Rockstar Consortium US LP et al v. Google Inc Doc. 41

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.**	**Case No. 2:13-cv-00893-JRG-RSP** **JURY TRIAL DEMANDED**

PLAINTIFFS' SURREPLY TO GOOGLE'S MOTION TO TRANSFER

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Instead of addressing many of the points that Plaintiffs raised in their Response, Google's Reply simply ignores them. It does not explain, for example, the evidence showing Google has witnesses with relevant knowledge and relevant documents in India, New York City, and Dallas. It does not address whether Google's offices in or near this District can "access" documents just as easily as its California headquarters. It does not deny that Google's own former employee who led Google's attempted purchase of the patents-in-suit now lives on the East Coast, along with numerous other third-party witnesses who have relevant knowledge about the auction. It does not contend that the only prior art on which it intends to rely is the prior art discussed in its Motion. And it does not address the location of its evidence related to search-plus-advertising for third-party sites. As in this Court recently stated in *My Health, Inc. v. Click4Care, Inc.*, No. 2:13-cv-137, Dkt. 32, at *4 (E.D. Tex. Mar. 20, 2014), it "routinely observes movants utilizing carefully worded statements to avoid disclosing key facts that disfavor their positions, especially in the context of a Motion to Transfer." Instead of trying to solve its evidentiary issues, Google focuses its Reply on downplaying the substantial connections that both Plaintiffs and third parties have to this District and mischaracterizing Plaintiffs' arguments. Google cannot meet its heavy burden to show that transfer is clearly more convenient.

A. Relative Ease of Access to Sources of Proof Favors Plaintiffs

Rockstar's Response documented the numerous ways in which Google's proffer regarding access to documents was insufficient. Response at 5-8, 9-11. In its Reply, however, Google spends one paragraph on this point and notably does not supplement the record or fix any of its deficiencies. Google still maintains the language from its Motion, carefully stating that its documents "are in <u>or easily accessible from</u>" its headquarters in California. Reply at 4 (emphasis added). Yet Google makes no attempt to list the documents "in" California and the documents

that are just "easily accessible from" there. The fact that a server is "ultimately managed" from California, Reply at 4, says nothing about the documents' locations. Google did file a supplemental declaration stating that its office in the Eastern District of Texas closed in December, after Plaintiffs filed this suit. As a threshold matter, this Court judges the facts at the time of suit and this Court frowns upon a defendant's venue manipulation. *MobileMedia Ideas LLC v. HTC Corp.*, 2012 WL 1570136 at *3 (E.D. Tex. May 3, 2012). Regardless, however, Google still maintains an office near the Eastern District of Texas, in the Dallas area according to its website. Exh. 16 (attached). It is silent on whether "nearly all" relevant documents are just as "easily accessible from" there. Indeed, that Google's declarant Abeer Dubey apparently did not know in January that its Eastern District of Texas office closed at least one month prior calls into question the factual basis of his entire Declaration.

Google also passed on the opportunity to address whether relevant documents exist in India or New York City or Dallas, saying literally nothing about those offices despite the evidence Plaintiffs presented on the subject. Response at 6-7 (citing Exhs. 3-8). And Google still does not address any documents related to one of the accused products—namely search-plus-advertising on third-party sites—despite evidence suggesting those documents are on the East Coast and Dallas, among other locations. Response at 8. Google argues that it did not address this instrumentality in its Motion because Plaintiffs did not specifically list it in the complaint. But not only did Plaintiffs specifically present this specific infringement allegation to Google before suit, Response at 8, Google still does not address this issue in its Reply.

Instead, Google accuses Plaintiffs of a lack of specificity of its own documents. This allegation not only is untrue, it is irrelevant because Google bears the heavy burden. Regardless, however, Plaintiffs detailed their documents in this District. Resp. at 4-5. Plaintiffs also

discussed the third-party documents likely to exist on the East Coast due to the auction. *Id*. at 3-4. Google concedes the relevance of this "bidding process." Mot. at 2. The detail that Plaintiffs provide about Rockstar's equity owners is more extensive than what Google gave for those same equity owners. Google also criticizes Plaintiffs for describing the documents of the prosecuting attorney in a general manner. But given that Google has made inequitable conduct allegations that mention the prosecuting attorney thirty times, the general description itself is sufficient.

B. Availability of Compulsory Process Favors Plaintiffs

Google relies primarily on the existence of self-identified prior art witnesses in California. Some of these witnesses work at Google, and the PTO did not cite all the art it now identifies. Mot. at 3-5. Google still refuses to state that it will not rely on other prior art. And while Google has identified some witnesses in California, Plaintiffs submitted a chart showing prior art witnesses around the country—including in Dallas. Resp. at 9-10.

