

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-JRG-RSP

JURY TRIAL DEMANDED

**DEFENDANT GOOGLE’S REPLY IN SUPPORT OF ITS OBJECTIONS TO THE
MAGISTRATE’S MEMORANDUM OPINION AND ORDER DENYING GOOGLE’S
MOTION TO TRANSFER**

NOTES ON CITATIONS

1. “Br.” refers to Google’s Objections to the Magistrate’s Memorandum Opinion and Order Denying Google’s Motion To Transfer (Dkt. 188), filed on October 3, 2014.
2. “Opp.” refers to Rockstar’s Response to Google’s Objections to the Magistrate’s Memorandum Opinion and Order Denying Google’s Motion To Transfer (Dkt. 217), filed on October 23, 2014.
3. “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.
4. “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.
5. “Ex.” refers to exhibits appended to the Declaration of Sam Stake, filed herewith.

I. THE MANDAMUS ORDER STRONGLY SUPPORTS TRANSFER

Rockstar's responsive brief barely addresses the reasoning in the Federal Circuit's mandamus order on transfer in *In re Google*, No. 2014-147 ("Order") though its findings are directly on point. The Federal Circuit analyzed the "comparative convenience" of this District and the Northern District, concluding that "those considerations point **firmly** in the direction of the Northern District." (Dkt. 207-1, 7 (emph. added).) Specifically it found that Google "designed and created" its accused products (the Android platform) in the Northern District, that its witnesses for these products largely "reside near Google's headquarters in Mountain View," and that Google's pertinent records "are predominantly based in its headquarters in the Northern District." (*Id.*, 7-8.) The same is true in this case.

Here, the location of Google's operations, witnesses, and documents likewise strongly support transfer. It is undisputed, as shown through an employee declaration nearly identical in form and detail to its declaration in *In re Google* (Ex. 1), that Google's accused products (Google's search engine and AdWords) were principally developed at its headquarters in the Northern District, that Google's ongoing operations for these products are still largely based in the Northern District, and that numerous witnesses who can testify about the design, development, and business aspects of these products work at Google's headquarters. (Dubey I, Dkt. 18-3, ¶¶ 3, 5, 7-8.) Google also established through this declaration that its documentary records about the accused products are based in the Northern District, not in this District. (Dubey I, ¶¶ 6, 9-10; Dubey II, Dkt. 36-4, ¶ 3.)

The Federal Circuit also made significant findings in the Order about Rockstar and Rockstar's witnesses that support granting transfer. Specifically, the Federal Circuit gave no weight to Rockstar's purported "significant and long-standing ties" to this District (Opp., 6), concluding that "Respondents do not dispute that their primary operations are run out of Canada. Moreover, the only prospective employee witnesses that Respondents name from Plano work as counsel for Respondents, and are thus entitled to little consideration in a convenience calculus." (Dkt. 207-1, 8.) In this case too, Rockstar has not disputed that its primary operations are in Canada, and the only potential witnesses that either party has identified in or near this District are former Nortel

attorneys: four in Plano, two in Dallas, and one in Austin. (Br., 2, 5.) Rockstar argues that these attorneys are potential fact witnesses (Opp., 5-6), but the Federal Circuit rejected Rockstar's identical argument in *In re Google* that its attorneys deserve consideration in the transfer analysis because they are knowledgeable about "licensing and prosecuting the Nortel patents."¹ (Ex. 2, 9.)

Other key facts about this case show that the balance of convenience even more strongly favors the Northern District than in *In re Google*. In *In re Google*, Rockstar argued that two defendants, Samsung and ZTE, had offices in or near this District where witnesses knowledgeable about the accused products work. (Ex. 2, 9, 11.) In contrast, Google is the only defendant in this case, and there is no evidence that any Google witnesses work in or near this District. Also here, unlike *In re Google*, Google established that numerous non-party and party prior art witnesses are located in or near the Northern District, including former founders and chief software architects at Excite, Yahoo!, InfoSeek, WebCrawler, AltaVista, and the Search Engine Report.² (Dkt. 18, 3-6.) This concentration of prior art witnesses in the Northern District supports granting transfer.

