

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.	)	
	)	<b>JURY TRIAL DEMANDED</b>
GOOGLE INC.	)	
	)	
Defendant.	)	
	)	
	)	

**GOOGLE INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A  
SUPPLEMENTAL BRIEF IN RESPONSE TO GOOGLE'S MOTION TO TRANSFER,  
AND, IN THE ALTERNATIVE, CROSS-MOTION TO STAY CASE PENDING  
RESOLUTION OF GOOGLE'S TRANSFER MOTION**

Nearly three months after the completion of briefing on Google's Motion to Change Venue ("Transfer Motion") filed in January, Rockstar seeks to reopen briefing. Rockstar sets forth the good cause standard for reopening briefing in its single-page motion for leave, but it makes no effort to show that the standard is actually met. It cannot.

Initially, the evidence in Rockstar's supplemental brief is not important to the Court's resolution of the Transfer Motion. Rather, it simply repeats Rockstar's prior argument that prior art witnesses and evidence are dispersed around the world, an irrelevant fact under well-established Federal Circuit law. *In re Genentech, Inc.*, 566 F.3d 1338, 1344-45 (Fed. Cir. 2009).

Further, Google served its invalidity contentions that purportedly justify Rockstar's motion for leave more than three weeks before Rockstar sought leave to address them in connection with Google's Transfer Motion. Rockstar provides no explanation for this delay; a delay that highlights the prejudice to Google from Rockstar's untimely request which will only further delay resolution of Google's Transfer Motion. This prejudice is heightened given the imminent, substantive deadlines in the case including claim construction deadlines starting this week. The Federal Circuit has recognized that transfer motions should be decided before proceeding to any motion on the merits of the action. *In re Fusion-IO, Inc.*, No. 12-139, 489 Fed. Appx. 465, 466 (Fed. Cir. Dec. 21, 2012).

Finally, the only available cure to Google's undue prejudice resulting from re-opening briefing on the Transfer Motion would be to stay the litigation pending resolution of the Transfer Motion. Accordingly, in the alternative, Google requests that the Court stay the litigation pending resolution of the Transfer Motion. Indeed, even irrespective of Rockstar's request to reopen briefing, Federal Circuit precedent supports staying this case pending resolution of Google's Transfer Motion. *Id.*

## **Statement of Relevant Facts**

### **I. GOOGLE MOVES TO TRANSFER TO THE NORTHERN DISTRICT OF CALIFORNIA.**

Google filed its Transfer Motion on January 10, 2014. (Dkt. No. 18, 20.) After obtaining an over three-week extension of time for its Opposition to Google's Transfer Motion (Dkt. No. 25), Rockstar responded on February 20. (Dkt. No. 33.) Google and Rockstar filed their reply and sur-reply on March 10 and March 27, respectively. (Dkt. No. 36, 41.)

Google filed a Notice of Supplemental Authority on April 24, shortly after the Northern District of California denied defendants' motion to dismiss or, in the alternative, to transfer to the Eastern District Google's declaratory judgment action in *Google Inc. v. Rockstar Consortium US LP, MobileStar Techs., LLC*, Case No. 13-cv-5933 (N.D. Cal.). (Dkt. No. 49.)

### **II. THE COURT ENTERS A DOCKET CONTROL ORDER THAT HAS NUMEROUS IMMINENT DEADLINES.**

On May 13, this Court entered a Docket Control Order. (Dkt. No. 68.) Under the Docket Control Order, the parties have the following upcoming substantive deadlines, including claim construction deadlines which commenced yesterday:

June 24, 2014	Comply with P.R. 4-1
July 15, 2014	Comply with P.R. 4-2
Aug. 5, 2014	Comply with P.R. 4-3
Aug. 12, 2014	File Amended Pleadings
Aug. 26, 2014	File Response to Amended Pleadings
Sept. 2, 2014	Comply with P.R. 4-4
Sept. 16, 2014	Deadline to Substantially Complete Document Production
Sept. 16, 2014	Comply with P.R. 4-5(a) and Submit Technical Tutorials (if any)
Sept. 26, 2014	Deadline to Exchange Privilege Logs

Sept. 30, 2014	Comply with P.R. 4-5(b)
Oct. 7, 2014	Comply with P.R. 4-5(c)
Oct. 14, 2014	Comply with P.R. 4-5(d)
Oct. 28, 2014	Claim Construction Hearing

Indeed, the Court has already made substantive rulings in this case, such as having entered a Protective Order and E-Discovery Order in the last week. (Dkt. Nos. 90 and 95.)

