UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GODO KAISHA IP BRIDGE 1,

Plaintiff,

v.

INTEL CORPORATION,

Defendant.

Case No. 2:17-cv-00676-RWS-RSP

JURY TRIAL DEMANDED

IP BRIDGE'S RESPONSE TO INTEL'S NOTICE OF ADDITIONAL AUTHORITY

Plaintiff Godo Kaisha IP Bridge 1 ("IP Bridge") respectfully submits this brief response to Defendant Intel Corporation's Notice of Additional Authority (Dkt. No. 175) ("Notice").[1]

Regarding the standard of review to be applied to Judge Payne's rulings on Intel's non-dispositive motion to transfer venue:

Intel's Notice highlights the fundamental flaws in Intel's arguments concerning the applicable standard of review of Judge Payne's findings concerning Intel's § 1404(a) motion to transfer venue. The question is whether the issue ruled upon is dispositive or non-dispositive; not the vehicle through which the ruling is delivered. At oral argument and in the face of overwhelming support, Intel conceded that motions to transfer venue are non-dispositive. (11/20/18 Hrg. Tr. at 38:18-39:3.) With that concession, there should be no remaining dispute that this Court applied an incorrect standard of review: The governing statute here, 28 U.S.C. § 636(b)(1), as well as IP Bridge's cited case law and Federal Rule of Civil Procedure 72, all confirm that the statutorily prescribed standard of review for a magistrate judge's findings depends on whether the underlying motion is dispositive or non-dispositive. Accordingly, this Court was required to apply the clearly erroneous standard of review to Judge Payne's finding on Intel's motion to transfer venue.

Intel's attempt to distinguish IP Bridge's cases does not withstand scrutiny for at least three reasons. ***First***, Intel attempts to explain away those cases in which the court held that it must apply the clearly erroneous standard of review to a Report and Recommendation ("R&R") on a motion to transfer venue, arguing that those courts merely "chose" to apply that standard of review. (*See*

[1] A notice of additional authority typically includes a citation to new case law, without argument or analysis. In contrast, Intel's Notice does not contain a citation to new case law, but instead contains substantial argumentation about cases raised at the hearing on IP Bridge's Motion for Reconsideration. While Intel complains that IP Bridge raised at the hearing cases not cited in the briefing, Intel cannot deny that the majority of those cases responded to arguments that Intel made for the first time in its sur-reply brief (Dkt. No. 170), to which IP Bridge had not previously had an opportunity to respond. Should the Court consider the new arguments Intel raises in its Notice, IP Bridge respectfully requests the Court also consider IP Bridge's Response to Intel's Notice.

Notice at 1-2 & n.1.) In other words, Intel asserts that the applicable standard of review is a matter of choice for the district judge, rather than a matter prescribed by statute. Intel's characterization of those cases could not be more wrong.[2] None of those cases characterized the applicable standard of review as a choice. Indeed, the very fact that those cases analyzed what standard of review to apply demonstrates that the courts did ***not*** view the standard to apply to be a matter of choice—if it were a choice, such analysis would be unnecessary since the court could just select what standard to apply. Each of those cases establishes that this Court clearly erred in applying *de novo* review to Judge Payne's findings concerning Intel's motion to transfer venue.

Intel's argument that the Court may "choose" what standard of review to apply not only is unsupported by the cited cases, it fundamentally contravenes the statute. The Federal Magistrates Act empowers district judges, in the exercise of their discretion, to refer certain matters to magistrate judges. 28 U.S.C. § 636(b)(1). When a district judge exercises that discretion, a party may file objections to the magistrate judge's resolution of such matter, as Intel did here. *Id.* When a party does so object, Congress ***mandated*** the standard of review the court ***must*** apply based on whether the underlying matter is non-dispositive or dispositive: clearly erroneous or contrary to law for those matters not excepted from § 636(b)(1)(A) (*i.e.*, for non-dispositive matters), and *de*

[2] In *Smith v. Hilton*, this Court looked to the statute, 28 U.S.C. § 636(b)(1)(A), and determined that it must apply the clearly erroneous standard of review to the R&R on transfer, because a transfer motion is non-dispositive. No. 6:16-cv-913, 2016 WL 6246449, at *1 (E.D. Tex. Oct. 26, 2016) ("Because the instant motions are non-dispositive, the Court reviews the Magistrate Judge's findings for clear error."). Likewise, in *Capstone*, the court looked to the statute and Rule 72 and held that the "only" question for the Court when reviewing a magistrate judge's determination of a non-dispositive matter is whether it was "clearly erroneous or contrary to law." *Capstone Int'l, Inc. v. Univentures, Inc.*, No. 3:10-CV-416, 2011 WL 4529372, at *2-*3 (N.D. Ind. Sept. 28, 2011) (noting that "when reviewing a magistrate judge's non-dispositive decision to transfer a case, the Court asks only whether the order is "clearly erroneous or contrary to law," treating the magistrate judge's R&R on transfer as a "nullity" because the statue does not provide for a magistrate judge to issue an R&R on a non-dispositive matter, and returning the underlying motion to transfer to the magistrate judge for issuance of an order rather than an R&R). And, in *McEvily*, the court flatly rejected the argument that it would be proper to apply *de novo* review to an R&R on a motion to transfer venue, noting that "clearly erroneous" is "the one" standard to be applied to non-dispositive matters. *McEvily v. Sunbeam-Oster Co.*, 878 F. Supp. 337, 340 (D.R.I. 1994) ("I need labor no further—as a motion to transfer venue is a nondispositive motion, the 'clearly erroneous' standard is the one to be employed in deciding this appeal.").

novo for those matters that are excepted from § 636(b)(1)(A) (*i.e.*, for dispositive matters). *See* 28 U.S.C. § 636(b)(1)(A) & (B).[3] Nothing in the statute makes the applicable standard of review a matter of choice for the district court.[4] Critically, Intel has not cited a single case holding that a district judge may choose which standard of review to apply in reviewing a matter referred to a magistrate judge. The standard of review is set by statute.