II. FEDERAL AND FIFTH CIRCUIT LAW STRONGLY SUPPORTS TRANSFER

Rockstar accuses Google of making "misrepresentations" in its transfer briefing (Opp., 1-2, 5, 7), but then fails to identify even a single misrepresentation. For example, Rockstar accuses Google of concealing a "strong presence in the EDTX," but Google explained that its small office in Frisco closed in November 2013 and staffed no employees that work on the accused products. (Dubey II ¶¶ 2-3; Dubey I ¶ 6.) Rockstar also accuses Google of failing to disclose its Dallas office, but this recently-opened office outside of the District has no meaningful connection to this case, nor could Rockstar establish one during briefing. (Dkt. 33, 7.) Rockstar also accuses Google of concealing prior art witnesses, but neither party has identified any prior art witnesses in this District.

¹ Rockstar states that the cases cited by the Federal Circuit concern only litigation counsel, and not an attorney as a fact witness. (Opp., 5.) Not so. A case cited in the Order (but ignored by Rockstar) held that the convenience of an attorney who might also serve as a fact witnesses was "not a factor to be considered." *Solomon v. Cont'l Am. Life Ins. Co.*, 472 F.2d 1043, 1047 (3d Cir. 1973) (cited by Order, Dkt. 207-1, 8).

² Rockstar now faults Google for failing to provide a "comprehensive list of the prior art cited during prosecution" (Opp. at 4), but it ignores that Google's InfoSeek, WebCrawler, and AltaVista prior art formed the basis for key Patent Office rejections, and that this prior art is now central to Google's inequitable conduct defense. (Dkt. 18 at Exs. 12-13; Dkt. 20, e.g., ¶¶ 52-69.)

(Opp., 4.) Rockstar further contends that Google ignores Ericsson and Blackberry's offices in and near this District, but Rockstar overlooks that these offices only house the US subsidiaries of Rockstar's shareholders, and that no witnesses or documents relevant to this case have been identified in either office. (*Id.*; Exs. 3-4.) Finally, while Rockstar points out that Google served subpoenas on former Nortel attorneys that live in Texas, and one in this District, the Federal Circuit's Order held these witnesses deserve no weight in the transfer analysis. (Dkt. 207-1, 8.)

Rockstar also contends that Google manufactured a new legal standard in its Objections. (Opp., 1-2.) But Google has always applied the correct legal standard: the transfer analysis should focus on sources of evidence in and around this District and in the Northern District, and it is improper to treat either venue as a "centralized location." *In re Genentech, Inc.*, 566 F.3d 1338, 1344-45 (Fed. Cir. 2009). The Federal Circuit's most recent application of this standard, in *In re Toyota*, 747 F.3d 1338, 1340 (Fed. Cir. 2014), confirms that the Court's focus should be on the transferee and transferor forums rather than on sources of proof removed from both venues: "The comparison between the transferor and transferee forums is not altered by the presence of other witnesses and documents in places outside both forums."³

Applying this legal standard, Google demonstrated that the Northern District is home to substantially more party witnesses, non-party witnesses, and documentary evidence than this District, supporting transfer. The Federal Circuit's mandamus Order only further confirms this imbalance is decisive, because Google has substantial operations, witnesses, and documents based in the Northern District, and Rockstar has no meaningful, non-litigation or non-licensing presence in this District. Google respectfully requests that the Court reconsider the Magistrate's denial of transfer, and grant Google's motion.

³ Rockstar argues that Google waived any reliance on *In re Toyota* by failing to include it in its transfer briefing. (Opp. at 1.) But as Rockstar concedes, *In re Toyota* issued after principle briefing closed on Google's transfer motion. *Freeman v. County of Bexar*, 142 F.3d 848, 852 (5th Cir. 1998) is inapposite because it concerns waiver of a legal argument, not a new case. In any event, the Court must make an "independent assessment of the law" when reviewing a magistrate's recommendation, and should consider binding precedent like *In re Toyota*. *Acosta v. United States*, No. SA-06-CR-364, 2010 WL 519706, at *1 (W.D. Tex. Feb. 9, 2010).

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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 31, 2014.

/s/ Sam Stake _____

Sam Stake