### **III. GOOGLE SERVES ITS INVALIDITY CONTENTIONS; ROCKSTAR WAITS THREE WEEKS BEFORE SEEKING LEAVE TO SUPPLEMENT.**

Google served its Invalidity Contentions on May 23, 2014. (Dkt. No. 75.) Yet, Rockstar waited three and a half weeks to ask Google if it would consent to Rockstar seeking leave to file a supplemental brief regarding the Transfer Motion to reference these contentions. (Declaration of Andrea Pallios Roberts (“Roberts Dec.”), ¶ 2.) During the parties’ meet and confer on June 20, Google explained its concern that Rockstar’s requested relief would delay resolution of the pending Transfer Motion. (*Id.*, ¶ 3.) Rockstar’s counsel dismissed this concern, arguing that it will only take the Court “45 seconds” to review the supplemental brief. (*Id.*) Google asked Rockstar if it would agree to stay the litigation pending resolution of the Transfer Motion to alleviate this prejudice. (*Id.*) Rockstar refused. (*Id.*)

### **Argument**

The late supplementation of briefs is governed by this Court’s Local Rules and Federal Rule of Civil Procedure 16(b). *Intel Corp. v. Commonwealth Scientific and Indus. Research Organisation*, 2009 WL 8590766, \* 1 (E.D. Tex. Apr. 9, 2009). Local Rule CV-7 provides that following the specified time for filing briefs, “[a]bsent leave of court, no further submissions on [a] motion are allowed.” Local Rule CV-7. Rule 16(b) provides that a scheduling order “may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b). In

determining “good cause” the following factors are relevant: “(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.” *Intel Corp.*, 2009 WL 8590766 (citing *Sw. Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 546 (5<sup>th</sup> Cir. 2003).)

In its motion for leave, Rockstar acknowledges these factors in conclusory fashion, but makes no showing that they weigh in favor of granting Rockstar’s motion. They do not. Rather, the factors weigh in favor of denying Rockstar’s motion for leave to file a supplemental brief, or in the alternative, staying the litigation pending resolution of the Transfer Motion.

**I. THE PURPORTED EVIDENCE IN ROCKSTAR’S PROPOSED SUPPLEMENTAL BRIEF IS NOT IMPORTANT TO THE COURT’S RESOLUTION OF THE PENDING TRANSFER MOTION.**

Rockstar concludes the evidence in its proposed supplemental brief is important to resolution of the Transfer Motion, but provides no explanation of how or why. (Dkt. No. 92.) In actuality, the purported evidence in Rockstar’s proposed supplemental brief is not important to the Court’s resolution of the Transfer Motion.

Rockstar argues that “Google’s [invalidity] contentions confirm that prior art witnesses are spread throughout the country and even internationally, with many residing in subpoena range of this Court. Few such witnesses appear to be located in California.” (Dkt. No. 92-2.) But, this just repeats the same argument Rockstar made in its opposition brief and sur-reply, that prior art witnesses and evidence are dispersed around the world. (Dkt. No. 33, at 8 and 12; Dkt. No. 33-16; Dkt. No. 41, at 3-4.) As Google previously noted, the Federal Circuit has rejected the argument that transfer should be denied because this District and another are equally inconvenient for certain potential witnesses or documentary evidence. *In re Genentech, Inc.*, 566 F.3d 1338, 1344-45 (Fed. Cir. 2009); (Dkt. No. 36 – Google’s Reply in Support of Motion to

Change Venue, at 3.) That Rockstar has not shown that the additional evidence in its proposed supplemental brief is important to the resolution of the Transfer Motion weighs in favor of denying the motion for leave.<sup>1</sup>

## **II. ROCKSTAR ALSO DOES NOT JUSTIFY ITS DELAY IN SEEKING LEAVE.**

Rockstar fails to show that it was justified in failing to seek leave earlier. Rockstar states that it could not have submitted the evidence in its supplemental brief by the original briefing deadlines because it was not yet available. (Dkt. No. 92.) But this does not explain why Rockstar did not seek leave to file a supplemental brief immediately after Google's Invalidity Contentions were served. Instead, more than three weeks elapsed before Rockstar even mentioned that it wanted to file a supplemental brief. Given the schedule in this case and the upcoming imminent claim construction deadlines detailed above, this was too long. Rockstar gives no explanation for why it did not or could not seek leave sooner, even though Google raised this issue with Rockstar before Rockstar filed its motion. This factor weighs in favor of denying Rockstar's motion for leave as well.