Second, Intel unsuccessfully attempts to distinguish a trio of cases from the Southern District of New York.[5] (*See* Notice at 2 & n.4.) Each of those cases held that the applicable standard of review of a magistrate judge's R&R turns on whether the underlying motion is dispositive or non-dispositive, ***not*** on whether the magistrate judge styled the decision an R&R versus an order.[6] Intel attempts to distinguish these cases on the basis that they did not involve a motion to transfer venue, but that is a difference without distinction. Nothing in the Federal Magistrates Act, Rule 72, or any other relevant law sets motions to transfer venue apart from other

[3] *See also* Fed. R. Civ. P. 72; *Peretz v. United States*, 501 U.S. 923, 944 (1991) ("The Federal Magistrates Act provides two separate standards of judicial review: 'clearly erroneous or contrary to law' for magistrate resolution of nondispositive matters, see 28 U.S.C. § 636(b)(1)(A), and 'de novo' for magistrate resolution of dispositive matters, see § 636(b)(1)(B)–(C).").

[4] Similarly, and contrary to Intel's suggestion, nothing in the statute permits a magistrate judge to dictate the standard of review to be applied by the district judge by "elect[ing]" to issue a report and recommendation. (*See* Notice at 2). Consistent with the statutory text, and all of the case law, the standard of review turns on whether the motion is non-dispositive, and is not a matter of choice for the magistrate judge or district judge.

[5] Intel also addresses the Fourth Circuit's decisions in *Aluminum Co. of Am.*, but IP Bridge highlighted that case at the hearing as further support for the proposition that motions to transfer venue are non-dipositive, a point that Intel conceded. Further, contrary to Intel's assertion, IP Bridge did address that case in prior briefing. (Dkt. No. 168 at 3.)

[6] *Nikkal Indus., Ltd. v. Salton, Inc.*, 689 F. Supp. 187 (S.D.N.Y. 1988) ("In reviewing Magistrate Francis's findings, the court will be guided by the Judicial Procedure Act, 28 U.S.C. § 636 (1986), which directs that one of two standards are applicable in the instant situation. Either a de novo review or a clearly erroneous standard will be employed. ***The standard depends on whether the issue decided by the magistrate is dispositive or non-dispositive.***") (emphasis added); *R.F.M.A.S., Inc. v. So*, 748 F. Supp. 2d 244, 285 n.1 (S.D.N.Y. 2010) ("Although Magistrate Judge Dolinger characterized his ruling as a Report and Recommendation, for the purposes of the applicable standard of review this Court considers the relevant inquiry, consistent with the plain text of 28 U.S.C. § 636(b)(1)(A) and Federal Rule of Civil Procedure 72(a), to be whether the pretrial matter at issue is 'dispositive of a party's claim or defense,' ***rather than how a magistrate judge styles his decision***.") (emphasis added); *Chichinlnisky v. Trustees of Columbia Univ. in City of New York*, No. 91-cv-4617, 1993 WL 403972, at *9 (S.D.N.Y. Oct. 7, 1993) ("For this Court to reject all or a portion of the report [and recommendation], Columbia ***must*** demonstrate that the Magistrate Judge's findings are clearly erroneous or contrary to law.") (emphasis added).

non-dispositive motions. The analysis and holding of this trio of cases apply equally here to Intel's non-dispositive motion to transfer venue. Further, Intel's argument that none of those cases concluded it would be error to review an R&R on a non-dispositive issue *de novo*, simply ignores the express holding of each of those cases—that the district court ***must*** apply the "clearly erroneous" standard of review to an R&R on a non-dispositive matter. *See supra* footnote 6. Each of these cases also establishes that this Court clearly erred in applying *de novo* review to Judge Payne's findings concerning Intel's motion to transfer venue.

Third, and perhaps in recognition that it cannot adequately distinguish the cited cases, Intel concludes its argument concerning the proper standard of review by referring to a "practice" of magistrate judges issuing R&Rs on motions to transfer venue and of district courts reviewing those R&Rs *de novo*. (*See* Notice at 3.) But Intel's argument fails for two reasons. First, past "practice" does not and cannot trump statutory law. Second, as noted at the hearing, in every case that Intel cited concerning such past "practice," the district judge affirmed the magistrate judge's R&R. (*See* 11/20/18 Hrg. Tr. at 65:9-25.) The issue present ***here***, however, only arises when a district judge ***reverses*** a magistrate judge's findings on a non-dispositive matter: A magistrate judge's decision that is affirmed under *de novo* review would necessarily and *a fortiori* be affirmed under deferential "clearly erroneous" review. Intel's heavy reliance, therefore, on past "practice" misses the mark, as any such "practice" has no bearing on the present issue before this Court.

Regarding this Court's analysis of witness convenience:

At the hearing, as IP Bridge did in briefing (Dkt. No. 161 at 8-9; Dkt. No. 168 at 3-5), IP Bridge cited to numerous cases that establish that the Court must consider all potential material and relevant witnesses in the transfer analysis. In its Notice, Intel does not contest the force of this legal principle. Instead, Intel argues that those cases do not establish that "this Court committed

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