolio of over 6,000 patents and advise Nortel on the best ways to monetize these assets.

Upon information and belief, Mr. Bhatia participated in this analysis of the Nortel portfolio while employed at Lazard. Upon information and belief, Lazard’s analysis of the Nortel portfolio included an examination of the validity and enforceability of Nortel’s patents, including a review of the prior art and patent prosecution histories. Upon information and belief, Lazard also analyzed third party products and services to determine whether they infringed Nortel’s patents. Further, upon information and belief, Lazard conducted valuation analyses to determine the monetary value of Nortel’s portfolio and Mr. Bhatia participated in these analyses. Mr. Bhatia’s work on the Lazard analyses are directly relevant to Google’s present investigation in support of its claims and defenses that the asserted patents are invalid, unenforceable, and not infringed, and to rebut Plaintiff’s contentions on damages. Thus, the proposed Letter Rogatory to Mr. Bhatia seeks information regarding Mr. Bhatia’s work on the Lazard analyses of the patentability and value of Nortel’s patent assets, including Nortel’s efforts to sell, license, and otherwise monetize its patent assets, including through the 2011 auction of Nortel’s patent portfolio.

As demonstrated above, there are multiple reasons for the production of documents and testimony from Kshitij Bhatia, and the proposed Letter Rogatory will enable Google to begin seeking this production expeditiously.

Conclusion

For the foregoing reasons, Google respectfully requests that the court approve, date, sign, and seal the proposed Letter Rogatory accompanying Google's Motion. The documents and topics for deposition requested by Google are set forth in the proposed Letter Rogatory, which is attached as Exhibit A. After the court signs the Letter Rogatory, Google further requests that the clerk authenticate the court's signature by affixing the court's seal thereto, and that the Letter Rogatory be thereafter returned by the clerk to counsel for Google. Counsel for Google will promptly have the Letter Rogatory transmitted to the High Court of Bombay at Mumbai for execution through its representative/counsel in the requested state.

DATED: October 20, 2014

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By /s/ David A. Perlson

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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 20, 2014.

/s/ Michelle Ernst _____

Michelle Ernst