## **III. GOOGLE WILL BE UNFAIRLY PREJUDICED BY ROCKSTAR'S SUPPLEMENTAL BRIEF.**

Granting Rockstar's motion will also be unduly prejudicial to Google because it will delay resolution of Google's January 10 Transfer Motion. Permitting Rockstar to file a supplemental brief with substantive, factual arguments will necessarily delay resolution of this

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<sup>1</sup> If anything, Rockstar's proposed supplemental brief further supports that Google's Transfer Motion should be granted because it confirms likely prior art witnesses and evidence are concentrated in the Northern District. In particular, according to Rockstar's chart of inventors, authors, and assignees, at least the following prior art references has an inventor, author, or assignee in the Northern District: AltaVista, U.S. Patent No. 5,710,884, Doubleclick, HotBot, InfoSeek, NetGravity, U.S. Patent No. 6,119,101, U.S. Patent No. 6,374,237, U.S. Patent No. 5,886,683, and Yahoo!. (Dkt. No. 92, Bonn Dec., Ex. 1.) Founders and key employees of the prior art systems still live and work in the Northern District, with the founder of Webcrawler, Brian Pinkerton, also in the Northern District. (See Roberts Dec., Ex. A.) Further, Danny Sullivan, the founder of *Search Engine Watch*, cited during prosecution, also lives in California. (*Id.*) Rockstar fails to establish any remotely similar concentration of prior art witnesses or evidence in any other location, including in this District.

motion. This delay is unduly prejudicial to Google because, although the case should be transferred to the U.S. District Court for the Northern District of California (*see* Dkt. Nos. 25 and 36; *see also In re Nintendo of America Inc. et al.*, Case No. 2014-132 (Fed. Cir. June 25, 2014) (directing transfer of patent infringement action to jurisdiction where key employees work, documents are maintained, and products developed), Google will have to meet the several upcoming substantive deadlines detailed above pursuant to this Court’s Docket Control Order while Google’s Motion to Transfer is pending.

This type of prejudice is why the Federal Circuit has recognized that, relying on Fifth Circuit precedent, a motion to transfer should be afforded “top priority in the handling of th[e] case” and should be considered before “discovery . . . irrelevant to the determination of the preliminary question of transfer” is conducted. *In re Fusion-IO, Inc.*, No. 12-139, 489 Fed. Appx. 465, 466 (Fed. Cir. Dec. 21, 2012) (citing *In re Horseshoe Entm’t*, 337 F.3d 429, 433 (5th Cir. 2003); *see also McDonnell Douglas Corp. v. Polin*, 429 F.d 30, 30-31 (3d Cir. 1970)) (“Judicial economy requires that another district court should not burden itself with the merits of the action until it is decided that a transfer should be effected and such consideration additionally requires that the court which ultimately decides the merits of the action should also decide the various questions which arise during the pendency of the suit instead of considering it in two courts.”). Indeed, in *In re Fusion-IO*, the Federal Circuit noted the motion to transfer should be considered “before proceeding to any motion on the merits of the action.” 489 Fed. Appx. at 466. Following the Federal Circuit’s directive, this Court stayed the underlying litigation pending resolution of Fusion-IO’s motion to transfer to do just that. *Solid State Storage Solutions, Inc. v. STEC, Inc.*, 2:11-cv-00391-JRG-RSP, D.N. 292 at 1 (E.D. Tex. Jan. 3, 2013) (Payne, J.).

When the parties discussed Google’s concerns about delay during their meet and confer, Rockstar’s counsel dismissed those concerns by arguing it will only take the Court “45 seconds”

to review its supplemental brief. (Roberts Dec., ¶ 3.) Initially, that Rockstar thinks its brief is so trivial that the Court would or could take such little time to consider it shows that it does not need to be filed in the first place.

