Rockstar Consortium US LP et al v. Google Inc Doc. 36

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-RG
v.	)	**JURY TRIAL DEMANDED**
GOOGLE INC.	)	
Defendant.	)	

GOOGLE INC.'S REPLY IN SUPPORT OF ITS MOTION TO TRANSFER

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Rockstar concedes that non-party witnesses are paramount to the transfer analysis, but fails to rebut that they are concentrated in the Northern District. Rockstar also fails to rebut that Google's witnesses and sources of proof are in large part in the Northern District. Instead it mischaracterizes Google's motion, exaggerates its ties to this District, and speculates that witnesses and documents are scattered around the world, contrary to both fact and Federal Circuit law. The Court should disregard this misdirection, and grant Google's motion to transfer.

I. THE PUBLIC INTEREST FACTORS STRONGLY SUPPORT TRANSFER

A. The Availability of Compulsory Process Favors Transfer. Rockstar contends this factor "decisively" counsels against transfer, but does so only by misapplying this Court's law and urging the Court to ignore key prior art witnesses in the Northern District for whom compulsory process will be necessary. For example, Rockstar accuses Google of "cherry-pick[ing]" "self-identified prior art witnesses" to support this factor, and oddly accuses Google of gamesmanship for "fil[ing] this motion before serving its invalidity contentions." (Opp., 8, 12.) But Rockstar ignores that, during prosecution, the Patent Office said the patents were likely invalid over prior "use" software developed by WebCrawler, Infoseek, and AltaVista—all based in the Northern District—but that the law prohibited it from relying on this "use" prior art during prosecution. (Mot., 4-5; Exs. 12-14.) Live witnesses regarding this prior art in the Northern District will be critical to establish the existence, timing, and content of this "use" art, including from witnesses who work for Google competitors Yahoo!, Amazon (A9), and OneID. *Adenta GmbH v. OrthoArm, Inc.*, 501 F.3d 1364, 1371–73 (Fed. Cir. 2007) (affirming invalidity verdict where the "testimony of the witnesses together with the documentary evidence provided a coherent and convincing story" of prior public use or sale) (emph. added). As Judge Davis has recognized, these prior art witnesses will be "[o]f immense importance" to Google's defense,

provided that they can be compelled to testify.[1] *Network-1 Security Solutions, Inc. v. D-Link Corp.*, 433 F. Supp. 2d 795, 803 (E.D. Tex. 2006) (emph. added).

Unlike Google's showing regarding these critical non-party witnesses in the Northern District, the non-party witnesses that Rockstar points to in Texas are mostly those that even Rockstar admits are "'willing' to testify at trial," such as former attorneys and employees of Nortel. (Opp., 13.) But these "willing" former employees of Nortel, which (according to Rockstar's opposition brief (Opp., 4-5, 13)) have close ties with Rockstar, deserve less weight in the Court's analysis of compulsory process. "[T]he focus of this factor is on witnesses for whom compulsory process might be necessary." *Ingeniador, LLC v. Adobe Sys. Inc.*, Case No. 12-cv-00805 (JRG), *4 (E.D. Tex. Jan. 10, 2014) (emph. added). Rockstar also speculates that other non-party witnesses live in this Court's subpoena power, such as former Nortel employees who may have "worked" with the patents, as well as employees at Blackberry and Ericsson's satellite offices in Dallas who may have been involved in the Nortel Auction. (Opp., 13.) But Rockstar fails to identify even one employee in either category. This factor strongly favors transfer.

B. The Convenience of Witnesses Favors Transfer. As Rockstar concedes, the "convenience of witnesses is probably the single most important factor in a transfer analysis," and the convenience of non-party witnesses is "more important" even than the convenience of party witnesses. (Opp., 13.) As Google has explained, key non-party witnesses, including prior art witnesses and Rockstar shareholders, are concentrated in the Northern District. (Mot., 3-6.) Google employees knowledgeable about non-infringement, invalidity, and damages are also in large part in the Northern District. (Mot., 2-3; Dubey 1 ¶¶ 5, 7-8; Dubey 2 ¶3.)

Rockstar's response to Google is that potential witnesses, including prior art witnesses,

[1] In contrast, a prior patent anticipates if it discloses the claimed invention within its "four corners," freeing experts often to testify at trial in place of named inventors. *See, e.g., Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1280-82 (Fed. Cir. 2000). This fact likely explains the observation by Judge Davis—cited in Rockstar's opposition—that "inventors of prior art rarely, if ever, actually testify at trial." (Opp., 12.)

Google employees, and former Nortel employees and financial consultants, are likely dispersed around the world. Even if this were true (it is not), this approach would directly contradict Federal Circuit law, which rejects the use of this District's "central location" as a consideration against transfer. *In re Genentech, Inc.*, 566 F.3d 1338, 1344-45 (Fed. Cir. 2009).