Numerous third party witnesses live within the absolute subpoena power of the Eastern District of Texas, including former Nortel employees who have specific knowledge of the patents-in-suit and discussions with Google; the CBS affiliate in Dallas who uses Google's accused product; and the prosecuting attorney who Google cites thirty times in its answer. Resp. at 2-3, 8. Google attempts to dismiss two of these third-party witnesses because they are willing witnesses. But Google as the movant never claims that the prior art witnesses on which it relies so heavily would be unwilling to come to Texas. This Court either should not rely on Google's self-identified witnesses because of this failure of proof or it should examine third party witnesses more broadly. *See Geotag, Inc v. OnTargetJobs, Inc.*, No. 2:13-cv-64, Dkt. 28, at *4 (E.D. Tex. Mar. 7, 2014) (Gilstrap, J.) (citing caselaw and holding that "the presence or absence of potential third-party witnesses" is the focus of this prong). Either way, this factor favors

Plaintiffs. Moreover, contrary to Google's assertion, Plaintiffs have identified other third-party witnesses in or near this District besides the two listed willing witnesses in Texas. *See* Resp. at 2-4, 8, 13; Power Dec. ¶¶ 10, 27; Hearn Dec. ¶¶ 3-4. Looking at third-party witnesses as a whole, this factor favors Plaintiffs or at minimum is neutral. Resp. at 13-14; *supra* page 5.

C. The Cost of Attendance of Willing Witnesses Favors Plaintiffs

This factor strongly favors Plaintiffs. As discussed extensively above, Google provides no explanation regarding the evidence Plaintiffs submitted in their Response showing that Google has witnesses with relevant knowledge in New York, India, and Dallas. *See My Health*, No. 2:13-cv-137, at *3-4. This silence is intentional, especially considering that this Court has denied transfer where the movant had relevant employees in both California and India. *Portal Techs., LLC v. Yahoo! Inc.*, 2012 WL 3242205 at *2-3 (E.D. Tex Aug. 7, 2012). Google does not identify a <u>single</u> witness who has knowledge of the accused systems. *My Health*, No. 2:13-cv-137, at *3-4. The only possible witnesses it identifies are prior-art witnesses who work for Google, not those who have knowledge of the accused products. Dubey Dec. ¶ 8; Mot. at 3, 5.

Plaintiffs, by contrast, have specifically identified seven employees who likely have relevant knowledge. These include three who work full-time in Plano, three on the East Coast, and none in California. Google also tries to downplay the convenience for the employees of Rockstar's affiliate in Eastern Canada. These employees routinely travel to Rockstar's United States headquarters in this District. Looking solely at the parties, this factor favors plaintiffs.

An examination of third parties—which is the primary focus here—only helps Plaintiffs. Google does not identify a single third-party willing witness, while Plaintiffs have identified two in Texas alone. Resp. at 13. Across all third party witnesses, this factor still favors Plaintiffs. Plaintiffs identified a third party in this area who met with Google while at Nortel. Resp. at 3.

Google tries to downplay the third-party equity investors and participants in the auction process (including former Google employees) who live in Texas and the East Coast. Plaintiffs detailed why they have relevant evidence. Resp. at 3-4; Powers Dec. ¶ 10. Google itself has relied in support of its Motion that one of the five equity investors in Rockstar resides in California. Mot. at 2; Reply at 5. The problem for Google, however, is that, one of the other equity investors is in Irving, Texas, and another (Ericsson) resides in the Eastern District of Texas. Powers Dec. ¶ 10. Moreover, the third-party witnesses related to the auction itself—a main component of this case—are closer to this District than California. Google states that central location does not matter, citing *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009). But in that case, no relevant witnesses were in this District. This Court routinely considers distance for third-party witnesses where some witnesses are here. *Geotag*, No. 2:13-cv-64, at *4 (citing Fifth Circuit law).

D. The Other Factors Favor Transfer or Are Neutral

On judicial economy, this case likely will share at least some discovery with the other Rockstar cases in this District, as even Google concedes. Google also provides no separate reason for why the local interest favors transfer. On court congestion and time to trial, Google backs away from its Motion showing a faster trial time here. Mot. at 15. Now it focuses on time to disposition, but this Court focuses on time to trial. *TQP Dev. LLC v. Yelp Inc.*, 2013 WL 5450309 at *6 (E.D. Tex. Sep. 30, 2013) (Payne, J). The same source Google cites shows that the time to trial is faster here (25.5 months here versus 27.5 months there). Google Exh. 46 at 2-3. This Court has found that given the time lag to transfer a case, the factor did not favor transfer even where the statistics showed the same time to trial. *Id.* This disparity is likely to favor this District even more once this Court sets a trial date at the April 7 scheduling conference.

For all the foregoing reasons, this Court should deny Google's Motion to Transfer.

DATED: March 27, 2014 Respectfully submitted,

By: */s/ Justin A. Nelson*

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 27th day of March, 2014 with a copy of this document via the Court's CM/ECF system per Local Rule CD-5(a)(3).

/s/ Justin A. Nelson
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