In any event, Rockstar ignores that it filed a declaration in support of its proposed supplemental brief with 68 attached exhibits. (See Dkt. No. 92.) Exhibit 1 is a two page chart purporting to identify the location of inventors, authors, and assignees associated with prior art Google contends invalidates the asserted claims. (Dkt. No. 92-4.) Rockstar did not attach evidentiary support for its conclusions regarding the locations of these inventors, authors, and assignees. Thus, Google would have to conduct a detailed factual analysis from scratch to respond to Rockstar's proposed supplemental brief.<sup>2</sup> And, this Court will have to engage in its own factual analysis of the proposed supplemental brief in resolving the Transfer Motion if leave is granted. This will delay resolution of the Transfer Motion, unduly prejudicing Google. This factor supports denying Rockstar's motion as well.

**IV. THE CURE TO GOOGLE'S UNDUE PREJUDICE WOULD BE TO STAY THE LITIGATION PENDING RESOLUTION OF THE TRANSFER MOTION.**

The cure to the undue prejudice to Google from further delay of resolution of Google's motion would be to stay the litigation pending resolution of the Transfer Motion, which as noted above, is just what occurred in *Solid State Storage Solutions*, following the Federal Circuit's ruling in *In re Fusion-IO*, and is a result supported by other district court cases in the Fifth Circuit. *Acceleron, LLC v. Dell Inc.*, No. 1:12-cv-4123, Dkt. No. 30 (N.D. Ga. Mar. 18, 2013) (granting stay, citing *Fusion-IO*); *One StockDuq Holdings, LLC v. Becton, Dickinson & Co.*, No. 12-cv-03037, Dkt. No. 25 (W.D. Tenn. Feb. 13, 2013) (same); *Nguyen v. BP Exploration & Prod. Inc.*, No. H-10-2484, 2010 U.S. Dist. LEXIS 80068, at \*3 (S.D. Tex. Aug. 9, 2010) (granting stay pending resolution of transfer motion); *Esquivel v. BP Co. N. Am., Inc.*, No. B-10-

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<sup>2</sup> If the Court grants Rockstar leave to file a supplemental brief, Google requests leave to file a response thereto.

236, 2010 U.S. Dist. LEXIS 110015, at \*9, 14-15 (S.D. Tex. Oct. 14, 2010) (same); *B.E. Tech., LLC v. Sony Computer Entm't Am., LLC*, No. 12-cv-02826, 2013 WL 524893 (W.D. Tenn. Feb. 11, 2013) (finding that a stay of “Local Patent rule disclosures and fact discovery . . . will allow the Court to properly decide the pending Motions to Change Venue in light of judicial economy and comity.”)

Even irrespective of Rockstar’s motion for leave to re-open briefing, this authority supports staying the litigation pending resolution of the Transfer Motion. The hardship to Google from further delay in resolution of the Transfer Motion due to the upcoming case deadlines already exists. Further, judicial efficiency supports a stay so as to avoid the Court and all parties going through the claim construction process in this District, when the case should ultimately be transferred to the Northern District of California. In contrast, there is little if any prejudice to Rockstar, a non-practicing entity who will only be entitled to at most monetary damages, from a stay.

### **Conclusion**

For the foregoing reasons, this Court should deny Rockstar’s motion for leave to file a supplemental brief, or in the alternative, stay this case pending resolution of Google’s Transfer Motion.

DATED: June 25, 2014

QUINN EMANUEL URQUHART & SULLIVAN, LLP

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 June 24, 2014.

/s/ Andrea Pallios Roberts

Andrea Pallios Roberts

**CERTIFICATE OF CONFERENCE**

I hereby certify that the parties have met and conferred telephonically pursuant to Local Rule CV-7(h) on June 20 and June 25, 2014, and counsel for Rockstar opposed Google's alternative request for relief of staying the litigation pending resolution of the Transfer Motion. Participants in the conference included Amanda K. Bonn and Jeff Rambin, counsel for Rockstar, David A. Perlson, Andrea Pallios Roberts, and Mark Mann (on June 25), on behalf of Google. No agreement could be reached.

/s/ Andrea Pallios Roberts

Andrea Pallios Roberts