Rockstar also claims greater convenience in this District for possible witnesses in Canada, New Jersey, and New York. Rockstar does not dispute, however, that total travel times for these witnesses to Marshall and to the Northern District are comparable. (Mot., 10.) Rockstar instead relies on the hearsay statements of its Canadian employees, offered through the declaration of a U.S.-based Rockstar attorney, that they prefer to travel to this District in part because they are "well-acquainted with the flights, airports, and routes involved." (Powers ¶ 25.) Even if these hearsay statements were admissible, Rockstar cites no authority that knowing one's way around the airport is relevant to the transfer analysis.

Further, Rockstar fails to show that most individuals described in its opposition, including shareholders, former Nortel financial consultants, and Canadian employees, are indeed "likely" witnesses. Rockstar provides no declarations attesting to these individuals' pertinent knowledge or willingness to testify. In fact, Rockstar's CEO has publicly stated that the decision to sue Google "was entirely my call based on the facts in front of me," and that Rockstar's relationship with its shareholders is "distant." (Ex. 45.) Rockstar's argument that it has "deep and longstanding" ties to this District also amounts to very little. Rockstar again tellingly fails to name any specific, relevant witnesses that would reap significant convenience in this District. Rockstar tries to make much of Nortel's 10,000 former employees in the Northern District of Texas (Opp., 2), but fails to name <u>even one</u> employee that worked in the same technical field as the patents-in-suit. And while Rockstar points to a handful of ex-Nortel attorneys with knowledge of pre-suit negotiations, Google employees in the Northern District know about pre-

suit negotiations to the same degree. This factor strongly favors transfer.

C. The Location of Evidence Favors Transfer. As Google noted in its motion, "it is likely that the bulk of the relevant evidence in this action will come from [the accused infringer."] *Ingeniador*, Case No. 12-cv-00805 (JRG) at *4. Rockstar concedes this, but argues that Google provides too little "specificity" to show that the majority of this evidence is in the Northern District. (Opp., 9-11.) In fact, Google provided ample confirmation that its evidence is concentrated in the Northern District. This evidence includes Google's sworn employee declaration that "all or nearly all" documents about its search engine and AdWords are in or easily accessible from servers "ultimately managed" in the Northern District. (Dubey 1 ¶ 10.) That declarant also confirmed that development of its search engine and AdWords has been predominantly based in the Northern District. (Dubey 1 ¶ 7.) Mr. Dubey also confirmed that the most significant engineering, sales, and marketing decisions related to the accused products are made in Mountain View, thus further confirming that Google's evidence is in or most easily accessible from the Northern District.[2] (Dubey 1 ¶ 5.).

In any event, Rockstar's contentions with respect to the "sources of proof" factor fall flat in light of Rockstar's own cursory description of documents in this District. Rockstar contends that documents related to patent prosecution and licensing are likely in or near this District, as are documents of Blackberry and Ericsson's U.S. offices. (Opp., 11.) The extent of Rockstar's specificity, however, is general categories of documents, i.e., "BlackBerry and Ericsson's documents in the Dallas Area" and "the prosecuting attorney's documents in Austin." (*Id.*) Rockstar fails to describe in any detail the content of these documents, their accessibility from the Northern District, or whether Rockstar holds relevant documents in Canada too – in other words, exactly the type of specificity that Rockstar now accuses Google of withholding.

[2] While Rockstar criticizes Google for failing to discuss "search-plus-advertising" on third-party websites, it admits its complaint fails to identify this functionality. (Opp., 11.)

Also notably absent from Rockstar's opposition is any discussion of evidence held by third parties in and around the Northern District, including prior art witnesses and shareholders. Rockstar ignores this evidence despite conceding that "courts routinely look to . . . third parties' documents." (Opp., 11.) Because Google, Apple, Microsoft, and prior art documents are in or around the Northern District, this factor supports transfer.

D. The Judicial Economy Factor Is Neutral. Rockstar's other seven cases in this district involve different patents, technologies, and counsel (Opp., 14), and thus share no appreciable overlap with this case in claim construction, infringement, validity, enforceability, discovery, or experts. Rockstar alludes to some overlap on "corporate structure" and the Nortel auction, but fails to explain how this overlap might serve judicial economy. In any event, Rockstar's concern for judicial economy rings hollow, since it has filed co-pending patent infringement litigation against Cisco in the District of Delaware. (Ex. 37.)

II. THE PUBLIC INTEREST FACTORS SUPPORT TRANSFER

A. The Local Interest Supports Transfer. Rockstar contends that it has meaningful ties to this District that counterbalance the Northern District's local interest in this case. Rockstar only identifies by name, however, a small handful of local ex-Nortel attorneys with any knowledge of the patents-in-suit. In contrast, Rockstar has accused search engine and advertising products principally developed in the Northern District. This factor supports transfer.

B. Court Congestion and Time To Trial Are At Least Neutral. Rockstar contends that a 6.4 month difference between average time to trial in this District and the Northern District would counsel against transfer. Because most patent cases do not go to trial, however, total time to disposition in each venue is also important, if not more so, than time to trial. In 2012-2013, the Northern District resolved cases slightly faster than this District: 6.4 months versus 8.7 months. (Ex. 46.) This factor is neutral, at worst.

For the foregoing reasons, Google's motion to transfer should be granted.

DATED: March 10, 2014

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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 March 10, 2014.

/s/ *J. Mark Mann*
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